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Obtaining Emergency Relief in the Fifth Circuit

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When a party to an appeal needs quick intervention by the U.S. Court of Appeals for the Fifth Circuit—often, to stay proceedings or otherwise preserve the status quo during the appeal—relief is typically sought by filing a motion. In this paper, we discuss the procedural requirements for these motions and offer strategic suggestions for practitioners.

Rules governing motions

Types of motions

Except for requests to waive jurisdictional requirements, Federal Rule of Appellate Procedure 2 permits the courts of appeals to suspend “any provision” of the rules, as needed to “expedite its decision or for other good cause.” As a general rule, all requests for “an order or other relief” must be “made by [a] motion” in “writing.” Fed. R. App. P. 27(a)(1).

The rules specify the particular procedures and standards for certain motions. For example, Rule 8 sets forth the requirements for a motion for a stay or injunction pending appeal. Rule 9 governs motions for release from imprisonment during either direct appeals from criminal convictions or post-conviction challenges. Rule 18 governs motions for stays pending review of agency decisions or orders.

Form and content of motions

Federal Rule of Appellate Procedure 27 sets forth the procedure for bringing and opposing motions.

Rule 27 provides as follows:

(a) In General.

(1) Application for Relief. An application for an order or other relief is made by motion unless these rules prescribe another form. A motion must be in writing unless the court permits otherwise.

(2) Contents of a Motion.

(A) Grounds and relief sought. A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.

(B) Accompanying documents.

(i) Any affidavit or other paper necessary to support a motion must be served and filed with the motion.

(ii) An affidavit must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief must include a copy of the trial court's opinion or agency's decision as a separate exhibit.

(C) Documents barred or not required.

(i) A separate brief supporting or responding to a motion must not be filed.

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) Response.

(A) Time to file. Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

(B) Request for affirmative relief. A response may include a motion for affirmative relief. The time to respond to the new motion, and to reply to that response, are governed by Rule 27(a)(3)(A) and (a)(4). The title of the response must alert the court to the request for relief.

(4) Reply to Response. Any reply to a response must be filed within 7 days after service of the response. A reply must not present matters that do not relate to the response.

(b) Disposition of a Motion for a Procedural Order. The court may act on a motion for a procedural order—including a motion under Rule 26(b)—at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions. A party adversely affected by the court's, or the clerk's, action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed

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