Case Management Procedures in the Federal Courts of Appeals

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Foreword

One of the primary mandates of the Federal Judicial Center is "to further the development and adoption of improved judicial administration" in the courts of the United States (28 U.S.C. § 620(a)). Included in this is the direction to provide "research and planning assistance to the Judicial Conference . . . and its committees." It is this latter part of the charge that was the impetus for the study presented here. Beginning with a request from the Judicial Conference of the United States, and amplified by further queries from the Judicial Conference Committee on Court Administration and Case Management, the Center has synthesized various data to demonstrate once again the variety of practices and procedures that can comfortably co-exist under the umbrella of the Federal Rules.

The end value of studies like this, however, is not simply to demonstrate how culture and tradition vary the interpretation of rules. The ultimate benefit comes from the exchange of ideas and flow of information, stimulating new methods of case management and docket control that benefit not only the courts, but the end users: those who come before the courts.

The Center would like to offer a special "thank you" to the Hon. Diana Murphy, who served as chair of the Committee on Court Administration and Case Management's Appellate Case Management Subcommittee while the project was in progress.

Judge Fern Smith
Director, Federal Judicial Center

Preface

While the Federal Rules of Appellate Procedure impose a generally uniform scheme of appellate practice and procedure, the U.S. courts of appeals, each with unique traditions and circumstances, have developed different ways of managing their dockets. Recognizing the potential of circuit-based experimentation with case management as a fertile source of ideas for improving the practices and procedures of the courts, the Judicial Conference of the United States recommended in its *Long Range Plan for the Federal Courts* that the courts of appeals exchange information about case management. The Judicial Conference also recommended that the federal court system "collect and analyze information on various courts of appeals' case management practices."[1] In light of those recommendations, the Federal Judicial Center began to update and expand the appellate case management information it had collected in 1992.[2] Upon learning of this effort, the Judicial Conference Committee on Court Administration and Case Management, charged with implementing the recommendations through its appellate case-management subcommittee, asked the Center to collect additional information about case-management practices in the courts of appeals. These practices are always in flux, and we present here a snapshot of the practices reportedly in effect in the late 1990s.[3]

In developing this snapshot, we began with public statements about how the courts do their work: the Federal Rules of Appellate Procedure, the rules of each circuit, and the published internal operating procedures of each court of appeals. For some courts, we had published articles or practitioner handbooks that described particular practices or approaches. We also had the benefit of earlier inquiries to the courts from the Center or from other courts. Chief Judge Procter Hug, Jr., supplied copies of memoranda that members of a Ninth Circuit advisory committee prepared after consultation with representatives of other courts of appeals.

1. Judicial Conference of the United States, Long Range Plan for the Federal Courts (December 1995), Recommendations 35 and 36.

2. Some of this information, collected initially by Laural Hooper, was reported in Judith A. McKenna, *Structural and Other Alternatives for the Federal Courts of Appeals* (Federal Judicial Center 1993), and at the Center's 1993 and 1995 workshops for circuit judges.

3. In large measure because of the transitory nature of the information, we have not endeavored to cite local rules or internal operating procedures for each court. Readers should consult the latest version of each for up-to-date information about court practices.

Later in the development of this material, we combined our efforts with work we did throughout 1998 for the Commission on Structural Alternatives for the Federal Courts of Appeals. Through its chairman, retired Justice Byron R. White, the commission asked the chief judges of the courts of appeals for their cooperation in the Center's effort to obtain information about their courts' case-management procedures. Some of the chief judges sent narrative descriptions of their practices, some were interviewed by Center staff, and all cooperated in supplying and verifying information compiled by the Center.

Using these materials, we prepared for each court a preliminary profile of practices in specific case-management areas. These profiles were refined as additional information was obtained. Some courts supplied information at a high level of detail; others gave more general summaries of their practices. We have distilled much of the information in an effort to reach a balance that provides sufficient specificity to allow a basic understanding of how the courts operate but not to simply reiterate the entire body of internal operating procedures.

Part I highlights key areas in which variation exists in the operations of the courts of appeals. The reader will be able to get a view of the range of variation and experimentation in important areas by skimming Part I. Part II comprises circuit-by-circuit descriptions of how each court of appeals manages its caseloads.

Acknowledgments

In gathering data from the thirteen courts of appeals, we became indebted to numerous individuals. In the First Circuit we owe special thanks to Chief Judge Juan R. Torruella, Circuit Executive Vincent Flanagan, and Clerk of Court Phoebe Morse; in the Second Circuit, Chief Judge Ralph K. Winter, Circuit Executive Karen Greve Milton, and John Coffey of the Office of the Clerk; in the Third Circuit, Chief Judge Edward R. Becker, and Clerk of Court P. Douglas Sisk; in the Fourth Circuit, Chief Judge J. Harvie Wilkinson, III, and Clerk of Court Patricia Connor; in the Fifth Circuit, former Chief Judge Henry A. Politz and Chief Judge Carolyn Dineen King, Clerk of Court Charles R. Fulbruge, III, and Senior Staff Attorney Anthony J. Bonfanti; in the Sixth Circuit, Chief Judge Boyce F. Martin, Jr., and Clerk of Court Leonard Green; in the Seventh Circuit, Chief Judge Richard A. Posner, and Circuit Executive Collins T. Fitzpatrick; in the Eighth Circuit, former Chief Judge Pasco M. Bowman, II, and Clerk of Court Michael E. Gans; in the Ninth Circuit, Chief Judge Procter Hug, Jr., and Clerk of Court Cathy Catterson; in the Tenth Circuit, Chief Judge Stephanie K. Seymour, and Clerk of Court Patrick J. Fisher; in the Eleventh Circuit, former Chief Judge Joseph W. Hatchett, and Circuit Executive Norman E. Zoller; in the District of Columbia Circuit, Chief Judge Harry T. Edwards, and Clerk of Court Mark Langer; in the Federal Circuit, Chief Judge H. Robert Mayer, Clerk of Court Jan Horbaly, and Pamela J. Twiford, Chief Deputy Clerk/Operations.

Several members of the Federal Judicial Center staff helped us compile the information in Part II: Laura Mascheroni, Naomi Medvin, Kristina Gill, Jackie Morson, Carolyn Hunter, and Jeannette Summers. We are also grateful to Russell Wheeler and Donna Stienstra for comments on earlier drafts.

Part I

Appellate Court and Case Management: Key Variations

In this part we describe generally how the major aspects of case management in the courts of appeals are arranged and performed. In several instances we give examples of courts that use a particular practice. We have not attempted to be exhaustive, and the failure to mention a court in connection with a particular practice should not be taken as evidence that the court does not use the practice. Often, the mention of a court reflects the fact that the court's published rules or internal operating procedures describe the practice; courts vary in the level of specificity of their operating procedures, and many may use practices that are not necessarily described in official publications.

As background and context, Table 1 gives basic information about the caseloads of the courts of appeals.[4] The appellate case management practices summarized here, and set out in more detail in the profiles in Part II, explain to some degree how the courts processed the more than 52,000 appeals terminated in 1998.

Court organization and staffing

Panel types used. In addition to regularly constituted three-judge panels that hear orally argued cases, courts use a variety of other types of judicial panels. These are detailed in the individual court profiles in Part II. Specially constituted panels, which may be standing or rotating, include motions panels, death penalty panels, and "screening" or "conference calendar" panels to decide nonargued cases. These and other ways of arranging judges to process the appellate caseload are described in more detail in later sections.

4. The source for the information about cases in the regional courts of appeals is the Federal Judicial Center's Integrated Data Base (IDB), a multi-year researchable database using information transmitted periodically by the courts to the Administrative Office of the U.S. Courts (AO). Some tables in this Part give information about the thirteen federal courts of appeals; some include only the twelve regional courts because the Court of Appeals for the Federal Circuit uses a slightly different case information system and does not report the same information about its cases. Where possible, we obtained analogous information from the Federal Circuit (labeled "Fed."), but for some tables the figures are not directly comparable. Columns labeled "Nat'l" contain national averages, usually across the twelve regional courts of appeals. Unless otherwise noted, percentages reported are based on lead and single cases in the category described (e.g., "counseled cases").

Table 1: Snapshot of Appeals Terminated in FY 1998

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Fed.
Judgeships	12	6	13	14	15	17	16	11	11	28	12	12	12
Appeals Terminated by Any Method													
Total	1,590	1,430	4,291	3,231	5,233	7,774	4,331	3,019	3,397	8,425	2,614	6,427	1,386
Counseled	1,197	1,078	2,853	1,995	2,699	3,653	2,438	1,834	1,974	4,916	1,619	3,647	–
Appeals Decided on the Merits													
Total	628	737	1,719	1,736	2,550	3,543	1,937	1,414	1,853	4,315	1,573	2,822	1,019
Counseled	438	605	1,161	1,227	1,533	2,419	1,334	995	1,203	2,899	1,082	2,200	–
Appeals Decided on the Merits, per Authorized Judgeship	52	123	132	124	170	208	121	129	168	154	131	235	85

Available judge power and use of visiting judges. Courts of appeals have three sources of judges to comprise the panels that decide cases—active judges, senior judges of the court, and judges from outside the court (who may be active or senior circuit or district judges or, on occasion, retired Supreme Court justices). Resident senior judges are classified as "sitting" judges if they handle at least 25% of the caseload of an active judge. Courts differ both in the amount of resident judge power and in how they supplement those resources. Table 2 gives an overview of the judge power available in each circuit's court of appeals in FY 1998.

Table 2: Snapshot of Resident Judge Power in FY 1998

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Fed.
Judgeships	12	6	13	14	15	17	16	11	11	28	12	12	12
Sitting senior judges	1	5	9	6	3	5	8	6	8	17	5	7	1
Vacant judge months	12.0	9.0	46.2	14.5	38.4	12.0	13.7	0.0	10.8	89.0	0.0	1.8	12.0

Table 3 provides summary information on the use of visiting judges to decide appeals on the merits in the past five fiscal years. In most courts, visiting judges are used exclusively on oral argument panels.

Table 3: Appeals in Which at Least One Visiting Judge[5] Participated, as a Percentage of All Terminations on the Merits, FY 1994–1998

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Nat'l
1994	7	13	42	28	19	13	36	27	16	18	43	21	23
1995	0	16	17	13	10	9	50	26	20	23	34	15	20
1996	0	17	20	23	8	5	51	4	32	27	26	19	20
1997	0	18	44	26	12	5	32	2	18	26	19	20	19
1998	0	25	79	37	14	5	26	1	19	23	9	17	21
5-yr. avg.	2	18	40	25	12	7	39	13	21	24	27	18	21

Note: The Court of Appeals for the Federal Circuit has not needed to use visiting judges in recent years, but its judges often serve as visitors in other courts.

5. "Visiting judge" is defined for this purpose as (1) an active or senior circuit judge not resident in the circuit; or (2) an active or senior district judge from any circuit. Senior circuit judges of the court are *not* counted as visiting judges. Figures are for lead and single cases terminated on the merits, excluding en banc proceedings.

Organization and general duties of nonjudicial staff

All of the courts of appeals use a variety of non-judicial staff, principally consisting of staff attorneys, clerks, and circuit mediators (who may have other titles such as "conference attorney"). The Ninth Circuit[6] is alone in employing an appellate commissioner, who handles, among other things, those motions that were formerly handled by the single duty judge, and who may serve as a special master for the court. The Seventh Circuit's nonjudicial staffing is distinctive insofar as its circuit executive, a statutory employee of the judicial council and a former staff attorney, performs several functions typically delegated to the staff attorneys' office in other circuits, including jurisdictional and non-argument screening.

Although the authorized number of staff attorneys is set by a formula that uses total appeals filed as its basis, courts use their allocations in different ways. Some augment their allocations with other positions; others do not employ the full number allocated. With the highest caseloads, the Fifth and Ninth Circuits employ the most staff attorneys, with 46 and 48 staff positions, respectively. Table 4 shows the most recent allocation of staff attorney positions in the regional courts of appeals.

Table 4: Central Staff Attorney Positions Allocated to the Regional Courts of Appeals, FY 1999[7]

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th
Work units	13	9	26	22	29	46	23	15	19	48	17	32

Courts differ in how they organize and use their staff attorneys. Staff attorneys are generally centralized at circuit headquarters, e.g., Boston, New York, St. Louis. In most courts, the central staff attorneys operate under the supervision of a chief staff attorney in an Office of Staff Counsel, Office of Legal Counsel, or similarly titled operation. In one court (the court of appeals for the Ninth Circuit), staff attorneys fall under the jurisdiction of the court's clerk. Because of this unique arrangement, the clerk also holds the title of "court executive" and the chief deputy clerk serves as the chief staff attorney. In some courts, staff attorneys assigned to the clerk's office perform some screening and other preliminary functions.

6. Unless otherwise noted, the shorthand "circuit" refers to the court of appeals for the circuit.

7. Allocations are as reported by the Administrative Office of the U.S. Courts. The Court of Appeals for the Federal Circuit, which receives its own appropriation separate from that of the other courts of appeals, generally employs a central staff of four staff attorneys and four technical advisors.

In general, central staff attorneys assist the courts of appeals by screening appeals and by preparing cases for disposition without oral argument. In some courts, they concentrate on pro se cases, and in others they work on most civil and some criminal appeals, if only to make a preliminary determination about whether the case should be set for oral argument.

In addition to the major duties described in more detail below and in the detailed profiles (jurisdictional screening, screening and workup of nonargued cases, and motions work), staff attorneys in at least some courts perform other duties, such as assisting in drafting local rules or responses to proposed Judicial Conference policies, working on specific cases at the request of individual judges, serving as temporary or floating "elbow clerks" to individual judges, and assisting with various special projects at the chief judge's request.

Over the years, some courts have changed their policies with respect to the nature of the central staff attorney's position, which in earlier years was planned to be a temporary one. Typically, supervisory staff attorneys have career positions, but line staff attorneys often have limited terms, or presumptive terms that may be extended under certain circumstances. (For example, several courts have presumptive two- or three-year terms for their staff attorneys, sometimes with a cap such as the Ninth Circuit's five-year limit.) However, some courts, including the Fifth and Tenth Circuits, have made staff attorneys eligible for permanent employment.

Some courts organize their staffs into units that concentrate in particular areas, such as jurisdictional screening, pro se cases, and death penalty or capital habeas corpus matters. Individual staff attorneys are primarily generalists with regard to the subject matters of the cases that they handle, but some develop areas of expertise. Emergency matters are typically assigned to the more senior staff attorneys.

Case management

Getting the appellate process started. To implement screening, mediation, and other pre-decision phases of appellate case management, most courts have adopted some formal requirements for information to be submitted in the early stages of an appeal. The most common vehicle is the "docketing statement," in which the filer states the basis of the court's jurisdiction, identifies related cases, and provides certain information about the issues and procedural posture of the case. This information helps the court staff determine whether the case is suitable for an appellate media-

tion program, whether it is likely to require oral argument, and whether the transcript procurement process is on track.

Pre-argument conferencing, mediation, or settlement programs. All of the regional courts of appeals have some form of appellate mediation or conference program to resolve some appeals by settlement with little or no judicial intervention. Most use court-employed attorneys as mediators; the D.C. Circuit uses volunteers from the local bar, and a few courts use retired or senior state or federal judges. These programs were catalogued in a 1997 Federal Judicial Center publication.[8] At page 26, *infra*, we reproduce as Table 17 the summary table from that publication that gives essential information about the programs. We have updated the table to reflect additional or changed information contained in the individual court profiles in Part II, but we have not attempted to fully update that publication here.

Case screening. The term "screening" has come to mean different things in different courts. At one time, screening meant diverting a case from the presumptive oral argument track to a nonargument track. Accordingly, "screened cases" or "screeners" typically referred to those cases decided by a three-judge panel without oral argument. Here, we use the term more broadly: "screening" means the process by which a court determines what treatment an appeal will receive and what path it will follow.

Appeals are screened for various purposes, but the most important screening function is to determine preliminarily whether the case will be orally argued or decided without argument. Screening models vary on two important dimensions: (1) who does the screening; and (2) what case types are screened into or out of the argument track.

As a formal—but important—matter, in all courts judges decide whether a case will be orally argued, because Fed. R. App. P. 34 permits decisions without oral argument only if the panel unanimously agrees that the case does not need oral argument. Nevertheless, as a practical matter, in almost all courts, cases that are screened at all are screened into the argument or nonargument track by staff, subject to panel review. Also, except for the Second Circuit, courts seldom or never allow pro se litigants to argue orally. Initial screening in some courts thus means finding out whether the parties are represented by counsel—if not, the case goes onto the nonargument track. (In some courts, staff attorneys

8. Robert J. Niemic, Mediation & Conference Programs in the Federal Courts of Appeals (Federal Judicial Center, 1997).

may recommend that counsel be appointed if it appears the case warrants oral argument.)

Screening by staff. In the most common arrangement, staff attorneys screen appeals into an argument or nonargument track. In some courts, certain types of appeals—e.g., direct criminal appeals raising issues other than sentencing guideline application—are not subject to staff screening but go directly to the argument calendar or to a judge for screening. Staff used for screening may be central staff attorneys, attorneys in the clerk's office, or (in one court) the circuit executive. There is some variation, sometimes within courts, in whether the screening for argument occurs as soon as the appellant's brief is filed or after the case is fully briefed. Typically, courts that use a staff screening model have central staff attorneys screen cases and suggest whether the court would benefit from oral argument; in several courts, staff attorneys also recommend a decision on the merits of the case and draft an order or proposed opinion.

Screening by judges. In a few courts, judges play a large role in case screening. In the Tenth Circuit, judges do all the screening. In general, each active judge is on a "screening panel" at all times (these are reconstituted annually), and each member of the panel is primarily responsible for one-third of the cases assigned to that panel. That judge makes a preliminary decision to: (a) set the case for argument; (b) set it for nonargument disposition with staff workup; or (c) hold it in chambers and prepare a merits disposition for the rest of the screening panel to consider. Either of the other judges on the panel may disagree with (b) or (c) and call for argument, but disagreements are rare.

In the Third Circuit, judges screen counseled cases for argument or nonargument disposition, but do not sit on separate screening panels. Argument panels receive the briefs and other materials, and the panel members determine which cases will be argued (pro se cases are not argued).

Although the Fifth Circuit uses central staff for much screening, for some case types individual judges decide whether oral argument is necessary. The Fifth Circuit also has a "jurisdiction calendar" that meets every month to dispose of cases with jurisdictional defects; some courts perform the same function with motions panels.

Table 5 shows for each court the parties primarily responsible for initial screening for argument or nonargument disposition.

Table 5: Initial Screeners for Argument/Nonargument Disposition

	D.C.	1st	2d*	3d	4th	5th**	6th	7th	8th	9th	10th	11th	Fed.*
Judges			–	X		X					X		–
Central staff	X	X	–			X	X			X		X	–
Clerk's office			–		X				X				–
Circuit exec.			–					X					–

*All cases are scheduled for oral argument in the Second Circuit unless they involve an incarcerated pro se litigant. All counseled cases, but no pro se cases, are scheduled for argument in the Federal Circuit.
**Individual judges serve as screening judges for certain case types in the Fifth Circuit, including diversity, Title VII, bankruptcy, some tax, and some agency cases. Staff attorneys do initial screening for pro se cases, prisoner cases challenging conditions of confinement, habeas corpus cases, civil federal question cases, immigration cases, cases in which the United States is a party, civil rights cases other than Title VII, and Social Security cases.

