***Fifth Circuit Judges Panel***

*Questions outline – v.2*

Eastern District of Texas Bench Bar Conference 2022

**Introduction of Panelists & Co-Moderators**

Panelists:

* Chief Judge Priscilla Richman;
* Judge Carl Stewart
* Judge James Graves
* Judge Catharina Haynes
* Judge James Ho

Co-moderators:

* Michael Smith, *Scheef & Stone, LLP*
* Ryan Raybould, *U.S. Sen. John Cornyn*

**TOPICS FOR QUESTIONS TO THE PANEL**

**Issuance of Opinions**

* What goes into the court’s decision whether to publish an opinion?
* Why might the court not publish a decision even if both sides have asked for publication?
* Some have observed that not publishing a decision might make it less likely that the Supreme Court will take up an issue? Is that a consideration?
* In some cases it appears the Court waits for a dissent before issuing an opinion, and in other cases not. Why might this be the case?

***En Banc* Review**

* What would you tell attorneys considering whether to seek or oppose a petition for *en banc* review? (Trying to avoid simply asking what the relevant factors are)

**Additional Briefing**

* How often does the court request additional briefing or find it helpful?
* And should I ask to submit it if I think it would be helpful?

**Arguments Not Raised**

* One of the most frustrating experiences for advocates is when a court decides a case based argument that was not raised. What might lead to court to do that, as opposed to asking for additional briefing on the new argument?

**Certification of Questions of State Law**

* A Texas Supreme Court Justice who shall remain nameless told me to ask you why you started certifying so many questions to state law to them?
* When does the court find this necessary or helpful?

**General (IF TIME PERMITS)**

* Has the Fifth Circuit changed since you have been on it?

**COVID (IF TIME PERMITS)**

* I understand the court has gone back largely to its pre-– COVID procedures. Was there anything that you learned during practice under COVID – zoom hearings and so forth – that has changed the way you view cases?

**Dos / Do Nots (LAST QUESTIONS OF PANEL)**

* What can practitioners do to help members of the panel find for them, or advocate for their position in conference?
* What’s the one thing you hope you never hear that a former clerk of yours did when working on an appeal.

(*Note to panel*: this is a proposed rephrasing of the usual “what are your pet peeves?” question that hopefully puts a different and more interesting spin on it).

**ADDITIONAL TOPICS IF TIME PERMITS**

*(topics from EDTX Bench/Bar prior judicial panels included below for consideration – trial level issues deleted and questions rephrased)*

**Written Advocacy**

* **What are some things lawyers would be well-advised to do in written advocacy – what helps get their points across effectively?**
* **What are things lawyers should not do in written advocacy?**
* Is it helpful to the court when attorneys engage in name-calling and heated accusations in written briefing? Some attorneys think they need to include rhetoric like this to show that the other side is the bad actor or that a position is strongly held. Do you agree? Does this help or hurt their positions?

(*Note to panel:* it helps members of the audience to be able to go back to client and say “I was just at a conference and the judges told us to lay off the poison-pen rhetoric – it is actually counterproductive” so we often ask this question just to give attendees something useful to take home)

* I’d like to know what my work product looks like in your chambers. Do you still work with paper or on a screen? Is there anything about the nature of e-filing that’s changed how you handle motions that attorneys need to know? What can we do to present things in a more convenient format or manner? Any pet peeves here?

**Oral Advocacy**

* **What are some good practices you have seen from attorneys in oral argument? Bad practices?**

**Trial Court and Appellate Court Perspectives**

* **We are fortunate to have members of the panel who have served on both the appellate and trial benches. I would like to ask Judges Stewart and Haynes to talk about the differences they have perceived between the two roles.**
* Appellate decisionmaking is collaborative among the members of a panel, as opposed to the trial court. Can you tell us how that joint decisionmaking process is different, and how that might affect how lawyers used to trial courts should present their cases?

**Types of Appellate Courts**

* Many of the lawyers in the audience have more experience with a specialized court like the Federal Circuit as opposed to a court of general jurisdiction. Should lawyers adopt a different strategy when arguing to a regional circuit? Are the needs of the judges different on the two types of appellate courts?

**Level of Detail in the Record**

* Some trial court judges include detailed discussions on the record and in written opinions for every ruling. Others are more circumspect. From the appellate perspective, which is the better practice and why?
* What can lawyers do to help make sure the record has the requisite detail?

**Standards of Review**

* As an attorney, how do I use the applicable standard of review to my advantage? Is that a point I emphasize or should I focus on the merits of the issue, regardless of the standard?

**Preservation of Error**

* Are there certain things trial lawyers do to preserve error you think are unnecessary or could be done in another or more efficient way?

**Attorneys’ Role in Preparing the Case for Appeal**

* **Are there practices by trial lawyers that make appellate review difficult or easier?** Are there things that you commonly find yourself wishing a trial lawyer had done to improve the record or aid your review? Are there clarifications that attorneys should seek from trial courts that would aid the record?

**Miscellaneous**

* What are some best practices you have seen from lawyers that we haven’t discussed?
* What are some things you can’t believe lawyers actually do when practicing in your court?

**Last Question**

Harry Truman was famous for having a sign on his desk that “the buck stops here” and I’ve seen some judges have something similar with a favorite saying that they think is important. **Do you have a sign like that in your chambers that you can tell us about – and if not, what would you like lawyers to think you have on such a sign?**

MCS – 10/20/2022