What cases get oral argument? Circuit standards for granting argument are formally similar, with local rules and internal operating procedures generally restating in more or less detail the minimum standard set down by Fed. R. App. P. 34(a): Oral argument must be allowed unless a three-judge panel unanimously determines that: (1) the appeal is frivolous; or (2) the dispositive issue or issues have been authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. Any judge on the panel may decide that the case should be orally argued and direct the clerk to place it on the oral argument calendar. No national statistics are kept on how often cases initially screened for nonargument decision get rerouted for argument. We did not systematically canvass the courts on this point, but anecdotal evidence suggests that the frequency is low and probably varies with the type of screening program used (e.g., where only pro se cases are screened, the preliminary decision is unlikely to be changed; where all counseled cases are screened as well, some are likely to present issues that judges, but not staff, identify as needing argument—and vice versa).

Case characteristics that courts often identify as likely to trigger oral argument include presence of counsel, novel issues, complex issues, extensive records, and numerous parties. For a look at how the criteria affect different case types, Tables 6 and 7 show the percentage of cases in various categories that were decided after oral argument in FY 1998. As Table 6 shows, whether the litigants have counsel plays an important role in whether the court hears oral argument—most courts rarely or never allow unrepresented litigants to argue, and in all courts the percentage of cases in which argument occurs is higher for counseled cases.

Table 6: Percentage of Cases Decided after Oral Argument, FY 1998

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Nat'l
All	54	58	68	29	25	38	51	59	43	37	35	34	41
Counseled	73	69	85	41	41	52	74	83	65	54	50	43	57

Note: Figures are percentages of lead and single cases decided on the merits in each category.

Table 7 shows that case type also makes a difference in whether oral argument will occur, with counseled private civil cases being more likely, in most courts, to be decided with oral argument than other counseled cases.

Table 7: Counseled Cases Decided After Oral Argument, as a Percentage of Counseled Cases Decided on the Merits, FY 1998

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Nat'l
Criminal	65	62	81	29	27	37	63	80	53	47	52	29	45
Agency	88	67	85	27	44	56	68	75	68	29	45	44	50
U.S. civil	69	53	83	39	54	40	60	76	58	58	22	36	51
Private civil	62	83	92	56	77	59	86	89	76	73	58	62	72
Other	17	67	46	24	66	51	48	49	51	41	44	39	44

What other assessments are made during the screening process? In addition to screening for whether oral argument should be heard, many courts assess the following attributes while screening a new appeal:

- jurisdictional defects warranting dismissal without determination on the merits by a three-judge panel;
- suitability for diversion to the court's settlement or mediation program;
- whether counsel should be appointed for an unrepresented party;
- whether the litigants have complied with the court's requirements regarding brief format and other procedural matters;
- whether a certificate of appealability should issue in habeas corpus cases;
- whether an appeal in a habeas corpus matter is successive;
- whether a pro se appeal is frivolous;
- indicators of the amount of judge time required to dispose of the appeal, i.e., the "weight" that should be attached to the appeal in light of the complexity or novelty of the issues;
- whether an appeal presents an issue already being considered by a panel of the court, and whether the case should be routed

to that panel or held in abeyance pending the decision;

- whether the appeal presents an issue that is currently before the Supreme Court, and should therefore be stayed pending the high court's decision; and
- how much time should be allotted for oral argument.

Decision without argument. Nonargument decision-making practices are closely tied to the screening process. Courts use one, or a combination, of two fundamental processes: (a) contemporaneous, collegial deliberation; and (b) serial review by the panel judges. Table 8 summarizes the primary models used.

Within the types of nonargument decision making, the role of staff varies, as Table 9 shows. In most courts the central staff attorneys draft memoranda and proposed dispositions of some type. A few courts have the staff attorney prepare a neutral memorandum. Most have the attorney draft an order that will (if adopted) dispose of the case and, if necessary, an opinion explaining the order. These opinions are not routinely published, but some courts make exceptions. In a few courts, the staff attorney works with one judge to draft a disposition for the remaining two judges to review. In several courts, the staff attorneys present cases to the merits panel, either in person or by telephone.

Motions management

Depending on their nature, motions are decided by three-judge panels, by fewer than three judges, or by staff. In most courts, motions in cases already calendared for argument are sent directly to the merits panel for decision. Motions in uncalendared cases go to motions panels or, in some instances, individual judges. Courts differ primarily in how they allocate the motions work among the court's judges.

Courts often delegate initial decision-making authority for many procedural motions to the clerk's office or central staff. For other motions, staff attorneys review the papers submitted and do any necessary legal research before presenting the motions to judges by memorandum or, in some courts, by telephone or in person. Most prepare proposed dispositions for the judges.

Table 8: Models of Nonargument Decision Making

Cir.	Argument panels also decide submitted cases	Judges meet as nonargument panel	Judges confer by telephone	Judges review appeals serially
D.C.	Some cases that argument panels unanimously decide do not need argument	Most nonargued cases decided by special panels	Occasional cases	
1st				All nonargued cases
2d	All nonargued cases			
3d	All nonargued cases			
4th			Simplest cases	All but the simplest nonargument cases. Lead judge reviews draft opinion and notifies other judges of intention to adopt or reject it; invites responses.
5th		Conference calendar: Simple cases that are not fact-intensive. Each judge reviews 30 cases the night before or morning of conference; panel disposes of approximately 90 cases with staff-prepared dispositions.		Summary calendar: Cases that are more complex than on conference calendar yet do not warrant argument. Initiating judge reviews staff-proposed disposition and sends to next panel judge, and so on.
6th	All nonargued cases			
7th		Some nonargued cases	Some nonargued cases	
8th		All nonargued cases		
9th		All nonargued cases		
10th		Some panels use	Some panels use	
11th				All nonargued cases. First judge reviews staff memorandum and proposed order with briefs/record; sends to next judge, and so on.
Fed.	All nonargued cases			

Table 9: Models of Staff Role in Nonargument Decision Making

Cir.	Staff-prepared materials distributed to judges	Staff role in panel consideration
D.C.	General: Proposed judgments, memoranda to the litigants, and bench memoranda analyzing the arguments, case law, and record	Staff present case/discuss with merits panel (both case types)
	Simple: Proposed orders	
1st	Pro se cases: Memorandum and draft disposition	None
	Other fully briefed cases: Memorandum and draft opinion	
2d	Bench memorandum in pro se cases only	None
3d	Simple pro se cases only: Draft per curiam opinion	None
4th	Simple cases: Draft opinion and supporting documentation go to panel	Staff present case/discuss with merits panel by phone
	More complex: Memorandum and draft opinion; these go with supporting documentation to panel	None
5th	Summary calendar: For many cases, in-depth research memorandum; for about half of these, proposed disposition	None
	Conference calendar: Memorandum and short per curiam opinion	Staff present case/discuss with merits panel
6th	Pro se cases and cases where counsel waive oral argument: research memorandum and proposed dispositive order	None
7th	Draft memorandum order (not bench memorandum)	Staff meet with full panel, then work with authoring judge
8th	Memorandum and concise proposed dispositive order	Further research as directed by authoring judge
9th	Draft memorandum disposition; supplemental research memorandum as necessary	Staff present case/discuss with merits panel
10th	Draft dispositional document (usually order and judgment) and detailed analytical memorandum; these are approved by mentor judge before distribution to other panel members	Staff attorney works with "mentor" judge, then meets with full panel
11th	Some classes of cases: memorandum and proposed order	Court is experimenting with oral presentations to special panel of senior judges in some appeals
Fed.	None	None

Panel types. Motions duties are principally allocated among rotating, three-judge panels of randomly assigned judges. Nomenclature for motions panels varies—e.g., the D.C. Circuit labels them "special panels," while the Third Circuit refers to them as "standing panels for motions" (as distinct from standing panels for pro se merits cases). In most courts, both active and senior judges serve on motions panels. An active judge is typically designated the "lead," "duty," "presiding," or "initiating" judge of the motions panel. In some circuits, including the Third, Fifth, Tenth, and Eleventh Circuits, motions panels are constituted for the entire year. In others, including the First, Second, Sixth, Seventh, Ninth, and Federal Circuits, motions panels change every week or every month. In some courts, the regular merits panels also serve as motions panels; in others, the motions panels are the same as the nonargument screening panels.

In the Tenth Circuit, a "clerk's panel" of two judges decides proce-

dural motions that require judicial action but do not require three judges. Members of the clerk's panel may request a third judge for difficult or important issues, or to break a tie vote.

Panel operations. As with cases decided without argument, courts differ in how their motions panels confer. In some courts, the panel deciding motions confers in person, often with a staff attorney present. In addition to conferring in person approximately every ten days, Ninth Circuit motions panel judges confer by telephone. In other circuits (e.g., the First, Fifth, and Eleventh), nonemergency motions are considered seriatim—the staff mails a single set of materials to the first judge, who passes the set on to the second judge with a proposed disposition. That judge notes agreement or disagreement and passes the papers on to the third judge, who returns them with the written disposition to the clerk's office. The Ninth Circuit uses a similar procedure for motions that do not dispose of the appeal, but in most instances, if the first two judges concur, the motion is not sent to the third judge.

Motions decided by a single judge. Almost all courts provide for single judges to decide certain motions. That judge is usually the duty judge, or presiding judge, of the motions panel at the time the motion is ready for decision. The Fifth Circuit assigns single-judge motions by rotation to all active judges on a routing log.

Motions often decided by single judges (sometimes the author of a panel opinion) include: motions for extension of time or to exceed the word limit in briefs; motions for extension of time to file petitions for rehearing or for leave to file petitions for rehearing out of time; motions for approval of fees under the Criminal Justice Act; opposed motions that the clerk could rule on if unopposed; and post-decision motions for stay or recall of the mandate pending action on a writ of certiorari.

For motions not expressly categorized as one-judge matters, several courts authorize judges to determine whether it is appropriate to rule on a motion alone. The Seventh Circuit, for example, authorizes individual judges to decide motions ordinarily decided by more than one judge if it is in the interest of expediting a decision or otherwise for good cause. The Ninth and Eleventh Circuits provide that a single judge may act only on non-dispositive motions. The Second, Fourth, and Eighth Circuits authorize a single judge to decide an emergency motion at his or her discretion. Indeed, while not encouraging the practice, rules in the Fourth and Eighth Circuits allow a party to file an emergency motion directly with an individual judge at his or her resident chambers. The Fourth Circuit gives judges discretion to entertain emergency motions, but also

provides that an individual judge may not dismiss or otherwise ultimately determine an appeal.

A number of circuits, including the Fourth, Fifth, and Sixth Circuits, provide that rulings by single judges are subject to review by the court or a panel thereof. Other courts note particular examples of matters in which three-judge review may be triggered. For example, the Third Circuit provides that when the author of a panel opinion would deny a motion for extension of time in which to file a rehearing petition, the motion will be referred to the entire panel for disposition.

Motions generally decided by more than one judge. The courts of appeals generally require three-judge panels to dispose of substantive motions and all motions to dismiss appeals unless the parties stipulate to the disposition. In addition to requiring three-judge panels to act on substantive motions and motions to dismiss, the D.C. Circuit provides that three-judge panels must decide opposed motions and mandamus petitions. The Sixth and Seventh Circuits require three-judge panels to rule on motions for stays and injunctions, and the Seventh Circuit provides that only motions panels can deny a motion to expedite an appeal where a denial may moot the appeal. The Seventh Circuit also provides that at least two judges are required to review motions requesting bail (where the Sixth Circuit refers bail motions to three-judge panels), to deny certificates of appealability, and to refuse leave to proceed in forma pauperis on appeal. The Eighth Circuit also provides that three-judge panels are required to decide (1) motions for leave to appeal under 28 U.S.C. § 1292(b); (2) motions for leave to proceed in forma pauperis; (3) applications for a certificate of appealability under 28 U.S.C. § 2254 where the district court has denied the certificate; (4) motions for appointment of counsel; (5) motions for production of a transcript at government expense; (6) motions for bond pending appeal; (7) applications for stay pending appeal and applications for peremptory writs of mandamus and prohibition; (8) some procedural issues; and (9) emergency and special matters.

In most circuits, standing three-judge motions panels also decide emergency motions, giving them priority over non-emergency procedural and substantive motions. In the Eleventh Circuit, however, a specially constituted emergency motions panel is drawn by rotation from an emergency routing log and, as mentioned above, in some courts individual judges may act on emergency motions. In the D.C. Circuit, an emergency motion in a case already calendared for oral argument is referred to the merits panel. The Seventh Circuit, while it uses a standing motions

panel, provides that if a member of the motions panel is not available when an emergency motion is filed, a substitute judge will be selected.

Argument and case-assignment practices

Circuit geography, tradition, and policy choices about panel construction have led to differences in ways of arranging argument schedules. These influences often give way in the face of a shortage of judges. Multiple and prolonged judicial vacancies reduce the opportunity for active judges of the court to interact, because these judges must be distributed across the panels, which are then filled out with senior and visiting judges. Table 10 shows only the basic issues on which the courts vary in meaningful ways. The number of sittings and cases are the courts' estimates, and for simplicity of presentation some details reflected in the individual profiles (such as extra sittings for complex, capital, or en banc cases) have been omitted here.

Table 10: Models of Argument Panel Operation

Cir.	Typical number of sittings for active judges per term or year	Number of cases argued/decided	Typical argument time per side
D.C.	Eight 4-day sittings	14 per week	15–20 min.
1st	Ten 5-day sittings	4–5 per day	Up to 15 min.
2d	Eight 5-day sittings + two pro se panels	31 per week	10–15 min. if counseled; 5 min. pro se
3d	Seven 4-day sittings	35–38 calendared; approx. 1/3 argued	15–20 min.; 30+ granted if warranted
4th	Eight or nine 5-day sittings	At least 4 per day	20 min.; 15 for some case types
5th	Seven 4-day sittings	5 per day	20 min.; 30 in complex cases
6th	Eight 4-day sittings	6 per day plus 3 nonargued cases	15 min.
7th	34 panels per year, 1–2 days per sitting week	6 per day for most; 9 per day for short argument days	10–25 min. or longer, panel presider reviews allotment and revises as warranted
8th	Eight 5-day sittings	5 per day	10–20 min.; 30 if warranted
9th	Eight 5-day argument calendars and 1 conference calendar; or 7 argument and 2 conference	Per day: cases equivalent to 24 "points" on court's case weighting scale (approximately 6–8 cases per day)	10–20 min.
10th	Five 5-day sittings and three to seven 1-day sittings	6 per day	15 min.; more if warranted
11th	Seven 4-day sittings	5 per day	Up to 15 min.; 30 if complex
Fed.	4–5 days per month	Avg. 4 argued/2 submitted per day	15 min.

Some courts have their staffs try to distribute cases across panels to equalize judicial workloads, either based on staff assessments of case difficulty or according to case type to give each panel a range of matters. Beyond that, most case assignment is random, with case assignment separate from the panel construction function to maintain the real and apparent integrity of the process.

Courts also differ in how they construct their panels and when they announce the panel identity to litigants. Some announce it early, perhaps to encourage litigants to settle or withdraw their appeals as outcomes become more predictable. Others withhold panel identity so that attorneys do not spend time and effort tailoring arguments in their briefs to the anticipated panel. Most do not allow party-initiated continuances once the panel has been announced.

Opinion and publication issues

In the 1970s, the Judicial Conference encouraged the courts of appeals to adopt criteria for the publication of precedential opinions. Similarly, the Long Range Plan recommended that the courts adopt internal procedures to maintain the consistency of circuit law. One of the suggested implementation strategies for this recommendation was that "[a] uniform set of procedures and mechanisms for access to court of appeals opinions, guidelines for publication or distribution, and clear standards for citation should be developed."[9]

Criteria for publication and non-publication. In response to the Judicial Conference's encouragement, and amidst growing concerns about the proliferation of opinions, many courts adopted policies and internal rules to discourage unnecessary publication. Current criteria are fairly similar in wording, but differ somewhat in their application. Table 18 (page 33) gives an overview of the formal criteria that courts say govern their decisions about what to publish. Although applicable circuit rules vary greatly in specificity, they do not reflect any significant inconsistency of formal criteria.

Notwithstanding relatively consistent formal criteria, publication rates differ across circuits, ranging in 1998 from 11% of merit terminations to 54%. We cannot here tease out how much of this difference is attributable to differences in case mix and how much to other factors, but it may be useful to look at publication rates in light of the nature of cases

9. Implementation Strategy 37d, Long Range Plan for the Federal Courts, *supra* note 1, at 69.

and how they are otherwise treated. Table 11 shows how various case processing and outcome characteristics affect publication rates.

Table 11: Opinion Publication Percentages in the Regional Courts of Appeals, FY 1998, by Case Characteristic

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Nat'l
Overall	54%	51%	33%	16%	11%	29%	23%	54%	47%	18%	30%	19%	28%
If counseled	67	60	45	22	17	40	32	71	66	25	40	25	38
If pro se	9	7	6	3	0	5	1	9	6	2	6	2	4
If orally argued	83	84	44	47	36	68	40	80	87	40	65	48	57
If submitted on briefs	3	5	6	2	0	4	3	12	10	3	9	4	4
If dissent filed	96	92	100	76	68	87	56	89	98	66	69	100	76
If concurrence filed	97	100	100	96	73	100	64	91	97	88	81	91	92
If affirming	38	48	27	10	7	18	14	52	41	14	26	16	22
If reversing	89	85	89	55	41	73	58	80	90	53	50	45	63
If remanding	60	74	51	28	15	06	50	12	42	21	51	16	34

Note: Figures are published, reasoned opinions as a percentage of terminations on the merits in the categories described. Publication percentage for reversals includes cases affirmed in part and reversed in part.

Oral argument and representation by counsel. Table 11 displays the frequency of published opinions within categories of counsel status and disposition method. Oral argument is strongly associated with opinion publication overall.[10] Even absent argument, publication occurs more often in cases where all parties are represented by counsel than in cases with pro se litigants. Although these patterns are sometimes interpreted as evidence of second-class treatment of certain classes of cases or litigants, they are also the patterns one would expect if screening programs are operating as intended and if most meritorious cases can attract counsel.

Dissents and concurrences. Some courts explicitly list the issuance of a separate opinion (either dissent or concurrence) as a condition that will trigger publication (at least if the concurring or dissenting judge wishes to publish), and it is sometimes presumed that courts publish at least any decision on which the panel members disagree enough to generate a dis-

10. Counseled and pro se cases in which argument is heard are grouped here because, with the notable exception of the Second Circuit, most courts rarely or never grant oral argument to uncounseled litigants.

sent. The preparation of a separate opinion makes it more likely that an opinion will be published, but this is not a thoroughly reliable predictor.

Case outcomes. As Table 18 reflects, some courts use case outcome—reversal, affirmance, etc.—as a criterion for publication. Where the judgment appealed from was published, reversals may be especially important. Table 11 shows that reversals and partial reversals tend to be published with fair frequency, although somewhat less predictably than cases in which a panel member felt strongly enough to prepare a separate opinion. However, the dangers of overinterpreting reversals and partial reversals have been well documented, and nonpublication cannot necessarily be taken as evidence of unavailability of either results or reasoning that would be of substantial assistance to the bar.

Reasoned v. "without comment" opinions. Table 12 shows the percentage of merit terminations that are disposed of in each court "without comment," as defined by the individual court. There seems to be broad agreement that summary orders in the nature of the one-word "Affirmed" disposition fall in this category and are coded as such. After that, uniformity ends. Although dispositions are reported by the courts to the AO to be "reasoned" or "without comment" (as well as published/unpublished, signed/unsigned), there is no uniformity of application of the instructions regarding the definition of a "reasoned" opinion. Some courts report one-paragraph "appeal without merit" opinions as reasoned opinions. Other courts use one-word summary affirmances and characterize them, in accordance with the instructions, as "without comment" dispositions. Arguably, these are functionally equivalent dispositions, so it is not possible to reliably compare the courts of appeals on this dimension using nationally reported data.

Table 12: Opinions/Dispositions/Orders "Without Comment," FY 1998

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Nat'l
% of all merit terminations	0	0	0	32	0	2	0	2	18	3	0	19	7
% of orally argued cases yielding "without comment" order	0	0	0	19	0	5	0	0	1	1	0	26	4
% of cases decided on the briefs yielding "without comment" order	0	0	0	38	0	0	0	6	34	5	0	15	9

Table 13: Published Opinions as a Percentage of Terminations on the Merits, Selected Years

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Nat'l
1987 (all cases)	37	61	46	30	19	41	22	65	48	38	36	39	38
1993 (all cases)	32	62	33	18	15	24	17	47	42	18	35	17	26
1998 (all cases)	54	51	33	16	11	29	23	54	47	18	30	19	28
1998 (counseled cases only)	67	60	45	22	17	40	32	71	66	25	40	25	38

Availability of not-for-publication opinions. "Unpublished" opinions are available on Westlaw and LEXIS from all of the courts of appeals except those in the Third, Fifth, and Eleventh Circuits.[11] Courts that do make these opinions available use different labels (e.g., "nonprecedential," "not-for-publication," "unpublished"), but the status of the opinion is always visible on the first page of the Westlaw and LEXIS versions. All opinions are available for inspection at the issuing court. At least one court (the Third Circuit) compiles the unpublished opinions in volumes in the court's library.

Use of not-for-publication opinions. Table 19 (page 35) shows the status of the published rules and internal operating procedures on the citability of unpublished opinions. There is substantial variation in courts' policies and practices in this area. There is no significant non-uniformity of procedures among those courts that allow unpublished opinions to be cited for whatever persuasive value they might be worth. Where a rule speaks to the procedures to be followed when citing unpublished opinions, they generally require the citing party to attach the opinion to the document (e.g., brief) it is purported to support, with service on other parties.

En banc rehearings and other efforts to maintain consistency

Grounds for and frequency of en banc rehearings. En banc practices in the thirteen courts of appeals are quite similar. When we began our review, Fed. R. App. P. 35 set the basic criteria for a suggestion for rehearing en banc: (1) a conflict with a decision of the Supreme Court, (2) a conflict with the court's precedent, and (3) an issue of grave or exceptional importance. Three circuits, the D.C., Seventh, and Ninth, had local rules indicating they would also consider granting en banc rehearing for inter-

11. The outcomes of these cases are available through these services, just as they can be found in table form in the West reporter system, but generally the only text included is a reference to the court's local rule on unpublished opinions.

circuit conflicts at least in some circumstances.[12] Since December 1, 1998, Fed. R. App. 35 has incorporated intercircuit conflict as an example of a matter that may be of exceptional importance and therefore grounds for rehearing en banc.[13] No matter what the standard, Table 14 shows that en banc rehearings occur infrequently.

Table 14: Number of En Banc Rehearings, FY 1994–1998

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Total
1994	1	1	0	11	12	5	5	10	6	9	5	11	76
1995	6	0	1	9	20	20	6	4	9	8	4	11	98
1996	4	4	1	11	19	15	6	5	7	25	6	7	110
1997	2	3	2	6	10	15	8	3	5	17	5	7	83
1998	5	3	2	4	19	9	6	2	3	24	3	6	86

Note: Figures are lead and single cases decided en banc in the pertinent fiscal year (not necessarily argued that year).

Currently, only the Ninth Circuit uses a limited en banc, although two other courts are authorized to do so.[14] In the Ninth Circuit, the en banc court consists of the chief judge and ten judges drawn essentially by lot from among eligible judges. In the absence of the chief judge, an eleventh active judge is drawn by lot, and the most senior active judge on the panel presides. Because only eleven of the court's judges participate, the court may order a rehearing by the full court following a hearing or rehearing en banc, but has never voted to do so. Other variations among

12. The Ninth Circuit rule provided for possible en banc rehearing if the intercircuit conflict substantially affected a rule of national application in which there is an overriding need for national uniformity. Other courts may have determined that persistent and disruptive intercircuit conflicts met the "exceptional importance" standard for rehearing en banc under Fed. R. App. P. 35, but only these courts had local rules explicitly recognizing intercircuit conflict as an example of a potentially "exceptionally important" issue.

13. Fed. R. App. P. 35(b)(1)(B) ("a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue"). The revised rule also dropped the label "suggestion" and replaced it with "petition," and substituted "en banc" for "in banc." Here and in Part II, we use "petition" and "en banc" even though many courts have not yet revised their local rules to reflect the new terms.

14. The 1978 Omnibus Judgeship Act authorized courts with more than fifteen active judges to perform their en banc functions with fewer than all the court's active judges. Section 6 of the Omnibus Judgeship Act of 1978 provided, *inter alia*, "Any court of appeals having more than fifteen active judges . . . may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals." Act of Oct. 20, 1978, Pub. L. No. 95-486, Section 6, 92 Stat. 1629, 1633. The Ninth Circuit adopted the limited en banc procedure in 1979; at the time of this writing it is seeking public comment on possible changes to the size and operation of its en banc panels.

the courts of appeals include: (1) what constitutes a majority vote for purposes of granting a rehearing en banc; (2) the effect of granting a suggestion for rehearing en banc; and (3) alternatives to empaneling a full en banc court to ensure consistency.

Voting and eligibility. Table 15 shows that the majority of the courts of appeals restrict the decision of whether to grant rehearing en banc to those active judges who are not disqualified from acting in the case.

Table 15: Calculating "Majority" for Ordering Rehearing En Banc

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Fed.
Active judges not disqualified		X	X	X				X	X	X	X		X
All active judges	X				X	X	X					X	

Eligibility of senior judges to serve on the en banc panel also varies. Although senior judges of the court who served on the panel whose decision is under review are eligible on the same basis as other judges of the court, in some circumstances senior judges who were not on the panel are also eligible. Several courts provide for this possibility explicitly: In the Fourth Circuit, a judge who was active at the time the case was heard or reheard en banc but takes senior status before the decision is rendered will continue to be eligible to participate in the en banc decision. In the Third and Sixth Circuits, a senior judge is eligible as long as he or she was in active service at the time the en banc poll was initiated. (The Sixth Circuit also allows senior and visiting judges on the original panel to request an en banc poll to be taken, but not to vote.) Finally, a judge in the Ninth Circuit who is selected for a limited en banc panel may continue to serve on the en banc court even if he or she takes senior status during the process.

Effect of grant. Courts differ slightly in their description of the immediate effect of a grant of rehearing. Table 16 reveals that in the majority of circuits, when a petition for rehearing is granted, the original panel opinion is vacated and the mandate is stayed. In some courts, the grant vacates both the panel opinion and the judgment, but in two a rehearing grant vacates the judgment but not the opinion.

Table 16: Effect of Granting a Petition for Rehearing En Banc

Effect	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Fed.
Vacates panel opinion		X	X*	X	X	X	X	X	X	X		X	X
Vacates the judgment	X			X	X		X				X		X
Stays the mandate	X	X	X	X	X	X	X	X	X	X	X	X	X

**Note:* Decision is made on a case-by-case basis. If the court decides to vacate the opinion, the order granting the petition for rehearing will so indicate.

Procedures employed to minimize intra- and intercircuit conflicts. All the courts of appeals require counsel seeking rehearing to identify the conflicting precedent or important question on a special form or in a special section of the brief or motion. In addition, the courts employ a variety of procedures, both formal and informal, as a means of limiting conflicts without convening the court en banc. Table 20 (*infra*, page 36) shows some of the procedures used by the courts to enhance consistency.

Special procedures for pro se cases

Appeals filed by litigants unrepresented by counsel make up a large part of appellate court filings (more than 40%). These, and the considerably smaller number of appeals in which a party other than the appellant is unrepresented, pose special management challenges for the courts of appeals. Courts have devised various ways to help pro se litigants with meritorious claims pursue their appeals and to expedite disposition of nonmeritorious appeals. They use their staff attorneys (and sometimes paralegals) extensively in this process, and occasionally appoint counsel for indigent pro se civil litigants. Additionally, courts generally accept informal or fill-in-the-blank briefs from pro se litigants, typically prisoners.

In the First and D.C. Circuits, the clerks' offices, not the staff attorneys' offices, handle communications with pro se litigants. In the Second Circuit, pro se law clerks may counsel pro se litigants on procedural matters, and case managers or intake staff in the clerk's office handle pro se correspondence and walk-in inquiries. In the Third Circuit, staff attorneys handle pro se mail and telephone calls, and will schedule in-person meetings with pro se litigants on request.

In the First Circuit, counsel may be appointed only in criminal cases. Litigants must have applied for in forma pauperis status in the district court and moved for the appointment of counsel on appeal. By contrast, counsel may be appointed in civil cases in the Third Circuit, again upon the filing of a motion for appointment of counsel. In the Fourth and

Ninth Circuits, counsel will be appointed for formal briefing and oral argument if the court determines that a pro se appeal warrants argument, as, for example, where the appeal raises a novel or unresolved issue. A supervising attorney in the Ninth Circuit's pro se unit coordinates the court's pro bono counsel program. In that program, the court guarantees oral argument opportunities to attorneys willing to undertake pro bono representation when the court determines counsel should be appointed. Finally, staff counsel in the D.C. Circuit may recommend to a special panel that counsel or amicus curiae be appointed in a civil case.

Table 17: Mediation and Conference Programs in the Federal Courts of Appeals

Cir.	What is program called and when did it begin?	What case types are eligible for selection for a conference?	Which cases are selected for conferences?	Is program mandatory or voluntary?	What ADR method(s) are used?	Who participates in conferences?	Who conducts conferences?	Program's involvement with briefing and other procedural matters
1st	Civil Appeals Management Program (CAMP)—implemented 1992.	Fully counseled civil cases (but not prisoner cases, habeas corpus petitions, motions to vacate, original proceedings, some agency cases, including INS and NLRB appeals, or cases with unresolved jurisdictional problems).	Every CAMP-eligible case, and any matter referred by a circuit judge or hearing panel.	Mandatory.	Facilitative and evaluative mediation.	Attorneys with full settlement authority. Clients not required, but permitted, to attend.	Two settlement counsel: a former state supreme court justice and a senior U.S. judge.	Settlement counsel also aid disposition of appeal by resolving open procedural matters, and may recommend filing of motions for enlargement of time to file briefs, which are generally granted.
2d	Civil Appeals Management Program (CAMP)—implemented 1974.	Fully counseled civil cases (but not habeas corpus petitions, motions to vacate, or original proceedings).	Nearly all CAMP-eligible cases, and any case referred by a hearing panel.	Mandatory.	Facilitative and evaluative mediation.	Attorneys with appropriate settlement authority, usually without clients; clients permitted, but not required, to attend.	Three conference attorneys employed by court in its Office of Staff Counsel.	Conference attorneys have authority to dispose of certain procedural motions, and issue and revise scheduling orders.

Table 17 (cont'd)

Cir.	What is program called and when did it begin?	What case types are eligible for selection for a conference?	Which cases are selected for conferences?	Is program mandatory or voluntary?	What ADR method(s) are used?	Who participates in conferences?	Who conducts conferences?	Program's involvement with briefing and other procedural matters
3d	Appellate Mediation Program—implemented 1995.	Fully counseled civil cases (but not prisoner cases, original proceedings, or cases with unresolved jurisdictional problems).	Non-frivolous cases with settlement potential selected by program director from those eligible for the pro-gram, cases referred by hearing panels, and most cases where a party requests a conference.	Manda-tory.	Facilitative mediation.	Attorneys with settlement authority; clients usually attend.	Several senior judges in the circuit and media-tion program director employed by the court.	The clerk's office does not issue a briefing order until after a case leaves the program. If the scheduling of additional mediation sessions will affect the briefing schedule in a case, the clerk postpones issuance of the briefing order upon the mediator's recommendation.
4th	Office of the Circuit Mediator—implemented 1994.	Fully counseled civil cases (but not prisoner cases).	Cases selected by program's chief circuit mediator from those eligible for the program with consideration given to settle-ment potential, cases referred by hearing panels, and most cases where counsel requests a conference.	Manda-tory.	Facilitative and evaluative mediation.	Lead counsel with settlement authority; clients permitted, but not required, to attend.	Four circuit mediators employed by court (including one retired state supreme court justice).	The circuit mediator may recommend extensions to the briefing schedule if all parties consent and if the circuit mediator determines that significant progress toward settlement has occurred and that an extension will contribute to a settlement. The clerk routinely adopts the circuit mediator's recommendation on briefing schedules. The circuit mediator may also send the clerk recommendations for other consent orders that control the course of proceedings in the case or that may dispose of the case.

Table 17 (cont'd)

Cir.	What is program called and when did it begin?	What case types are eligible for selection for a conference?	Which cases are selected for conferences?	Is program mandatory or voluntary?	What ADR method(s) are used?	Who participates in conferences?	Who conducts conferences?	Program's involvement with briefing and other procedural matters
5th	Appellate Conference Program—implemented 1996.	Fully counseled civil cases (but not prisoner cases or cases with unresolved jurisdictional problems).	Cases selected by conference attorneys based on settlement potential, cases referred by hearing panels, and most cases where counsel requests a conference.	Mandatory.	Facilitative and evaluative mediation.	Lead counsel; conference attorney may require attendance by parties.	Three conference attorneys employed by court.	Conference attorney may recommend extension of the briefing schedule and entry of other orders controlling the course of proceedings in a case.
6th	Office of the Circuit Mediators—implemented on trial basis in 1981 and permanent basis in 1983.	Fully counseled civil cases (but not some agency cases, such as SSA and NLRB appeals, cases with unresolved jurisdictional problems, tax appeals, or prisoner cases).	Cases selected after circuit mediators review files for program-eligible cases, cases referred by hearing panels, and most cases where a party requests a conference.	Mandatory.	Facilitative and evaluative mediation.	Lead counsel with settlement authority. Generally, clients not required to attend.	Five attorneys employed by court.	Program seeks to resolve procedural problems to prevent unnecessary motions or delays. Mediator may extend deadlines for briefing as necessary so that the first brief is due no earlier than two weeks after the date scheduled for the conference. If negotiations continue productively, briefing may be postponed for a reasonable time until negotiations are completed. The administrator in the Office of Circuit Mediators monitors cases for briefing due dates, status reports, submission of stipulations on settled issues, and other events.

Table 17 (cont'd)

Cir.	What is program called and when did it begin?	What case types are eligible for selection for a conference?	Which cases are selected for conferences?	Is program mandatory or voluntary?	What ADR method(s) are used?	Who participates in conferences?	Who conducts conferences?	Program's involvement with briefing and other procedural matters
7th	Settlement Conference Program—implemented 1994.	Fully counseled civil cases (but not certain agency cases, including INS and SSA appeals, prisoner civil rights cases, habeas corpus petitions, motions to vacate, or original proceedings), cases with unresolved jurisdictional problems not automatically excluded.	Three program-eligible cases in five selected at random by the clerk's office, and most cases where a party requests a conference.	Mandatory.	Facilitative mediation.	Attorneys with appropriate settlement authority. Clients generally not required to attend, but clients with full settlement authority must be available by telephone for the duration of the conference.	Two settlement conference attorneys employed by court's Settlement Conference Office; currently, hiring a third.	Settlement conference attorneys have authority to address procedural issues with the parties and modify briefing schedules.
8th	Settlement Program—implemented 1981.	Fully counseled civil cases (but not certain prisoner cases, some agency cases, including SSA appeals, tax appeals, interlocutory appeals, original proceedings, or cases with unresolved jurisdictional problems).	Cases selected by program director from those eligible for the program with consideration given to settlement potential, cases referred by hearing panels, and certain cases where a party requests a conference.	Voluntary—upon consent of all parties.	Primarily facilitative, but also evaluative, mediation.	Attorneys, usually accompanied by clients.	The court's program director serves as mediator.	None; the clerk's office handles all motions for extension of briefing schedules and other case-management matters.

Table 17 (cont'd)

Cir.	What is program called and when did it begin?	What case types are eligible for selection for a conference?	Which cases are selected for conferences?	Is program mandatory or voluntary?	What ADR method(s) are used?	Who participates in conferences?	Who conducts conferences?	Program's involvement with briefing and other procedural matters
9th	Circuit Mediation Program—implemented 1984. Program began as case-management program; evolved into settlement program in early 1990s.	Fully counseled civil cases (but not most prisoner cases, habeas corpus matters, motions to vacate, or original proceedings).	Cases selected after circuit court mediators review files for all eligible cases with consideration given to settlement potential, cases referred by hearing panels, and most cases where counsel requests a conference. Screening for settlement potential often includes telephonic assessment conferences conducted by circuit court mediators.	Mandatory.	Facilitative mediation.	Attorneys, sometimes with clients at the mediator's direction.	Eight circuit court mediators employed by court.	The court requires that program participants consult with the mediator before filing any procedural motion. Circuit mediators are authorized to rule on certain procedural matters, including vacating or resetting the appeal schedule. Usually, the mediator resolves procedural matters over the phone and counsel need not file a procedural motion. In exceptional circumstances, including complex litigation, circuit mediator is authorized to conduct a case-management conference.
10th	Circuit Mediation Office—implemented 1991.	Fully counseled civil cases (but not habeas corpus cases or cases with unresolved jurisdictional problems).	Cases randomly selected by circuit mediators from cases eligible for the program, cases referred by hearing panels, and most where a party requests a conference.	Mandatory.	Facilitative mediation.	Lead counsel with settlement authority; circuit mediator may permit or require client to attend.	Three circuit mediators employed by court.	Circuit mediator may apply to the clerk for an order to extend time for briefing or otherwise to control the course of proceedings in order to promote the mediation process.

Table 17 (cont'd)

Cir.	What is program called and when did it begin?	What case types are eligible for selection for a conference?	Which cases are selected for conferences?	Is program mandatory or voluntary?	What ADR method(s) are used?	Who participates in conferences?	Who conducts conferences?	Program's involvement with briefing and other procedural matters
11th	Circuit Mediation Office (CMO) —implemented 1992.	Fully counseled civil cases (but not prisoner cases or cases with unresolved jurisdictional problems).	Cross-section of cases selected by CMO after reviewing files for cases eligible for the program, cases referred by a hearing panel or circuit judge, and most cases where a party requests a conference.	Mandatory, but a case may be removed from program upon request of a party and consent of circuit mediator.	Facilitative and evaluative mediation.	Lead counsel with appropriate settlement authority. Circuit mediators permit and may require parties to attend.	Four circuit mediators employed by court.	Circuit mediators assist in the resolution of procedural issues. Circuit mediators may grant requests for enlargement of the briefing period if negotiations are productive and all parties and the circuit mediator agree. Such requests may be made by letter to the circuit mediator. Under the procedure, no motion is necessary; the circuit mediator forwards the letter request to the clerk's office with a memorandum recommending the enlargement of the briefing period.
DC	Appellate Mediation Program—implemented 1987.	Fully counseled civil cases. (Many of the mediated cases are on review from a decision of a federal agency or involve the United States, the District of Columbia, or other government entities; eligible cases include original proceedings.)	Cases are referred to the program by the legal division of the clerk's office, working in concert with the director of dispute resolution in the circuit executive's office. Parties may also request mediation by submitting a form to the clerk's office.	Mandatory.	Facilitative and evaluative mediation.	Attorneys with settlement authority. Clients strongly encouraged, but not required, to attend.	One of thirty trained volunteer attorney-mediators, who are experienced litigators, senior members of the bar, and law school professors. Director of dispute resolution employed by court.	Motions for extension of the briefing schedule must be filed with the clerk's office. The parties may represent in the motion that the mediator (not identified by name) concurs in the request.

Table 17 (cont'd)

Cir.	What is program called and when did it begin?	What case types are eligible for selection for a conference?	Which cases are selected for conferences?	Is program mandatory or voluntary?	What ADR method(s) are used?	Who participates in conferences?	Who conducts conferences?	Program's involvement with briefing and other procedural matters
Fed.	No pre-argument mediation or conference program. Instead, Fed. Cir. R. 33 requires parties in counseled cases to discuss settlement and file a joint statement of compliance with the rule.	Fully counseled civil cases brought pursuant to certain provisions of Title 28 of the U.S. Code including patent infringement appeals from the district court and certain appeals from the U.S. Patent and Trademark Office.	For all cases covered by Fed. Cir. R. 33, clerk's office notifies parties that they are required to conduct prehearing settlement discussions.	Mandatory.	Settlement discussions by counsel alone—no requirement of third-party mediator.	Counsel for parties are required to schedule and conduct settlement discussions. After discussions, parties must file either a joint statement of compliance with the settlement discussion rule or a statement of agreement of dismissal of case.	No special court staffing. Parties conduct their own settlement discussions.	Briefing and other procedural matters continue to be handled by the clerk's office in the absence of a mediation or conference program.

Table 18: Criteria for Publication

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Fed.
Publication generally ordered if opinion													
– is of general public interest[15]	x	I			x	x	x	x	x	x			
– has precedential or institutional value (general)			I[16]	x							I[17]	I[18]	I
– establishes, alters, modifies, or significantly clarifies a rule of law (incl. "first impression")	x	I			x	x	x	x	x	x	I		
– calls attention to an existing rule of law that appears to have been generally overlooked	x					x				x			
– criticizes or questions existing law	x				x	x		x		x			
– resolves or creates a conflict in the law	x				x	x	x	x	x[19]				
– applies an established rule of law to a factual situation significantly different from that in published opinions		I		x	x		x						
– constitutes a significant and non-duplicative contribution to legal literature by a historical review of law, or by describing legislative history					x	x		x	x				

Note: x = explicit statement of criterion; I = criterion inferred from other statements. Absence of entry denotes omission of criterion from published rules and procedures, not necessarily nonapplicability of criterion.

15. Formulations vary: "a legal issue of continuing public interest" (4th Cir. Loc. R. 36(a)(ii)); "concerns or discusses a factual or legal issue of significant public interest" (5th Cir. Loc. R. 47.5.1(e)); "involves an issue of continuing public interest" (7th Cir. R. 53(c)(1)(ii)); "involves a legal or factual issue of continuing or unusual public or legal interest" (8th Cir. Plan for Publication, ¶ 4(d)); "involves a legal or factual issue of unique interest or substantial public importance" (9th Cir. R. 36-2(d)). Sometimes phrased in negative: "An opinion which appears to have value only to the trial court or the parties is ordinarily not published." (3rd Cir. internal operating procedure 5.3)

16. Dispositions in open court or by summary order when decision is unanimous and no jurisprudential purpose would be served by a written opinion (2d Cir. R. § 0.23).

17. Disposition without opinion means "that the case does not require application of new points of law that would make the decision a valuable precedent" (10th Cir. R. 36.1).

18. Opinions that the panel believes to have no precedential value are not published (internal operating procedure 5).

19. Also includes new interpretation of or conflict with decision of a state appellate court.

Table 18 (cont'd)

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Fed.
Reversal/remand													
– published if decision reversed was published	X							X	I				
– published regardless of publication below						X[20]	X[21]						
Where decision below was published													
– generally publish		X[22]					X			X[23]	X		
– publish affirmance if grounds for affirmance differ from those in district court's opinion	X					X[24]			X				
Publish if disposition is not unanimous, or includes a separate expression		X[25]	I			X[26]	X			X[27]			
If disposition follows consideration of the case by the U.S. Supreme Court							X	X[28]					
– publish if Supreme Court considered merits in opinion						X							
– publish if Supreme Court reversed or remanded									X	X			
Publish if case is decided en banc		X											
Publish only if orally argued					X								

Note: X = explicit statement of criterion; I = criterion inferred from other statements. Absence of entry denotes omission of criterion from published rules and procedures, not necessarily nonapplicability of criterion.

20. "May" be published.
21. Published unless reversal caused by an intervening change in law or fact; or reversal is a remand without further comment to the district court of a case reversed or remanded by the Supreme Court (6th Cir. R. 24(a)).
22. "If a District Court opinion in a case has been published, the order of court upon review shall be published even when the court does not publish an opinion." 1st Cir. R. 36.2(b)(5).
23. Publish unless panel determines that publication is unnecessary for clarifying the panel's disposition of the case (9th Cir. R. 36-2(e)).
24. "May" be published; also, rule does not explicitly limit to published district court opinion.
25. Publish unless all the participating judges decide against publication.
26. "May" be published.
27. Published if author of separate expression requests publication.
28. Publish if "pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court" (7th Cir. R. 53(c)(1)(vi)).

Table 19: Circuit Rules on the Citability of "Unpublished" Opinions

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Fed.
Strict noncitation rules													
Specific statement re citation for purposes of res judicata, collateral estoppel, law of the case, etc.	x							x[29]		x			x
General statement limiting use to related cases		x	x										
Loose noncitation rules													
When counsel believes the opinion is persuasive on a material issue:													
– citation is disfavored but permitted												x	
– citation is disfavored but permitted if no published opinion would serve as well					x		x		x				
– citation is disfavored but permitted if opinion has persuasive value with respect to a material issue that has not been addressed in a published opinion and it would assist the court in its disposition											x		
– unpublished opinions issued on or after January 1, 1996, are not precedent but may be cited as persuasive						x							
Other													
Unpublished opinions issued before January 1, 1996, are precedent, but should not normally be cited because opinions believed to have precedential value were published.						x							
No explicit limitation on party citation; limitation on court's own citation, by tradition.				x[30]									

29. Seventh Cir. R. 53(e) extends the prohibition on citation of unpublished opinions to those of other courts, if the rendering court also prohibits it.

30. Practice is unclear from rules. 3d Cir. R. 28.3 governs format of citations to federal decisions "that have not been formally reported" but may be intended to cover recent decisions electronically available before printing of official reports.

Table 20: Procedures Used to Enhance Consistency of Decisions

Procedure	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	Fed.
Panel reconsideration opportunity	X	X	X	X	X	X	X	X	X	X	X	X	X
Prefiling circulation of opinions	X	–[31]		X	X	–[32]	X	–[33]		–[34]	X	–[35]	X[36]
Post-filing amendment										X			
Pending issue flag or case grouping		X[37]	X[38]			–[39]		–[40]		X[41]			
Conflict flag						X	X[42]	X					
Overruling without rehearing[43]	X	X						X			X		

31. Ordinarily no pre-filing circulation, but a judge or panel may choose to do so.

32. Generally, neither published nor unpublished opinions are circulated to nonpanel judges. However, a panel opinion that will create a conflict between circuits must be precirculated to all active judges.

33. Opinions are circulated if the proposed opinion approved by a panel adopts a position that would overrule a prior decision of the court or create a conflict between or among circuits, and may be circulated if a proposed opinion would establish a new rule or procedure.

34. Generally, opinions are not circulated before filing; however, the court is experimenting with a pre-publication report in which the court is notified of what opinions will be filed two days later and whether the opinion affects any cases pending before other panels.

35. Ordinarily no pre-filing circulation, but a judge or panel may choose to do so.

36. Precedential opinions circulated to all active and senior judges for comment and to the Central Legal Office for comment regarding any appearance of conflict or confusion between opinion language and that in earlier opinions of the court or its predecessor courts.

37. In the alternative, the court alerts one panel to the fact that another panel is considering a similar issue simultaneously.

38. The presiding judge of each panel prepares and circulates a list of pending issues to alert other panels. Certain types of issues are tracked by central staff.

39. Staff attorneys maintain a searchable, automated tracking system for their memoranda.

40. Cases with the same issue as a case pending before the Supreme Court or this court of appeals are held pending the decision in the controlling case. Sometimes cases in a closely related area of the law but with different issues and different parties are scheduled for the same day before the same panel of judges.

41. Case management attorneys prepare inventory cards for each case which identify the issues that will be raised on appeal, the panels with cases raising similar issues, and the disposition status of each related case. This information is stored in a database, which allows for easy word searches and enables the assignment of cases raising similar issues to the same panels where possible.

42. When a panel decision will initiate or continue a conflict with one or more circuits, the writing judge circulates the opinion with a cover note indicating the conflict.

43. The court may make special mention that the panel's interpretation of a particular issue has been separately considered by all the judges and resolves an apparent conflict between two prior decisions of the court or overrules a prior precedent of the court. The full court must approve such a decision before it becomes the law of the circuit.

Part II

Appellate Court and Case Management: Descriptions of Each Court of Appeals

United States Court of Appeals for the District of Columbia Circuit

I. General Information

The District of Columbia Circuit encompasses Washington, D.C. The Court of Appeals serves as the reviewing court for the U.S. District Court for the District of Columbia and decides a large proportion of appeals from actions by the nation's administrative agencies.

The court has twelve judgeships. In FY 1998 it had one senior sitting judge and twelve vacant judge-months.

A. Judges and panels

Orientation and assignments for new judges

The court has no formal orientation for new judges.

Visiting judges

The court has not used the services of visiting judges for several years.

Panels

In addition to regular argument panels, each judge serves on a "special panel" that handles emergency motions, interlocutory appeals, dispositive motions, opposed procedural motions, and cases decided without oral argument. These panels are constituted for three months during the court's sitting term and for shorter periods throughout the summer. Judges also serve on up to three "complex panels" during each term. These panels hear cases involving large numbers of parties and issues. By statute, one judge presides over the "Special Division" that the Chief Justice appoints to handle independent counsel matters.

Screening judges

Although initial screening is done by the court's legal division as described in section II.B, on each argument panel one active circuit judge is designated as a "screening judge." The screening judge sets argument time allotments, any special argument formats, and the order in which the scheduled cases should be argued. The screening judge then notifies the clerk's office, which issues an appropriate order. *See* § V, *infra.*

B. Central staff

Central legal staff

The court's legal division has a director, an assistant director, and eight full-time and four part-time staff attorneys. Two of the staff attorneys are career attorneys; the rest have two-year terms that may be extended.

In addition to the case-related work described *infra,* the central legal staff provides assistance with various projects at the request of the chief judge, other judges of the court, or the clerk. For example, central legal staff may be involved in developing policies and procedures for special matters, such as Prison Litigation Reform Act cases, attorney sanctions, or courtroom management in special circumstances. They also perform legal research as requested. Staff attorneys also screen pleadings to ensure that they are properly routed or addressed in an expedited fashion where warranted.

Clerk's office

The special counsel to the clerk oversees certain work in the legal division and assists the chief judge and the court in reviewing Criminal Justice Act vouchers. The clerk's office also employs a legal coordinator who assists case administrators, answers queries from chambers, and helps the central legal staff screen pleadings.

Appellate mediation program staff

The court employs a director of its appellate mediation program. The director oversees approximately thirty trained volunteer attorney-mediators selected by the court. *See* § II.C, *infra*.

C. Technological resources

The court has a sophisticated intranet site containing access to all of the important information necessary for the functioning of the court, such as rules, policies, calendars, schedules, district court and appellate dockets, opinions, staff attorney memoranda, and links to useful government sites.

The court also uses a commercial software product called TeamTalk that has been integrated with other applications by the court's automation staff to produce an automated voting system. This system allows staff to transmit vote sheets electronically and judges to cast electronic votes, including text comments. The court reports that use of this application has significantly reduced paperwork, especially on en banc votes.

II. Intake, Screening, and Settlement Programs

A. Intake

Information provided by attorneys

When a new appeal or petition for review is docketed, the clerk's office sends the appellant or petitioner a docketing statement form, which must be filed within thirty days. Each appellant or petitioner must also file a preliminary nonbinding statement of issues on appeal and a copy of the district court or agency opinion or order. These are referred to as "initial submissions."

Information provided to attorneys

Information concerning the court's mediation program, electronic access to court information, and procedures for expediting briefing and argument are enclosed with the order directing the filing of the initial submissions.

B. Screening

Screening for jurisdiction

Staff attorneys screen cases for jurisdictional defects and prepare, if necessary, a show cause order directing the parties to address the issue. When the parties respond, the order and responses are submitted to the sitting special panel for decision.

Screening for argument/nonargument disposition

Role of staff. Staff attorneys screen all cases early for a preliminary determination of whether argument or nonargument decision is appropriate. All pro se cases where the pro se litigant is not an attorney are retained by the staff attorneys, who prepare them for nonargument disposition. If the staff attorney is convinced the appeal should be argued, the staff work-up is a recommendation to the special panel that counsel or amicus be appointed and that the appeal be calendared for argument.

In counseled civil and agency cases, the legal staff reviews the appellant's or petitioner's statement of the issues and the decision being appealed. In most counseled direct criminal appeals, a staff attorney reviews the appellant's brief (only occasionally waiting for the appellee's brief). In criminal appeals with more than two appellants, the staff attorney screens the case based on the preliminary record and appellate docketing statement.

For each case, a staff attorney fills out a screening form that notes whether the case has been presented to a panel before, the background of

the case and issues involved, and the reason for classifying the case as an argument or nonargument case. The most important factor in the decision whether to hear oral argument is whether the appellant is represented by counsel. Other factors considered include the number of parties, cases, and issues presented; the size of the district court or agency record; and whether the case presents an issue of first impression in the circuit.

When a staff attorney concludes on initial screening that disposition without argument may be appropriate, the clerk's office sets a briefing schedule but no argument date. When the briefs are filed, the staff attorney reviews them and recommends argument or nonargument disposition.

Role of litigants. When the court concludes that oral argument would not be helpful, it notifies the parties that argument will not be held. Parties may, within ten days, file a motion for reconsideration of this decision, but according to Circuit Rule 34(j), such motions are disfavored. (By the time parties receive notice of nonargument disposition, a staff attorney has already presented a draft judgment and memorandum to the panel, and the panel has very likely accepted the staff recommendation.)

Standards for granting or denying oral argument. Pursuant to Fed. R. App. P. 34, oral argument will be denied if a three-judge panel unanimously concludes that the appeal is frivolous, the dispositive issues have been authoritatively decided, or the facts and legal arguments are adequately presented in the briefs and oral argument would not significantly aid the court.

Screening for case weighting or issue tracking

Cases are classified according to rough measures of difficulty only in the sense that a case screened for disposition without oral argument is considered less difficult than a case scheduled for regular merits panel consideration. Likewise, a case assigned to a complex merits panel is considered more difficult than a case assigned to a regular merits panel. Borderline complex cases assigned to the regular merits panel are assigned a computer code that prevents two such cases from being calendared on the same day.

C. Appellate mediation program

The court of appeals implemented its appellate mediation program in May 1987, and the program is now an established part of the court's appellate process. The role of the mediators is to help parties reach a settle-

ment or, at a minimum, to help parties resolve some issues in their case. If settlement is not possible, the mediators will help parties clarify or eliminate issues to expedite the appellate process. Cases are referred to the program by the legal division of the clerk's office, working in concert with the director of dispute resolution in the office of the circuit executive. Also, parties may request mediation by submitting a form to the clerk's office; these requests are confidential and are given special consideration in selecting cases to be mediated under the program. Once a case is selected for mediation, participation in the program is mandatory. The mediators are volunteer attorneys, selected by the court and trained by professional mediator trainers.

III. Briefing and Motions Practice

A. Briefing

General

For most calendared cases, the briefing schedule is set at the time the case is scheduled for oral argument. Four to eight months before the argument date the clerk's office notifies counsel of their briefing schedule, argument date, and panel. For any particular month's scheduled cases, all briefs must be filed at least fifty days before the first day of that month.

For cases screened for disposition without oral argument, the clerk's office issues a briefing schedule as soon as the case is screened by the legal division (usually about 50–60 days after the appeal is opened).

For most criminal cases, the clerk's office issues the briefing schedule upon receipt of notice that all necessary transcripts have been prepared.

Briefs on digital media

The court does not require briefs to be filed on digital media.

B. Motions practice

Composition and operation of motions panels

Motions in cases that have not been calendared for argument, and most dispositions of cases without argument, are handled by a special panel. These panels sit for three months during the court's term and for shorter periods during the summer. Barring emergencies, they meet approximately every two weeks. The staff attorneys prepare memoranda for the special panels, including proposed orders or judgments. The special panel receives these materials, along with any necessary underlying

pleadings, in advance of the scheduled motions conference. The staff attorneys meet with the panel and present the motions in conference.

Procedural motions

The clerk may dispose of certain procedural motions or may submit motions to a panel of the court. In calendared cases, certain procedural motions, such as motions for extension of time and motions to exceed the word limits on briefs, are submitted to the presiding judge for disposition. Any interested party adversely affected by an order of the clerk disposing of a motion may move for reconsideration thereof within ten days after entry of the order; the clerk submits the motion to a panel of the court. Staff attorneys prepare for oral presentation to the special panel procedural motions that are opposed or require panel action.

Substantive motions

The legal division prepares substantive motions of several types, including motions to dismiss or for summary affirmance; nondispositive motions, such as motions for appointment of counsel, for leave to proceed in forma pauperis, for a certificate of appealability, or for release; and all motions under the Prison Litigation Reform Act.

The legal division also reviews mandamus petitions and recommends to the special panel whether a response should be ordered. If no response is ordered, or once an ordered response is received, the staff attorney prepares a memorandum recommending a disposition on the petition or scheduling it for argument.

Emergency motions

For emergencies, the staff attorneys work up the matter and present their recommendations to the sitting special panel (or the merits panel if the case has been calendared) either in a memorandum or, if the emergency circumstances require, orally.

IV. Nonargument Decision-Making Practices

In cases originally screened for decision without argument, a staff attorney recommends to the special panel that the case be decided without argument and drafts a proposed judgment and memorandum. Once the staff attorney has worked up the case for decision without argument, the case is set for a conference at which the staff attorney presents the case and the judges either adopt the recommendation or send the case to the oral argument calendar. If the special panel accepts the recommendation that the case be decided without argument, it notifies the parties. Absent

a successful motion to reconsider that decision, the panel decides the merits of the appeal. The result is usually announced in an unpublished per curiam judgment and memorandum.

In cases screened for decision with oral argument, any judge on the merits panel may determine that a case set for argument can be decided without argument. If the other two panel members concur, the case is removed from the argument calendar and the court so notifies the parties. The parties may move for reconsideration of this decision, but such motions are rarely granted. Again, the result is typically an unpublished per curiam judgment and memorandum.

Some cases and other matters are presented to a "backlog prevention/reduction panel" comprising the chief judge and two members of the sitting special panel, who serve in rotation. Each month, one staff attorney presents orally to this panel matters that are routine or simple enough to warrant disposition without even a memorandum. These matters include habeas corpus cases filed in the wrong jurisdiction, denials of motions for summary affirmance when summary disposition is clearly unwarranted, and patently frivolous appeals. The staff attorney supplies proposed orders for these matters.

V. Argument Panel Operations

A. Panel composition, sitting schedules, and panel rotation

Yearly argument schedules and panel construction

The court's term generally runs from September to May. The sitting periods for each term are set the preceding winter. The clerk prepares a proposed schedule and submits it to the court for approval or modification.

Judges usually sit for eight one-week sitting periods per year. The clerk pairs each judge with every other judge at least three times during the term. In addition to the regular merits hearings, each judge is assigned one to three complex cases for argument and disposition over the course of the term.

Daily argument schedule

Generally, four cases are scheduled on Monday and Friday, and three on Tuesday and Thursday, for a total of fourteen argued cases per session. On Wednesday, panels generally hear staff attorney presentations of motions and cases submitted without argument.

Argument time

The panel's screening judge sets argument times. There is no set argument time, but fifteen or twenty minutes per side is a common allotment. Counsel may move for additional time, but the court rarely grants such motions.

Miscellaneous

During oral arguments, the judges, law clerks, and courtroom deputy have access to laptop computers. These computers are equipped with a chat program that allows the judges to communicate in real time with the other judges on the panel, their law clerks, or the courtroom deputy. The computers also provide access to Westlaw and to files stored anywhere on the court's network.

B. Assignment of cases to panels

General

The mix of cases in a given sitting generally reflects the proportions of case types in the court's caseload (e.g., criminal, private civil, U.S. civil, and agency cases).

Standby pool

Parties may expedite their own cases by agreeing to go into the court's standby pool. Cases in the pool are used as replacements for cases removed from the argument calendar too close to the argument date to allow normal replacement.

Continuing jurisdiction of motions panel

When a special panel has been involved in preargument motions that have required detailed consideration of matters of continuing importance to the merits of the case, that panel may decide that, given its time investment, judicial efficiency and economy would be best served by having the panel retain the case until final disposition. The court requires the special panel to retain and decide a case that the panel decides must have argument within thirty days of the filing of the last brief.

Related cases

Related cases may be consolidated for all purposes or joined for hearing before the same panel. When a related case that was not identified for consolidation in the preargument stage comes to the attention of the clerk, the panel with the earlier case is notified and given the option of taking the newer case.

Remands

If a case is remanded by the Supreme Court for further proceedings, it is assigned to the same panel that originally handled the case.

C. Staff role in working up cases for argument calendar

Staff attorneys prepare recommendations for the merits panel when substantive motions or opposed procedural motions are filed after the case is calendared.

D. Judicial preparation for argument: materials and timing

The clerk's office ordinarily distributes briefs, appendices, and other relevant materials to the judges shortly after briefing is complete. Panel members also receive any motions for special allotment of argument time. On each panel, one active circuit judge serves as a "screening judge." That judge sets argument times and any special formats for oral argument (e.g., any changes to the order of presentation, directions to counsel to address questions of particular interest, limitation on issues), and advises the clerk on the order of cases for each sitting day. These orders do not need the concurrence of the other panel members.

E. Disclosure of panel identity

The clerk posts the calendar for a sitting period about a month in advance, but the panel composition is subject to change. Argument panel identities are generally disclosed to counsel in the order setting the case for argument. Thus for civil appeals, counsel generally know the panel very early in the process—when the briefing schedule is set. In criminal appeals, the panel is usually not disclosed until after the parties have filed briefs, because the court does not decide whether to hear argument until after the appellant's brief is filed.

VI. Opinion Preparation and Publication

A. Types of dispositions and criteria for publication

The court uses four types of dispositions on the merits: a published signed opinion, a published per curiam opinion, an unpublished judgment or order with memorandum, and a simple judgment or order without memorandum. An unpublished judgment or order with memorandum is directed to those immediately concerned with the case. The memorandum is usually brief, stating only the facts and law necessary for an understanding of the court's decision. A simple judgment or order without memorandum indicates affirmance or reversal, or grant or de-

nial of a petition for review, with a brief explanation, such as citation of a governing precedent or adoption of the reasoning of the district court or agency. Panels usually agree at the case conference on the form of the decision. When a case has been submitted without oral argument, the screening judge usually prepares the opinion or memorandum.

The court's policy is to publish opinions and explanatory memoranda that have general public interest. Its rules set out the general criteria for publication as follows:

> An opinion, memorandum, or other statement explaining the basis for the court's action in issuing an order or judgment shall be published if it meets one or more of the following criteria:
>
> (A) with regard to a substantial issue it resolves, it is a case of first impression or the first case to present the issue in this court;
>
> (B) it alters, modifies, or significantly clarifies a rule of law previously announced by the court;
>
> (C) it calls attention to an existing rule of law that appears to have been generally overlooked;
>
> (D) it criticizes or questions existing law;
>
> (E) it resolves an apparent conflict in decisions within the circuit or creates a conflict with another circuit;
>
> (F) it reverses a published agency or district court decision, or affirms a decision of the district court upon grounds different from those set forth in the district court's published opinion;
>
> (G) it warrants publication in light of other factors that give it general public interest.

B. Criteria for judgment without opinion

Abbreviated dispositions

The court may dispense with a published opinion and confine its action to an appropriately abbreviated disposition. The court's criteria for issuing an abbreviated disposition are similar to those used to determine whether an opinion will be published. Abbreviated dispositions are most often used when the court grants a motion for summary affirmance or decides a case on the merits without oral argument. Occasionally, however, the court will publish a short per curiam opinion granting or denying a motion.

C. Prefiling circulation of opinions

All opinions of the court—whether or not designated for publication—are circulated to all judges on the court before issuance.

D. Availability of not-for-publication opinions

A copy of each unpublished opinion, memorandum, or statement is retained as part of the case file in the clerk's office and is publicly available there on the same basis as any published opinion.

E. Citability of not-for-publication opinions

Unpublished opinions are not citable as precedent but may be cited for their preclusive effects.

F. Miscellaneous opinion and publication issues

Motion to publish

Any person may request that an unpublished opinion be published, although the court disfavors such motions. Motions to publish must be made within thirty days after judgment or, if a timely motion for rehearing is made, within thirty days after action thereon, and must explain why the opinion meets the court's own criteria for publication.

Monitoring of opinion status

Each month, the court's judges report on the status of every case that has been argued but not yet assigned, and each judge reports on the status of every opinion assigned to him or her that either has not yet been circulated or is awaiting clearance by other members of the panel.

Occasionally a panel deliberately defers decision of a case, pending disposition of another case either in the court or in another tribunal. In these cases, the clerk's office usually notifies the parties by an order holding the case in abeyance pending a decision or other event that will make it ready for decision.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for grant of en banc rehearing

A petition for en banc rehearing must contain a separate section that concisely states the issue and why it is of exceptional importance or identifies the decision or decisions of the court, another federal court of appeals, or the Supreme Court with which the panel decision conflicts.

B. Treatment of petitions for rehearing en banc

Generally, the filing of a petition for rehearing en banc does not remove the case from plenary control of the panel. Rather, even if a petition for rehearing en banc is granted, the panel may still grant a rehearing before

the full court's review. Nonetheless, the judgment of the panel is vacated and replaced by the en banc opinion if en banc review is granted.

C. Independent action by the court

Though it is rare, any active judge of the court, and any member of the panel, may suggest that a case be reheard en banc. A vote is then taken to determine whether a majority of the active judges agree.

D. Process for rehearing and rehearing en banc

Response to petition

A party may not file a response to a petition for rehearing or suggestion for rehearing en banc unless the court asks for one. However, the court does not ordinarily grant a rehearing petition, or modify its judgment in a significant way, without requesting a response. Amicus curiae briefs are not permitted unless the court invites them.

Voting

The clerk sends the petition for rehearing to the panel members with a vote sheet and enters an appropriate order when the votes are returned. When a petition for rehearing en banc is filed, the clerk sends it to all members of the original panel (including senior judges and, when used, visiting judges) and to all other active judges of the court. The petition is accompanied by a vote sheet and, if an unpublished decision is involved, a copy of the unpublished decision of the panel. If, within the time allotted, no judge requests a vote or more time to consider the matter, the clerk enters an order denying the petition. If a judge does request a vote, the clerk sends a new vote sheet to all active judges of the court.

For purposes of calculating a majority of the court, "majority" means a majority of all active judges, regardless of recusals or temporary absences.

Effect of grant

When the court grants a rehearing en banc, it recalls the mandate if one has been issued. The clerk enters an order granting the rehearing en banc and vacating the judgment (but not the opinion) of the original panel, in whole or in part as appropriate. When the en banc court has an even number of judges and the result is an evenly divided vote, the court enters a judgment affirming the order or judgment under review and may publish the en banc court's divided views.

Hearing

The court may or may not request additional briefing when en banc rehearing is granted. It nearly always hears oral argument. The en banc court comprises all active judges who are not recused, plus any senior judge who was a member of the original panel and wishes to participate.

E. Sanctions for unmeritorious petitions

Costs of up to $250 may be assessed as a penalty for filing a petition for rehearing that is wholly without merit.

F. Other ways the court works to avoid conflict and inconsistency

In addition to prefiling opinion circulation and the normal en banc process, the court also seeks to limit intracircuit inconsistency by clearing up apparent conflicts in the opinions of three-judge panels. That is, in some instances, the court may make special mention that the panel's interpretation of a particular issue has been separately considered by all the judges and resolves an apparent conflict between two prior decisions of the court or overrules a prior precedent of the court. Such a decision, called an *Irons* footnote for the case in which it was first used, must be approved by the full court before it becomes the law of the circuit but does not require separate en banc rehearing or additional briefing.

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal appeals

All criminal appeals are expedited. The court specially expedites sentencing appeals where the defendant is incarcerated and where a sentence of short duration has been imposed. The court requires the appellant to file a memorandum of law and fact, limited to twenty pages, challenging the sentence. The appellee is allowed a twenty-page response, and the appellant may file a ten-page reply.

B. Habeas corpus cases and certificates of appealability

Habeas corpus proceedings, which by statute must be expedited, are ordinarily presented to the special panel by the court's central legal staff.

Certificates of appealability

Requests for certificates of appealability (COA) are presented to the special panel by the court's central legal staff. A three-judge panel makes the decision whether to deny or grant a COA. Ordinarily, if a panel grants a

COA and the litigant is proceeding pro se, counsel will be appointed to brief and argue the appeal.

Special procedures for capital habeas corpus cases
No such cases have been filed in the D.C. Circuit in recent memory.

IX. Special Procedures for Pro Se Cases

A. Role of central legal staff in pro se cases

Aside from the legal work in connection with nonargument decision making described above, staff assist with pro se matters by handling pro se correspondence. This is generally handled by the clerk's office or referred to the legal division for instructions if necessary. Staff attorneys do not communicate directly with litigants or counsel, but the director, assistant director, and special counsel to the clerk answer pro se litigants' procedural questions.

B. Materials or assistance provided to pro se litigants

No special assistance is routinely provided to pro se litigants.

C. Appointment of counsel

A staff attorney may recommend to the special panel that counsel or amicus curiae be appointed in a civil or agency case. If the panel agrees, the clerk's office selects the counsel or amicus curiae, subject to the panel's approval.

X. Appellate Procedural Issues Arising Under the Prison Litigation Reform Act

A. The PLRA's filing fee provisions and in forma pauperis status

The court sends prisoner litigants a fact sheet explaining how the court has implemented the PLRA's provisions regarding filing fees, exhaustion of remedies, and successive appeals. The court also supplies a Prisoner Trust Account Report form to be completed by a prisoner appellant's institution and submitted to the court.

In *In re Smith*, 114 F.3d 1247, 1250 (D.C. Cir. 1997), the court held that the PLRA's filing fee provisions apply to writs of prohibition that include underlying claims that are civil in nature. The court also concluded that release of the prisoner during the pendency of his petition for a writ of prohibition in the court of appeals does not affect his continuing obligation to pay the filing fees under the PLRA.

B. The PLRA's "three strikes" provision and in forma pauperis status

In *Chandler v. District of Columbia Department of Corrections*, 145 F.3d 1355, 1358–59 (D.C. Cir. 1998), the court held that the PLRA's three strikes provision does not apply to appeals initiated before the PLRA's effective date.

United States Court of Appeals for the First Circuit

I. General Information

The First Circuit encompasses Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. The First Circuit Court of Appeals is headquartered in Boston, but panels also sit twice a year in Puerto Rico and at such other times and places as necessary.

The court has six authorized judgeships and has requested one additional judgeship. In FY 1998 it had five sitting senior judges and nine vacant judge-months.

A. Judges and panels

Orientation and assignments for new judges

There is no formal orientation for new judges; all new judges receive a full caseload.

Visiting judges

Visiting judges are sent a packet of information, including information on the court's standard procedures for oral argument and assignment of opinion-writing duties.

Panels

In addition to argument panels, judges also serve on motions (or duty) panels, and as motions judges or duty judges.

Motions (duty) panels

Approximately one year in advance, the clerk creates a motions panel of three active judges for each month. Motions panel service rotates among the active and senior judges. This panel handles all procedural and substantive motions, including emergencies that arise during that month. These panels do not physically sit together, but decide matters serially.

Duty judge

A duty judge is assigned to decide motions that can be decided by a single judge but cannot be disposed of by staff. The duty judge is the lead judge of the motions panel.

B. Central staff

Staff attorneys' office

The court's staff attorneys' office has 14.2 authorized attorney positions. Currently, it is staffed with one senior staff attorney, one supervisory staff attorney, six full-time line staff attorneys, and four part-time staff attorneys (from 50% to 90%). All of them serve in Boston.

Staff attorneys have no fixed term. They do not formally specialize in categories of cases, but may develop informal temporary specialties in new or discrete areas or, on request, in a particular subject matter. Difficult emergencies are generally assigned to the most experienced attorneys.

In addition to other duties, the senior staff attorney sometimes assists in drafting local rules and works with the circuit executive and clerk in drafting responses to proposed policy changes of the Judicial Conference of the United States.

Clerk's office

The clerk of court has 18.8 authorized staff positions. Currently the clerk's office is staffed with eight case managers, three systems staff, two file room employees, one attorney, an operations manager, a quality control analyst, and three other deputy clerks.

Civil Appeals Management Program

The court employs two settlement attorneys. *See* § II.C, *infra*.

II. Intake, Screening, and Settlement Programs

A. Intake

Information provided by attorneys

All cases. The clerk's office provides a docketing statement form to all parties. This form must be filed within ten days of the filing of the notice of appeal. Counsel are required to report basic information about the appeal, the identity of all parties, counsel for all parties, case caption, and the identity of any related pending cases.

Civil appeals. In counseled cases eligible for the Civil Appeals Management Program (CAMP), the clerk's office sends appellant's counsel blank copies of two forms. The first form requires counsel to provide a preargument statement, which summarizes basic information about the appeal, including the nature of suit below and the judgment appealed from, the basis for federal jurisdiction, the issues to be raised on appeal, and the

identity of any related pending case. The second is a transcript report form.

Criminal appeals. Only the docketing statement described above is required in criminal cases.

Information provided to attorneys

When the notice of appeal and district court docket entries have been received, the clerk sends a notice to attorneys that summarizes the court's requirements upon case opening. The notice advises counsel of their responsibilities under the court's CAMP rules and of the dates for filing a statement of issues, briefs, and appendix designations. In addition, the clerk sends information about the court's local rules and identifies significant procedural issues that commonly arise on appeal.

B. Screening

Screening for jurisdiction

The clerk's office screens appeals as they are docketed and issues a show cause order if there is a jurisdictional problem. If there is no response to the show cause order, the clerk's office dismisses the appeal for lack of prosecution. If a response is received, it is sent to the staff attorneys' office for review and determination of whether the appeal should proceed. If it appears that the appeal should be dismissed, the staff attorney prepares an explanatory memo and draft order and circulates it to the three-judge motions panel for review.

Screening for argument/nonargument disposition

Certain specified case types are referred to staff attorneys to prepare for non-argument disposition: pro se cases, bail appeals, recalcitrant witness matters, Social Security appeals, *Anders* brief cases, and cases in which all parties waive argument.

Other cases, when fully briefed, are reviewed by the senior staff attorney, who determines whether to put them on the argument calendar or to have a staff attorney work up the case for decision without argument. If the case is put on the argument calendar, the amount of time to be allotted for oral argument is set by the court shortly thereafter. Typically referred for decision without oral argument are cases in which the issue is fairly simple, such as cases presenting only Sentencing Guideline issues that have been clearly addressed by First Circuit precedent. When one side moves for summary affirmance or to waive argument and the other

opposes, argument may or may not be heard, depending on the issues presented.

By local rule, parties may add to their briefs a statement explaining why oral argument should or need not be granted. If the parties do not stipulate to submission without oral argument and argument is denied, a party may file an objection, explaining why argument is needed.

Screening for case weighting or issue tracking

When screening cases, the senior staff attorney also notes the weight of the case. Also, when briefs are screened for oral argument or summary affirmance, the clerk's office tries to assign cases with similar issues to the same panel. When applicable, the clerk alerts one panel to the fact that another panel is considering a similar issue simultaneously.

C. Civil Appeals Management Program

The court's Civil Appeals Management Program, managed and staffed by settlement counsel, attempts to settle cases before briefing without court action, by encouraging and facilitating settlement of meritorious appeals and the withdrawal of meritless appeals. For cases that are not settled or withdrawn, the conferences are also intended to aid disposition by simplifying issues and resolving open procedural matters. Once a case is scheduled for conferencing, participation in the conference process is mandatory; attorneys attending conferences are required to have full settlement authority.

All civil cases docketed in the court are referred to the Civil Appeals Management Program, except original proceedings (such as a petition for writ of mandamus), prisoner cases and all habeas corpus petitions, Immigration and Naturalization Service cases, summary enforcement actions of the National Labor Relations Board, cases where a party appears pro se, and cases with unresolved jurisdictional problems. Among the many types of cases in the program are bankruptcy appeals, tax cases, most agency cases (except those involving denial of Social Security benefits), and other petitions for review of administrative orders.

III. Briefing and Motions Practice

A. Briefing

General

When the record is filed and all transcripts are received, the clerk's office sends counsel a notice advising the appellant of the filing dates for statement of issues, designation of the contents of the appendix, the briefs,

and appendix. After the appellant's brief is filed, the clerk's office likewise gives notice to the appellee. Except for cases from Puerto Rico, the court's local rules provide shorter briefing times than prescribed by the Federal Rules of Appellate Procedure (thirty-five days for the appellant's brief and appendix, thirty days for appellee's brief, ten days for reply brief).

Cross-appeals are treated as two separate appeals for briefing purposes. The parties may proceed as required under Fed. R. App. P. 28(h), or the court may, on its own motion, consolidate the appeals and order briefing under Rule 28(h), indicating which party is to be the appellant.

Briefs on digital media

The court requires a party represented by counsel to file one copy of its brief on a 3.5-inch computer disk, using either DOS WordPerfect or WordPerfect for Windows, version 5.1. The party must also serve a copy of the disk, along with a paper copy of the brief, on each separately represented party. The court's rules provide for relief from this requirement upon motion showing why the party should not be required to comply.

B. Motions practice

Composition and operation of motions panels

In each month, one three-judge panel handles all motions and summary dispositions produced by the staff attorneys' office that month, including emergencies, procedural motions, and substantive motions. Motions are generally decided without oral argument.

Procedural motions

Depending on the nature of the procedural motion, it may be handled by the clerk, the staff attorneys, or a motions panel. The court has delegated authority to the clerk's office to decide certain simple procedural motions, such as motions to extend briefing and motions under Fed. R. App. P. 28(h). In addition, the clerk's office may issue orders to show cause to resolve apparent jurisdictional defects, orders denying an attorney's motion to withdraw if it fails to comply with the local rule, and orders directing a party to file an in forma pauperis motion or a motion for a certificate of appealability in the district court.

The staff attorneys' office handles other procedural motions and is authorized to issue certain orders: allowing an appeal to proceed after a show cause response has been received, pointing out how an *Anders* brief fails to comply with the local rule, setting briefing schedules in a bail or

recalcitrant witness appeal, allowing a sur-reply brief of fifteen pages or less, and granting uncontested motions to reinstate appeals.

Substantive motions

The clerk's office sends substantive motions in uncalendared cases to the staff attorneys' office and substantive motions in calendared cases to the oral argument panel if it has already received the briefs. For most other substantive motions (e.g., motion for bail pending appeal, motion for stay, motion to dismiss or for summary affirmance, application for a certificate of appealability, petition for leave to file a second or successive habeas corpus petition, § 1292(b) petition), a staff attorney prepares an explanatory memorandum and draft order. Each day, a batch of these motions is mailed to the first judge on the motions panel. That judge reviews and signs off on or changes the draft order, notes changes on the transmittal form, and then mails the batch to the next judge on the panel. That judge repeats the process and sends the batch on to the third judge.

Emergency motions

Emergency motions receive priority in processing.

Special topics or problems regarding motions

When a motions panel decides that a motion or petition should be set for oral argument or the appeal expedited, it may recommend to the chief judge that the matter be assigned to the same panel for argument and decision. In the absence of such a recommendation, the matter will ordinarily be assigned in the same manner as other appeals.

IV. Nonargument Decision-Making Practices

Briefed pro se cases are routed automatically to staff attorneys for memorandum and draft disposition. For fully briefed cases retained in the staff attorneys' office, a staff attorney prepares a memorandum and draft opinion.

If oral argument has been waived by the parties before the case is calendared, a staff attorney drafts an opinion. If argument is waived after a case has been scheduled for oral argument, the panel produces the opinion in chambers.

The court uses serial, or "round-robin" processing for nonargued cases. As each panel judge receives the case, he or she may sign off on the draft disposition prepared by the staff attorneys, make changes, or direct the case to be scheduled for oral argument. The dispositions are referred to as "summary" dispositions.

V. Argument Panel Operations

A. Panel composition, sitting schedules, and panel rotation

Each judge sits on ten oral argument calendars a year, with each calendar typically lasting five days, except for the September calendar, which usually lasts from seven to ten days. The panel hears five or six cases per day. Consolidated cases are treated as one case, so the number of cases heard may reach a dozen or more a day.

Regular sittings are in Boston except for one-week sittings in Puerto Rico in November and March. In January through June, and October through December, the court sits for one week starting on the first Monday of the month. The court has a summer sitting during the last week of July and/or the first week of August. In November and March, the Court sits two weeks, with one week in Boston and one week in San Juan or Ponce, Puerto Rico. The court sits in each of the three other districts (Maine, New Hampshire, and Rhode Island) each year for a one-day sitting.

When a new judge is appointed to a district in the circuit, that judge is invited to sit with the court of appeals during his or her first year on the bench. Other district judges in the circuit also sit occasionally with the court. Out-of-circuit visiting judges sit with the court when needed.

The circuit executive assigns judges to panels.

B. Assignment of cases to panels

Panel construction and case assignment are done by different people to ensure objectivity in the assignment of cases to judges.

The senior staff attorney prepares a list of cases ready for argument, noting the weight of each case and any special circumstances that would suggest a case should be assigned to a specific judge or panel (e.g., if a judge had been involved with the case on an earlier appeal or motion). The clerk's office reviews the list, removing any cases that are not ripe for argument for other reasons, and then assigns the cases to argument panels, distributing the heavier cases equitably among the panels.

When the record is filed, the clerk tentatively assigns the case to a specific month for hearing. For cases in which the appellee's brief is filed by the fifteenth of the month, the court attempts to schedule argument or submission by the second month thereafter, except during the summer. About six weeks before the hearing, the clerk contacts counsel about the specific day of the hearing so that any calendar conflicts can be identified

and resolved. One week before the monthly sitting, the clerk prepares and distributes an order assigning the session's cases to a specific day.

Expedited scheduling is provided automatically in those cases where it is required by statute, such as recalcitrant witness cases. Parties may request expedited processing in other cases, but are encouraged to do so shortly after the case is docketed in the court of appeals.

C. Staff role in working up cases for argument calendar

Staff attorneys occasionally work on argued cases, but it is not common practice.

D. Judicial preparation for argument: materials and timing

Judges receive appellant and appellee briefs and appendices approximately six weeks prior to argument.

E. Disclosure of panel identity

The names of the judges on the panel may be disclosed seven days before the argument session. Once the names are disclosed, the court does not normally grant motions for continuances or for a change in argument date during the same session.

VI. Opinion Preparation and Publication

A. Types of dispositions

The court may dispose of a case with an order, a memorandum and order, an unpublished opinion, or a published opinion. A published or unpublished opinion is used when the decision calls for more than summary explanation.

B. Criteria for judgment without opinion

The court does not use judgment orders or one-line dispositions in orally argued cases and rarely uses them in nonargued cases.

C. Criteria for publication and nonpublication

In general, the court thinks it desirable that opinions be published and thus be available for citation. The policy may be overcome in some situations where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts, or otherwise serve as a significant guide to future litigants. (Most opinions dealing with claims for benefits under the Social Security Act, 42 U.S.C. § 205(g),

fall within the exception.) Unpublished opinions are directed to the parties.

As members of a panel prepare for argument, they consider the appropriate mode of disposition. At conference, they discuss and try to agree on the mode of disposition. This decision may be altered in the light of further research and reflection. In a case decided by a unanimous panel with a single opinion, the writer may recommend nonpublication in the cover letter that transmits the draft opinion to the rest of the panel. If, after an exchange of views, any judge believes the opinion should be published, publication is ordered. In a case decided by a nonunanimous panel, the opinion or opinions are published unless the entire panel decides against publication.

When the district court has published an opinion in the case, the order of the court of appeals is published even though the court might not otherwise publish it.

D. Prefiling circulation of opinions

Opinions are not normally circulated to nonpanel judges before filing, but a judge or panel may choose to circulate an opinion in extraordinary cases.

E. Citability of not-for-publication opinions

Unpublished opinions may be cited only in related cases. Only published opinions may be cited otherwise.

F. Availability of not-for-publication opinions

Nonprecedential opinions are available on LEXIS and Westlaw and on a Web site maintained by a legal news publisher.

G. Miscellaneous opinion and publication issues

Any party or other interested person may apply to the court for publication of an unpublished opinion, showing good cause.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for grant of en banc rehearing

The court requires that the petitioner express a belief "based on a reasoned and studied professional judgment" that the panel decision conflicts with Supreme Court or First Circuit precedent or that it involves a question of exceptional importance. Unlike some other circuits' rules, this court's rule is addressed to parties, not just counsel.

B. Treatment of petitions for rehearing en banc

A petition for rehearing en banc is treated as if it were a combined petition for rehearing by the panel and a petition for en banc rehearing.

When a party files a petition for rehearing en banc, the clerk sends it to the original panel and to the other active judges of the court. Usually, the panel will consider the petition first. If the panel decides not to rehear the case itself, or decides that the case should be taken en banc, the other active judges have one week after the panel's decision to indicate whether en banc rehearing is desired.

C. Independent action by the court

A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except: (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

D. Process for rehearing en banc

A party need not respond to a petition unless requested to do so by the court.

A majority, for purposes of a vote granting a rehearing en banc, means a majority of all active judges who are not disqualified from participating in the case.

A grant of a petition for rehearing en banc vacates the panel opinion and stays the mandate.

E. Sanctions for unmeritorious petitions

If a petition for rehearing or for rehearing en banc is found, on its face, to be wholly without merit, vexatious, multifarious, or filed principally for delay, the court may tax a sum not exceeding $250, payable to the clerk of the court or the opposing party, as the court may direct. At the court's order, counsel may be required personally to pay all or any part of these costs.

F. Other ways the court works to avoid conflict and inconsistency

Staff attorneys screening briefs for oral argument or summary affirmance try to identify cases presenting similar issues so that they may be assigned to the same panel or so that other panels may be alerted to the fact that the same issue is being considered simultaneously by multiple panels.

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal appeals

The court has no special procedures for handling criminal appeals.

B. Habeas corpus cases and certificates of appealability

Ordinarily, neither the court of appeals nor any of its judges will initially receive or act on a request for a certificate of appealability unless an application has first been made to the district court judge. If the district court grants a certificate of appealability, it must state which issue or issues satisfy the statute. If the district court denies a certificate of appealability, the court must state the reasons why the certificate should not issue. The petitioner may appeal the district court decision by submitting a motion to the court of appeals. The motion should provide specific and substantial reasons, and not mere generalizations, why a certificate should be granted. Failure to comply authorizes the circuit clerk to remand the matter back to the district court for compliance.

Indigent defendants proceeding under 28 U.S.C. § 2254 or § 2255 are entitled to appointed counsel for both state and federal death penalty habeas corpus actions. There is no local rule that addresses appointment of counsel for certificates of appealability.

There is no local rule that specifies the number of judges required to deny a certificate of appealability.

The local rules do not directly deal with a partial granting of a certificate of appealability by the district court. Local Rule 22.1(c) provides that if a district court grants a certificate of appealability as to one or more issues, the petitioner's appeal shall go forward only as to the issue or issues for which the district court granted the certificate. If the petitioner wants appellate review of an issue or issues for which the district court has denied a certificate of appealability, the petitioner must apply promptly, within the time set by the clerk, to the court of appeals for an expanded certificate of appealability. If the petitioner fails to apply, the appeal will proceed only with respect to issues on which the district court granted a certificate.

IX. Special Procedures for Pro Se Cases

The clerk's office handles all correspondence and telephone calls with pro se litigants and gives them direction if requested. Staff attorneys may draft a letter for the clerk's office to send to pro se litigants.

Pro se litigants who want counsel to be appointed on appeal, or litigants who had retained counsel in the district court and want counsel to be appointed on appeal, must first apply for in forma pauperis (IFP) status at the district court level and then make a motion. Only after obtaining IFP status from the district court may pro se litigants move for appointment of counsel on appeal.

If the litigant had IFP status in the district court and was represented by court-appointed counsel, the litigant does not have to reapply for appointment of counsel on appeal.

X. Appellate Procedural Issues Arising Under the Prison Litigation Reform Act

A. The PLRA's filing fee provisions and in forma pauperis status

There is no local rule regarding implementation of the PLRA's filing fee provisions on appeal.

B. The PLRA's "three strikes" provision and in forma pauperis status

There is no local rule implementing the PLRA's three strikes provision.

United States Court of Appeals for the Second Circuit

I. General Information

The Second Circuit encompasses Connecticut, New York, and Vermont. The Second Circuit Court of Appeals is headquartered in New York City. Panels do not sit in other locations, but hear many oral arguments by videoconference technology, allowing parties to argue from remote sites. In 1999, the court heard argument from nine such sites—Albany, Syracuse, Rochester, Buffalo, and Mineola in New York; Burlington and Brattleboro in Vermont; and New Haven and Hartford in Connecticut.

The Second Circuit Court of Appeals has thirteen authorized judgeships and has requested two additional judgeships. It has several senior judges who carry workloads sufficient to justify certification for staff (nine in 1998). In FY 1998, the court experienced 46.2 vacant judge-months. In late 1998, four new judges were confirmed to the court, and its final vacancy was filled in July 1999.

A. Judges and panels

Orientation for new judges

Each new judge meets privately with the chief judge for an orientation session before beginning work on the court.

Visiting judges

Because the court has a pending request for two new judgeships and has experienced a chronically large number of vacancies, it makes substantial use of visiting judges. During the last term, over 80% of its panels had a visiting judge, and several had two visiting judges pursuant to the chief judge's certification of an emergency under 28 U.S.C. § 46(b). With the recent addition of five new judges to the court, eliminating all vacancies, the court will reduce the use of visiting judges on sitting panels in the coming term.

Panels

In all but seven weeks of the year, the court uses only one type of panel—three-judge argument panels that also decide motions and non-argued pro se appeals, as described in section III, *infra*. For the seven weeks in which argument panels are not sitting, the chief judge designates

a panel of three judges to dispose of pro se in forma pauperis cases and decide motions.

Duty judge
When an argument panel is not sitting, an active judge is always available for emergencies.

B. Central staff

Staff attorneys' office
The staff attorneys' office employs a senior staff attorney, three supervisory staff attorneys, fourteen pro se law clerks, and six motions law clerks. The pro se law clerks serve staggered two-year terms; the motions law clerks serve concurrent one-year terms. The supervisory attorneys are career employees. Attorneys in this office draft bench memoranda for all pro se appeals and for motions in pro se and counseled cases. They also review and decide procedural motions (e.g., extension of time, oversized brief) in all pro se cases.

Office of staff counsel (Civil Appeals Management Program staff)
The court employs three conference attorneys who conduct all Civil Appeals Management Program (CAMP) conferences. *See* § II.C, *infra*.

C. Technological resources

As mentioned above, the court has a videoconferencing system for litigants to present oral argument from remote sites throughout the circuit to a three-judge panel sitting in the Foley Square courthouse. The court has also used the videoconferencing system to conduct meetings of the court and of judicial council committees. Recently, the U.S. Bankruptcy Court for the Southern District of New York used the system to conduct a multiday hearing with a court in Toronto, Ontario, Canada.

II. Intake, Screening, and Settlement Programs

A. Intake

Information provided by attorneys
Civil appeals. Appellants in civil appeals must submit a preargument statement reporting basic information about the appeal and about the judgment appealed from, including the nature of suit and basis for federal jurisdiction, the issues to be raised on appeal, and the identity of any related pending cases. The court also prescribes a form by which the ap-

pellant indicates whether a transcript is being obtained and, if not, why not.

Criminal appeals. The court has a local form for the notice of appeal in a criminal case. On that form, defense counsel reports whether the offense occurred after the effective date of the Sentencing Reform Act, and whether the appeal concerns conviction only, sentence only, or conviction and sentence. The form also captures transcript status information. On the court's Local Form A for appeals in criminal cases, the district court judge's courtroom deputy supplies information on the defendant's financial status, and whether leave to appeal in forma pauperis was sought and, if so, how it was resolved. The form also captures information about sentence date, bail/jail disposition, whether the defendant pled guilty or was convicted in a trial, and the number of other codefendants found guilty. Transcript information is also supplied. Finally, the sentencing judge is asked to answer three questions: "Does defendant's financial status warrant appointment of counsel on appeal? If so, should trial counsel be appointed on appeal? Should trial minutes be transcribed at the expense of the United States pursuant to CJA?"

Agency appeals. The court also has a form for agency appeals, which gathers information about whether the proceeding is an application for enforcement of a petition for review, about facts relating to jurisdiction and venue, a concise description of the proceedings below and the order to be reviewed or enforced, the issues proposed to be raised, and the relief sought. The form also asks about related pending cases.

Information provided to attorneys

Counsel are provided with a copy of the local rules. In light of the December 1998 amendments to the Federal Rules of Appellate Procedure, the court's rules committee currently is reexamining the local rules to resolve any conflicts the new rules may have created.

B. Screening

Screening for jurisdiction

Pro se cases. After preliminary issues about the filing fee and, if applicable, certificate of appealability, have been settled, and before a scheduling order is issued, one of the court's supervisory staff attorneys reviews the file in a pro se case to determine if there is a jurisdictional defect resulting from the untimely filing of the notice of appeal. If a jurisdictional problem is found, the file is retained in the staff attorneys' office and assigned

to a law clerk to prepare a bench memorandum recommending sua sponte dismissal.

Counseled cases. For fully counseled civil cases, jurisdictional screening for untimely filing is done by conference attorneys in the office of staff counsel in the context of the court's CAMP program, as described in section II.C, *infra*.

Screening for argument/nonargument disposition

Except for the examination of pro se in forma pauperis cases, there is no decisional screening to track cases; all cases, including pro se cases that survive initial review (unless a litigant is an incarcerated prisoner), are placed on an argument panel calendar. Parties need not request argument, but may request a specified time allotment. However, the court's rules provide that if the court does exercise its authority to deny oral argument sua sponte, or if incarcerated pro se litigants wish to argue, parties may file a statement of reasons for hearing oral argument. Parties may waive argument, subject to court approval. If one side wants argument and the other does not, the waiving party need not appear.

Screening for case weighting or issue tracking

A supervising staff attorney in the staff attorneys' office, to ensure equitable workload distribution, evaluates the appeal and assigns it a rank according to the number and complexity of the issues raised. Issues are tracked if they affect many other cases in the office (e.g., whether the Anti-Terrorism and Effective Death Penalty Act's one-year statute of limitations violates the suspension clause).

C. Civil Appeals Management Program

The court's Civil Appeals Management Program (CAMP) is intended to provide a forum for resolution of disputes without court action and to expedite the processing of civil cases docketed in the court. The focus of the program is on settling cases, but CAMP conferences also are intended to narrow issues, eliminate patently meritless arguments and appeals, and resolve procedural problems. The clerk's office refers, with few exceptions, all docketed civil and agency cases to the Office of Staff Counsel, which issues a notice of preargument conference in nearly every case referred. Once a conference is scheduled, participation in the conference process is mandatory. The court employs three conference attorneys who conduct all CAMP conferences. Cases in which a party is pro se are not referred to the conference attorneys for CAMP conferences.

III. Briefing and Motions Practice

A. Briefing

Briefs on digital media

The court encourages parties to use CD-ROM technology and, by administrative order of the chief judge, allows parties to file briefs on CD-ROM where all parties agree to do so.

B. Motions practice

Composition and operation of motions panels

The court does not use separate motions panels except in the seven weeks in which there is no panel hearing calendared appeals. During those weeks, the panels reviewing pro se appeals also decide submitted motions for the particular week.

Procedural motions

Procedural motions in uncalendared criminal cases and all pro se cases are ruled on by the senior staff attorney or a supervising attorney in the staff attorneys' office; conference attorneys also rule on procedural motions in uncalendared counseled civil cases. Procedural motions in calendared cases are disposed of by the presiding judge of the panel that is scheduled to hear the appeal.

Substantive motions

Substantive motions in uncalendared cases are referred to an argument panel once ready. Substantive motions in calendared cases are disposed of by the panel scheduled to hear the appeal.

Motions law clerks in the staff attorneys' office prepare bench memoranda regarding substantive motions. Counsel for the moving party prepares a draft order; if that order is inadequate, the motions clerk prepares a draft order in addition to a bench memorandum. When ready, the bench memoranda and draft orders are submitted to the next Tuesday argument panel, accompanied by copies of the motion, response, and any relevant items from the record.

Pro se in forma pauperis motions

Whenever a pro se appellant makes a motion that requires some examination of the merits, such as a motion for in forma pauperis status or for the appointment of counsel, or moves for a certificate of appealability in a habeas corpus case or a section 2255 appeal, a pro se clerk reviews the merits of the entire appeal. The pro se clerk prepares a bench memo

evaluating the appeal for frivolousness and recommending either that the appeal be dismissed as frivolous or be allowed to proceed (with a recommendation as to the disposition of the motion). These motions, with the pro se clerk's bench memos, are submitted for disposition to the panel scheduled to hear argument on each Wednesday that the court sits and to a "pro se panel" on weeks when the court is not sitting. The number of pro se motions submitted each week generally ranges from fifteen to twenty. In the vast majority of such cases, the appeal is dismissed as frivolous.

Emergency motions

Emergency motions can be heard by a sitting argument panel as necessary. Upon an appropriate showing of urgency, that week's presiding judge may set any motion for a hearing on any day the court is in session after conferring with the presiding judge of that day's panel. When the judge thus sets a hearing, the judge may endorse on the motion papers a temporary stay, pending oral argument before a sitting panel. There is always an active judge available for emergencies.

IV. Nonargument Decision-Making Practices

Cases are submitted on the briefs when the parties have waived argument after the case has been calendared or when a pro se party is incarcerated. Cases in which argument has been waived are disposed of by the scheduled argument panel. The argument panel confers about submitted cases on the day for which they were scheduled.

Pro se prisoner cases are handled first by the law clerks in the staff attorneys' office. The law clerks draft bench memoranda in pro se prisoner cases and submit them to a three-judge panel for decision. These cases are not placed on the oral argument calendar.

V. Argument Panel Operations

A. Panel composition, sitting schedules, and panel rotation

The chief judge sets the panels for the year before the start of the term. The composition of panels is determined by a rough formula that takes into account the desires of senior judges, unavailable dates for active judges, the need for gaps between sittings for each judge, and a desire to have each judge sit with different colleagues. The court's preference is to have the same three judges sit together for an entire week. The court's recent vacancy circumstances, which required it to use large numbers of

visiting judges, have made that impossible, but the recent addition of five new judges will allow the court to return to its preferred practice. The court has at least one panel of three judges sitting every week of the year, except for three weeks in July and August and one week in December. Two panels of three judges sit nine of those weeks.

The panels that hear calendared cases hear thirty-one appeals per five-day week, generally twenty-five or twenty-six counseled appeals and five or six pro se appeals. Each active judge sits on eight of those panels per year as well as on two pro se panels during the seven weeks in which a regular panel does not sit. One active judge is available for purposes of emergencies during those seven weeks.

Argument times. The presiding judge sets the time that each side will be allotted, after considering the appellant's brief and party requests. Normally, each side gets ten to fifteen minutes in counseled cases and five minutes in pro se cases.

B. Assignment of cases to panels

There is no judicial hand in the assignment of cases to panels. Once the appellee's brief is received and any staff work is completed, the calendar unit of the clerk's office schedules appeals based on a formula that takes into account case type, combined weights of cases, age of cases, judge disqualification, and attorney availability.

C. Central staff role in working up cases for argument calendar

In pro se cases that reach the argument calendar, pro se law clerks from the staff attorneys' office prepare bench memoranda.

D. Judicial preparation for argument: materials and timing

Each panel judge gets—both at home and in Foley Square chambers, if requested—the briefs and other necessary materials six to eight weeks before argument. Each chambers prepares individually for the argument. If the presiding judge anticipates that a case will be disposed of by summary order, that judge's law clerk is generally instructed to prepare a memorandum in the form of a summary order rather than a neutral bench memorandum.

E. Disclosure of panel identity

Hearing panels are disclosed at noon the Thursday before the upcoming week's oral arguments.

VI. Opinion Preparation and Publication

After argument, the panel confers and the presiding judge makes writing assignments if a published opinion is necessary.

A. Types of dispositions

The court disposes of calendared appeals by two principal methods: published opinions and unpublished summary orders. (The court once had a practice of ruling from the bench in a fair number of cases, but rarely does so now. Instead, the court may indicate after appellant's argument that it does not need to hear from the appellee, and enter a summary order by the next day.) Roughly two-thirds of calendared appeals are decided by "summary orders" that are not published in the West Reporter but are available on-line at no cost. Summary orders are generally prepared by the presiding judge of the panel. The orders are on average three to five pages long and explain the reasons for the court's decision. The orders are shorter where the affirmance is based on the district court's opinion and sometimes considerably longer in, for example, multi-defendant criminal cases. The remaining third of the court's decisions are published as signed or per curiam opinions in the West Reporter.

B. Criteria for judgment without opinion

The court does not use judgments without opinion unless the district court opinion suffices as reasoning the panel can adopt for the affirmance.

C. Criteria for publication and nonpublication

Because the court believes as a matter of policy that the demands of an expanding caseload require the court to be ever conscious of the need to use judicial time effectively, its rules provide that in cases in which the decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order. Nonunanimous decisions are published, as are opinions in the relatively few cases the court rehears en banc.

D. Prefiling circulation of opinions

The court does not circulate opinions to non-panel judges before filing.

E. Citability of not-for-publication opinions

The court does not permit citation to summary orders (or, when used,

decisions from the bench) in unrelated cases before the court; a circuit rule also prohibits their citation in any other court.

F. Availability of not-for-publication opinions

The court's unpublished summary orders are available in the clerk's office, on LEXIS and Westlaw, and at no charge on the court's bulletin board service and on the web pages of Pace University Law School and Touro Law School.

VII. Rehearing and Rehearing En Banc Practice

The court takes cases en banc only rarely, largely because the judges believe that the results they achieve are not justified by the time they consume. An en banc panel consists of all active judges, but a senior judge of the court who was a member of the panel issuing the decision under review may also elect to sit. No visiting district or circuit judge may sit with an en banc panel.

A. Grounds for grant of en banc rehearing

The contents of a petition for rehearing en banc must demonstrate a precedent-setting error of great public importance or a conflict with Supreme Court or Second Circuit precedent.

B. Treatment of petitions for rehearing en banc

Upon the filing of a petition for rehearing, the clerk's office sends a ballot to the judges of the original panel, with a fourteen-day response period. Upon receipt of the vote of the three judges, if there is a unanimous denial and no petition for en banc rehearing, the clerk's office will enter the order denying the petition. Failure of a judge of the panel to vote is deemed a denial, although the clerk's office will call to confirm it. If there is a petition for rehearing en banc, the clerk's office will hold the order and will circulate the petition to the entire court. Any active judge may call for a vote. If no vote is called for, the order denying the petition will issue, reporting that no judge called for a vote.

C. Independent action by the court

Any active judge may make a request for a vote to take a case en banc.

D. Process for rehearing en banc

No response to a petition for rehearing en banc is filed unless ordered by the court.

For purposes of a vote granting a rehearing en banc, "majority" means majority of all active judges not disqualified from sitting on the case.

E. Sanctions for unmeritorious petitions

The court may sanction a party for a petition for rehearing or rehearing en banc when a suggestion or petition is without merit.

F. Other ways the court works to avoid conflict and inconsistency

The presiding judge of each panel prepares a list of pending issues to alert other panels to issues that may soon be decided.

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal appeals

Procedural motions in criminal cases are referred to the senior staff attorney. Occasionally, the senior staff attorney will hold a conference in a multidefendant case to coordinate briefing and scheduling. The administrative attorneys administer the court's program to monitor and reinstate defaulted criminal cases and sanction defaulting attorneys.

B. Habeas corpus cases and certificates of appealability

Pro se habeas corpus and section 2255 cases are referred to the staff attorneys' office for disposition of procedural motions and recommendations regarding disposition. Motions in counseled habeas corpus and section 2255 cases are referred to the office of staff counsel (conference attorneys).

Certificates of Appealability

In cases where an appeal has been granted, but the district court or court of appeals has not issued a certificate of appealability, the appellant must promptly move for a certificate in writing without oral argument. A matter cannot proceed without a certificate. The period of time to file the actual brief is tolled until a certificate has been granted or counsel has been assigned, whichever is later.

A pro se appellant may make a motion for appointment of counsel. A single judge may determine assignment of counsel.

There is no local rule that specifies the number of judges required to deny or grant a certificate of appealability.

Under the Second Circuit's case law about certificates of probable cause, district courts were authorized to grant a certificate as to specific

issues. The defendant may appeal the issues not granted and also ask for the issues granted to be broadened to other issues. *See Vicaretti v. Henderson,* 645 F.2d 100, 102 (2d Cir. 1980), *cert. denied* 454 U.S. 868 (1981); *Barber v. Scully,* 731 F.2d 1073 (2d Cir. 1984). The procedure of bringing a motion to broaden the certificate is unclear, but one may presume it is part of an appeal of the district court's denial of part of the certificate. Nevertheless, the issues appear to be dealt with by the same panel in an expansion motion.

Special procedures for capital habeas corpus cases

The Second Circuit has not yet received an appeal in a capital case, but because in the circuit there are state prisoners on death row and federal prosecutions in which the death penalty is being sought, the court has adopted a new rule for death penalty cases. Capital cases will be assigned to a panel selected from a pool of available judges, and the panel assigned to a particular case will decide all matters in the case.

IX. Special Procedures for Pro Se Cases

A. Role of central staff in pro se cases

One of the three supervisory staff attorneys decides procedural motions in pro se cases; the other two supervisors review pro se cases for jurisdictional defects. All law clerks prepare bench memoranda on substantive pro se motions and pro se appeals, analyzing all relevant issues and recommending the ultimate dispositions for which they draft proposed orders.

B. Materials or assistance provided to pro se litigants

Pro se law clerks counsel pro se litigants on procedural matters. Correspondence from pro se litigants is handled in the clerk's office by the case manager. All procedural inquiries from pro se litigants who call or appear in the clerk's office are handled by the clerk's office intake staff and the individual case manager assigned to that litigant's appeal.

X. Appellate Procedural Issues Arising Under the Prison Litigation Reform Act

A. The PLRA's filing fee provisions and in forma pauperis status

In *Leonard v. Lacy*, 88 F.3d 181, 186 (2d Cir. 1996), the court concluded that the PLRA's filing fee provisions must be applied to all appeals prior to the assessment of an appeal's frivolousness. Moreover, the court cre-

ated a procedure for implementing the PLRA's filing fee provisions on appeal as follows:

> 1. This Court will require every prisoner seeking to appeal a judgment in a civil action without prepayment of fees to file with this Court, in addition to an affidavit of poverty, required by subsection 1915(a)(1), a signed statement authorizing the agency holding the prisoner in custody (a) to furnish to this Court a certified copy of the prisoner's prison account statement for the preceding six months, as required by subsection 1915(a)(2), and (b) to calculate and disburse funds from the prison account, as required by subsection 1915(b), including the initial partial filing fee payment and the subsequent monthly payments.
>
> 2. Upon receipt of the prisoner's authorization, the appeal will be processed in the normal course, including consideration of whether the appeal should be dismissed as frivolous.
>
> 3. The agency with custody of the prisoner shall have the obligation to send to this Court the certified copy of the prisoner's trust fund account statement for the prior six months, and to send to this Court or the District Court the initial partial filing fee payment, and the subsequent monthly payments until the entire $105 ($100 in agency cases) has been paid. Once the prisoner has authorized sending the certified copy of his prison account statement and making the disbursements from his prison account, the failure of the agency to send the statement or to remit any required payment shall not adversely affect the prisoner's appeal.
>
> 4. If a prisoner files an appeal without prepayment of appellate fees and does not furnish this Court with the required authorization, this Court will dismiss the appeal in 30 days unless within that time the prisoner files in this Court the required authorization.

Id. at 187.

In *McGann v. Commissioner, Social Security Administration*, 96 F.3d 28, 30 (2d Cir. 1996), the court concluded that "the PLRA fee requirements are not applicable to a released prisoner" even though the notice of appeal was filed while the appellant was incarcerated.

In *Covino v. Reopel*, 89 F.3d 105, 108 (2d Cir. 1996), the court held that the PLRA's filing fee provisions apply to appeals pending on the PLRA's effective date.

In *Reyes v. Kane*, 90 F.3d 676, 677 (2d Cir. 1996), the court held that a petition for habeas corpus is not a civil action for purposes of the PLRA.

B. The PLRA's "three strikes" provision

There is no local rule implementing the PLRA's three strikes provision.

United States Court of Appeals for the Third Circuit

I. General Information

The Third Circuit encompasses Delaware, New Jersey, Pennsylvania, and the Virgin Islands. The main courthouse for the Third Circuit Court of Appeals is in Philadelphia. Panels also hear appeals twice per year in Pittsburgh, Newark, and the Virgin Islands.

The court has fourteen authorized judgeships. In FY 1998, the court had six sitting senior judges, and fourteen and a half vacant judge-months.

A. Judges and panels

Orientation and assignments for new judges

Each staff unit conducts an orientation briefing for new judges and staff as necessary. Additionally, each new judge is assigned a mentoring judge, who is available for consultation.

Visiting judges

When a visiting judge is designated to sit with the court, the court sends orientation letters (including chambers keys, location, hotel information, local appellate rules, and internal operating procedures) to the judge and staff.

Panels

Along with standard argument panels (*see* § V, *infra*), the court uses "standing" panels, each constituted for an entire year. One set of four standing panels deals with motions (*see* § III, *infra*); the other set of five panels deals with pro se cases in which the court addresses the merits. In addition, for each death penalty case a special panel is constructed, with active judges randomly assigned.

B. Central staff

Staff attorneys' office

The court has an authorized allocation of eighteen line staff attorneys. Three of these eighteen permanent attorney positions have been allocated to other offices—two to the clerk's office and one to the circuit executive. In the staff attorneys' office there are five permanent full-time staff attorneys and one permanent part-time attorney. In addition, two supervisory

attorneys are career employees. The remainder of the staff attorneys have two-year terms. Most staff attorneys perform a two-month tour of duty as an "elbow clerk" in a judge's chambers.

Appellate mediation program

The court employs a mediation program director to mediate the eligible civil counseled cases. *See* § II.C, *infra*.

C. Technological resources

The court has facilities for holding oral argument via videoconferencing and via audio hook-up from the courtroom or by conference call. Courtrooms are also equipped with infrared hearing assistance devices.

The court uses fax distribution of clerk's orders and is working toward electronic filing of certain documents (petitions for rehearing from the Virgin Islands are being used as a pilot project to experiment with electronic filing).

II. Intake, Screening, and Settlement Programs

By local rule, when an appeal is filed the appellant must mail a copy of the notice to the trial judge. The trial judge may, within fifteen days, file a written opinion or amplification of any prior written or oral recorded ruling or opinion.

A. Intake

Information provided by attorneys

Civil and agency appeals. In civil cases (including petitions for review of agency action), counsel complete a civil appeal information sheet to supply procedural information concerning items such as nature of suit, identity of opposing counsel, and whether there are any cross-appeals or related appeals. In counseled cases, appellant's counsel must complete, for use in the court's appellate mediation program, a concise statement of facts and issues to be presented on appeal. Appellees' counsel who do not agree with the appellant's recitation of the facts and issues may file a response.

Criminal appeals. Parties in criminal cases must complete an information sheet that provides procedural information about the case and identifies bail cases and cases in which a short sentence has been imposed so that those cases may be expedited.

B. Screening

Screening for jurisdiction

The clerk's office case managers screen counseled cases upon receipt, looking for potential jurisdictional problems. If they think there may be a problem, they refer the case to one of two staff attorneys assigned to the clerk's office. If the attorney agrees that there may be a problem, the parties are requested to comment on the issue, and the matter is referred to a motions panel. In rare instances the staff attorney may list a case for summary action before a motions panel, which decides the case on motion papers rather than having it proceed to full briefing.

Staff attorneys screen pro se cases at docketing, looking for jurisdictional defects, necessity of a certificate of appealability, or other grounds for possible summary action.

Screening for argument/nonargument disposition

Screening for argument/nonargument disposition is done by the judges. Within seven days of the filing of the appellee's brief, any party may file a statement of reasons why the court should hear oral argument, but this is rarely done. Judges sitting on either regular argument panels or pro se merits panels review the case materials and decide whether to hear argument, which occurs if any judge requests it. *See* § IV, *infra.*

Panels vary in oral argument practice; some grant oral argument liberally, others do not. The court's local rules and operating procedures advise that oral argument is usually found to be unnecessary when (1) the issue is tightly constrained and not novel, and the briefs adequately cover the arguments; (2) the outcome of the appeal is clearly controlled by a prior decision of the Court; or (3) the sole issue is either sufficiency of evidence, the adequacy of jury instructions, or rulings as to admissibility of evidence, and the briefs adequately refer to the record, the state of the record will determine the outcome, and the sole issue is either sufficiency of evidence, the adequacy of jury instructions, or rulings as to admissibility of evidence. However, oral argument is usually granted if the appeal presents a substantial and novel legal issue; the resolution of an issue presented by the appeal will be of institutional or precedential value; a judge has questions to ask counsel to clarify an important legal, factual, or procedural point; a decision, legislation, or an event subsequent to the filing of the last brief may significantly bear on the case; or an important public interest may be affected.

Screening for case weighting or issue tracking
The court does not assign case weights or track pending issues.

C. Appellate mediation program

The court's appellate mediation program was designed to conserve judicial and party resources by facilitating settlement and otherwise expediting the appellate process. From the pool of eligible civil counseled cases, the program's director selects for preargument conference those cases that have nonfrivolous issues of the kind that are capable of being mediated and settled. The director, an experienced former senior litigator with a major law firm, mediates approximately 80% of the cases selected. Senior judges in the circuit mediate the rest. Generally, once a mediation is scheduled under the program, participation is mandatory. Usually parties attend the mediation with their counsel. Sometimes the program is asked to mediate problems arising out of motions or cases after oral argument. The court reports that the program settles or disposes of approximately 90–100 cases per year.

III. Motions Practice

Composition and operation of motions panels
Each year, the chief judge designates four standing motions panels. These panels receive motions from the clerk and staff attorneys' office in cases that have not yet been sent to merits panels. Insofar as possible, the staff equalizes the number of motions and emergency motions sent to each standing motions panel.

The motions panels generally consider and decide motions on the papers without oral argument, but sometimes call for argument either in person or by telephone conference call.

The staff attorneys' office sends each panel four to six pro se motions per week; the clerk's office sends motions in counseled cases as they are received. Judges on the panel receive the materials simultaneously. Each panel sets its own operating procedures. The task of writing orders is generally divided among the panel members, each taking the responsibility for a period of several months.

Procedural motions
The court has delegated authority to the clerk to rule on procedural motions; they are routed to staff attorneys assigned to the clerk's office. In some instances staff attorneys have authority to grant motions but not to deny them. The court's rules permit the clerk to entertain and dispose of

some procedural motions that can ordinarily be disposed of by a single judge under Fed. R. App. P. 27(c) and 3d Cir. Local Rule 27.5. This authority extends to motions that are ministerial, that relate to the preparation or printing of the appendix and briefs on appeal, or that relate to calendar control. A party may, by prompt application, have the clerk's action reviewed by a single judge or by a panel.

Staff attorneys also have some delegated authority over procedural motions, including authority to grant extensions of time for motions they handle. The clerk and the director of the staff attorneys' office may grant in forma pauperis motions.

Unless the court has designated the clerk to act on it, a motion for extension of time for filing a petition for rehearing or for leave to file out of time is referred to the author of the panel decision, who has authority to grant an extension. If the authoring judge votes to deny, the motion is referred to the entire panel for disposition.

A motion for the approval of a fee under the Criminal Justice Act is referred to the judge who authored the court's decision.

Substantive motions

For substantive motions in pro se cases, the staff attorneys' office produces memoranda. In cases involving summary disposition, dismissals under 28 U.S.C. § 1915(e), and mandamus cases, the staff attorneys draft a per curiam opinion with a proposed disposition. In cases that are likely to result in a denial of a certificate of appealability or in pro se cases likely to be dismissed on jurisdictional grounds, staff attorneys prepare memoranda with proposed order language. An order or opinion taking summary action, dismissing under § 1915(e), or denying a certificate of appealability terminates the case.

A motions panel may grant a motion to dismiss an appeal. If the motion seeks dismissal for lack of jurisdiction, and the panel votes not to grant the motion, the motion is referred to the merits panel by order, without decision and without prejudice.

A motion to amend the judgment of the court is referred to the original panel.

Emergency motions

Generally, all papers are filed with the clerk, and the clerk's office transmits them to the panel. Staff attorneys handle and usually provide a memorandum in pro se emergency motions cases. In an extreme emergency, the clerk may direct the movant to deliver that day, or to transmit

via facsimile, copies of the moving papers to each member of the standing motions panel, either at the judges' chambers or at some other place.

IV. Nonargument Decision-Making Practices

All cases not disposed of on motion are distributed to either regular argument panels or pro se merits panels. Regular argument panels handle cases decided with argument and counseled cases decided without argument. Judges on these panels receive the cases six to eight weeks before the argument date and decide at least ten days in advance of the argument week which cases referred for that week will be argued.

Pro se cases to be decided on the merits are referred in rotation each week to one of the five standing pro se merits panels. A staff attorney screens the appendices submitted by the parties and sends any documents from the district court record that were omitted. Typically, these panels receive two or three cases at a time as soon as the cases are prepared. As with motions, the materials are delivered to the judges simultaneously, not sent in round-robin fashion. In case that are not difficult, staff attorneys prepare and send to the panel, along with the papers, a proposed disposition in the form of a draft per curiam opinion.

V. Argument Panel Operations

A. Panel composition, sitting schedules, and panel rotation

Argument panels always include at least two judges of the court; the third judge may be designated from another court. Senior judges of the court are considered "judges of the court" and are generally treated as active judges for the purpose of establishing panels. However, in death penalty cases, the clerk uses a computer program to randomly select a panel from a pool of possible three-judge combinations consisting only of active circuit judges.

Each judge participates in seven argument calendars per year, each lasting for four days. Generally, 35–38 cases are calendared for the four days, but only about one-third of those are argued.

The panel determines how much time each side will be given for argument. Usually, fifteen to twenty minutes per side is allotted, but a panel judge may suggest a longer time, and thirty minutes or more per side may be granted. Panels tend to be liberal in granting additional time when difficult issues emerge during argument.

B. Assignment of cases to panels

The clerk randomly assigns all fully briefed counseled cases, except death penalty cases, to three-judge panels that may include a visiting judge. Death penalty cases are assigned to randomly selected panels of three active circuit judges.

C. Staff role in working up cases for argument calendar

Central staff are not involved in preparing orally argued cases except upon special request by a judge.

D. Judicial preparation for argument: materials and timing

Generally, judges on the panel receive the briefs and appendices sufficiently in advance to give them at least six to eight full weeks' study in chambers before the panel sitting.

E. Disclosure of panel identity

The clerk discloses the identity of the argument panel no later than ten days before the sitting.

VI. Opinion Preparation and Publication

A. Types of dispositions and criteria for publication

The court uses four forms of opinions: for-publication opinions of the court; "unreported–not precedential" opinions of the court; memorandum opinions, which always bear that legend; and per curiam opinions. The court for many years also used one-sentence or very short judgment orders extensively, but it reports that it has virtually abandoned that practice in favor of memorandum and per curiam opinions. The opinion writer, subject to the approval of the panel, determines whether the opinion is for publication or is not precedential (and hence not for publication). Most published opinions are signed but some are per curiam.

"Unreported–not precedential" opinions are used if the panel's opinion appears to have value only to the trial court or the parties. Memorandum opinions set forth the reasons supporting the court's decision but are not of precedential or institutional value; they vary in length from approximately two to twenty pages. They are used when the panel unanimously affirms the judgment, order, or decision of the court under review; dismisses an appeal; or enforces or denies review of an administrative agency order or decision. Memorandum opinions are not used when the disposition of the court is to reverse a decision or remand a case to the trial court, or to grant review or deny enforcement of an order of

an administrative agency, or to remand a case to such an agency. When what would otherwise be styled a memorandum opinion is drafted by a staff attorney for the court's consideration (almost always in a pro se case), it is styled as a per curiam opinion.

Judgment orders are very brief and simply recite that the judgment or order under review is affirmed, though sometimes they endorse the district court or agency opinion. When used, they require the unanimous decision of the panel and serve the purposes of memorandum opinions, set forth in the preceding paragraph. When used in a direct criminal appeal, they include a statement of those issues raised by the appellant and considered by the panel (so as to keep a record, in case of future petitions).

B. Summary action

Summary action is rarely used and only for cases in which it is clear that the district court is correct and there is no other procedural mechanism for early termination. Cases appropriate for summary action are identified at the jurisdictional screening stage; they are typically pro se cases. The staff attorneys' office sends a letter to the parties advising that the court is contemplating summary action; parties are given fourteen days to respond, which they may do by letter. Then the case, with a draft opinion, is submitted to a motions panel.

C. Prefiling circulation of opinions

For-publication opinions are circulated to all the active judges of the court for an eight-day period before filing, primarily to ensure the consistency and coherency of circuit law. Nonpanel judges of the court frequently comment on circulating opinions and make suggestions to the opinion writer. These are frequently accepted and often result in correction of a problem and improvement of the opinion. If a majority of nonrecused active judges votes to take the case en banc during the circulation period, the circulating panel opinion is not filed. Although senior judges do not have a vote on whether the court should take a case en banc, a senior judge may choose to receive circulating opinions.

D. Availability of not-for-publication opinions

Not-for-publication opinions are not available electronically or through Westlaw, LEXIS, other legal publishers, or on a court Web site. The parties and public may obtain copies from the clerk.

E. Citability of not-for-publication opinions

The court does not treat unpublished opinions as binding precedent and does not cite its own nonprecedential opinions. Citation by counsel is not prohibited, but it is also, a fortiori, not encouraged.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for grant of en banc rehearing

The contents of a petition for rehearing en banc must demonstrate a precedent-setting error of great public importance or a conflict with Supreme Court or Third Circuit precedent.

B. Treatment of petitions for rehearing en banc

Both petitions for rehearing by the panel and petitions for rehearing en banc are treated as if they were requests for rehearing en banc, unless the petition for rehearing by panel specifically states that it does not request rehearing en banc.

C. Rehearing procedures

Response to petition

A response to the petition is required if requested by (a) any member of a divided panel; (b) any four active judges; or (c) any judge voting for rehearing, provided there are a total of four votes either for an answer or for rehearing. The response is due within fourteen days. Courtesy copies of the response are sent to any senior judge or visiting judge who was on the original panel.

Voting

For purposes of a vote granting a rehearing en banc, a majority is defined as the majority of all active judges not disqualified from participating in the case. A judge's failure to vote within the time established for a petition for rehearing en banc is counted as a vote disfavoring en banc. Any judge who participated in an en banc poll, hearing, or rehearing while in regular active service but takes senior status before the case is decided may elect to continue participating in the final resolution of the case. Additionally, a senior judge who sat on the original panel may elect to participate in the en banc court.

Effect of grant

If a panel decides to grant rehearing, the authoring judge enters an order vacating the opinion and judgment and notifies the active judges. If re-

hearing en banc is granted, the chief judge enters an order granting rehearing and vacating the panel decision.

Hearings
En banc cases are almost always scheduled for oral argument, typically thirty minutes per side, with each side given at least five minutes uninterrupted argument at the outset.

D. Sanctions for unmeritorious petitions

Sanctions are rarely granted, but the court's local rules caution restraint on the part of counsel and remind them that their duties are discharged without their filing a petition for rehearing en banc unless the case meets the rigorous requirements of the applicable rules.

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal appeals

The clerk may consolidate related cases and order copying of the transcript to minimize costs among appointed counsel. Appeals from orders granting or denying release from custody, with or without bail, are governed by Local Rule 9.1. The rule provides that appeal "shall be by motion filed either concurrently with or promptly after filing a notice of appeal."

B. Habeas corpus cases and certificates of appealability

Certificates of appealability
A staff attorney screens cases at docketing to determine if a certificate of appealability is needed. Local Rule 22.2 requires the district court judge to rule on a request for a certificate at the time the final order is entered. If a certificate of appealability is needed but the district court has not granted or denied one, the clerk's office issues an order remanding the case for a ruling. If the district court has denied a certificate, the staff attorneys' office sends letters to parties advising that a panel of the court of appeals will decide whether to issue a certificate of appealability. Parties are given time to apply for or oppose a certificate.

The staff attorney writes a memorandum and drafts language for an order, and the case is submitted to a three-judge motions panel. Any one judge may grant the motion. An order denying a certificate of appealability terminates the case. If a certificate of appealability is granted or a jurisdictional issue is referred to a merits panel, a briefing schedule is is-

sued. *See* Local Rule 22.5 for procedures and rules regarding permission to file a second or successive petition under 28 U.S.C. § 2254.

When a certificate of appealability is granted to an indigent petitioner, the clerk automatically appoints counsel unless instructed otherwise by the court. There is no local provision of counsel for preparation of the application for a certificate. If the district court appointed counsel to handle the habeas corpus proceedings, that appointment covers the filing of a notice of appeal and request for a certificate of appealability. If the certificate is granted, counsel is reappointed by the court of appeals. Indigent defendants proceeding under 28 U.S.C. § 2254 or § 2255 are entitled to appointed counsel for both state and federal death penalty habeas corpus actions, including the preparation of an application for the certificate.

United States Code, Title 28 § 2253, Fed. R. App. P. 22, and the Third Circuit rules require the district court to state the specific issues that are included in the certificate. In death penalty cases, the denial of a certificate by the district court will not delay consideration of the merits of a case by the court of appeals. The court has not yet decided the procedure for cases in which the district court grants a certificate on fewer than all issues.

Special procedures for capital habeas corpus cases

The court has extensive local rules governing cases in which it is required to rule on the imposition of the death penalty, whether by a state or federal court. (*See* Local Rules Misc. 111.1–111.9.) The clerk's office legal coordinator (a staff attorney assigned to the clerk's office) tracks the capital cases and directs the parties to file four copies of pertinent parts of the state court record. If a warrant is issued and no stay is in place within ten days of execution, a panel is drawn from the computer and its judges are asked to stand by to decide emergency matters.

IX. Special Procedures for Pro Se Cases

A. Role of central staff in pro se cases

Staff attorneys and administrative assistants handle most pro se mail and a large volume of telephone calls from pro se litigants. Staff attorneys will see pro se litigants in person if the litigants arrange appointments. Staff in the clerk's office handle many pro se encounters. For security reasons and access to files, litigants are seen in the clerk's office.

B. Materials or assistance provided to pro se litigants

A pro se information sheet is provided to all pro se litigants when the case is docketed. Filing defects (e.g., copies, service) are corrected by the staff attorneys' office. The staff attorneys' office has discretion to decline to correct defects for abusive litigants. If a briefing schedule is issued, the pro se litigant may file an informal brief on a form that asks the litigant to respond to questions. *See also* § X, *infra*.

C. Appointment of counsel

If the court grants a certificate of appealability in a habeas corpus case, it will appoint counsel automatically. Counsel may also be appointed on motion in some other civil cases. *See Tabron v. Grace*, 6 F.3d 147 (3d Cir. 1993) and internal operating procedure 10.3.2.

X. Appellate Procedural Issues Arising Under the Prison Litigation Reform Act

A. The PLRA's filing fee provisions and in forma pauperis status

When prisoners seek to proceed on appeal in forma pauperis in cases in which 28 U.S.C. § 1915(b) applies, the court's local rules require them to file an affidavit of poverty that includes the amount in the prisoner's prison account; a certified copy of the prison account statement(s) (or institutional equivalent) for the six-month period immediately preceding the filing of the notice of appeal; and a signed form authorizing prison officials to assess and deduct the filing fees in accordance with 28 U.S.C. § 1915(b).

If the affidavit in support of the prisoner's motion to proceed in forma pauperis demonstrates that the appellant qualifies for in forma pauperis status and is not precluded from proceeding in forma pauperis under 28 U.S.C. § 1915(g), the director of the staff attorneys' office or the clerk issues an order granting in forma pauperis status. If 28 U.S.C. § 1915(b) applies, the order directs prison officials to assess and deduct the filing fees in accordance with the statute and to transmit such fees to the appropriate district court. The circuit clerk sends a copy of the order to the prisoner, the warden of the prison where the prisoner is incarcerated, and the appropriate district court.

B. The PLRA's "three strikes" provision and in forma pauperis status

Prisoners who have three "strikes" cannot claim in forma pauperis status on appeal unless they satisfy the PLRA's imminent danger standard. Prisoners who have three strikes are identified in the court's appellate information management system (AIMS) with three "#" signs before their prisoner number. When a docket clerk encounters a new appeal from a prisoner who has three strikes, the court sends a letter informing the prisoner that he or she may not proceed in forma pauperis. When an in forma pauperis motion is received in a case in which the PLRA applies and the prisoner has not already been identified in AIMS as having three strikes, the staff attorneys' office checks all prior cases. If the appellant already has two strikes in the court of appeals, the staff attorneys' office checks the district court database to determine whether there is a third strike on that court's docket and notifies the prisoner if a three-strikes determination is made. The clerk's office is also notified to mark the prisoner's name in AIMS.

In *Keener v. Pennsylvania Board of Probation and Parole*, 128 F.3d 143, 144–45 (3d Cir. 1997), the court held that dismissals for frivolousness before the PLRA's enactment would be counted as strikes for purposes of the PLRA's three strikes provision.

In *Gibbs v. Cross*, 160 F.3d 962 (3d Cir. 1998), the court held that the standard for demonstrating an imminent danger for purposes of avoiding the PLRA's three strikes provision was not equivalent to that for the serious physical injury required to state a cruel and unusual punishment claim under the Eighth Amendment.

In *Gibbs v. Roman*, 116 F.3d 83, 86 (3d Cir. 1997), the court instructed district courts to use a liberal pleading standard to evaluate allegations set forth in a complaint filed by a pro se prisoner facing the PLRA's three strikes filing bar. The court directed district courts to construe all allegations in favor of the complainant and to credit those allegations of "imminent danger" that are unchallenged by the defendant. The court also instructed that an inmate's satisfaction of the imminent danger standard, for purposes of avoiding the PLRA's three strikes provision, should be measured at the time of the incident alleged in the complaint and not at the time the complaint is filed or the appeal is lodged.

United States Court of Appeals for the Fourth Circuit

I. General Information

The Fourth Circuit encompasses Maryland, North Carolina, South Carolina, Virginia, and West Virginia. The Fourth Circuit Court of Appeals is headquartered in Richmond, Va.

The court has fifteen authorized judgeships. In FY 1998, the court had three sitting senior judges and 38.4 vacant judge-months.

A. Judges and panels

Orientation and assignments for new judges

Each court unit offers an in-person orientation and written orientation materials to new judges.

Visiting judges

The court of appeals has posted a visiting judge memorandum on the J-Net.

Argument panels

Approximately six weeks before the argument session, active judges are randomly assigned to argument panels.

Motions and submission panels

Motions and submission panels are randomly generated as matters arise, and are not standing panels. The clerk's office and office of staff counsel submit motions and nonargument cases to the next randomly generated panel.

Death penalty panels

Judges are assigned to death penalty panels in rotation, but with the constraint that at least one member of the panel selected will be from the state where the petitioner's conviction arose, unless no such judge is available.

B. Central staff

Office of staff counsel

The office of staff counsel is staffed by forty people: thirty-two attorneys and eight support persons. The thirty-two attorneys include one senior

staff attorney, three supervising staff attorneys, and twenty-eight full-time staff attorneys.

Clerk's office

The clerk's office, staffed by fifty-six people, provides case-management and automation support for the court. Twenty case managers provide most case support, with others in the office assuming responsibility for the briefing and calendaring aspects of the case.

Counsel to the clerk and the case managers have been delegated authority to rule on procedural motions. *See* § III.B, *infra*. Additionally, the clerk's office provides support as needed for attorney discipline and judicial complaint matters and also assists in the review of CJA vouchers.

Office of the circuit mediator

The court employs four circuit mediators (including one retired state supreme court justice). *See* § II.C, *infra*.

C. Technological resources

The court of appeals is investigating the use of videoconferencing.

II. Intake, Screening, and Settlement Programs

A. Intake

Information provided by attorneys

Civil appeals. Counsel for appellants must file a docketing statement within fourteen days of filing the notice of appeal. The docketing statement is used by the office of the circuit mediator for prebriefing review of civil cases in which all parties are represented by counsel, and in mediation. The statement sets forth in succinct form the nature of the proceedings and relief sought and frames the issues with reference to specific facts and circumstances of the case. To the statement, the appellant must attach certain key documents, including the district court docket sheet, a copy of the judgment appealed from, pertinent opinions or findings, the transcript order, and a certificate of service. Any party who finds the appellant's docketing statement incomplete, inaccurate, or misleading must file additions or corrections within seven days of service of the docketing statement.

Criminal appeals. The court uses the same docketing statement form for criminal appeals as is used for civil appeals. In addition, the court asks for

information about the defendant's conviction, sentence (if any), and incarceration status.

Agency appeals. In addition to an appearance of counsel, parties filing appeals from the tax court or petitions for review or enforcement of an agency decision must file a docketing statement that asks for basic information about the appeal.

Information provided to attorneys

When a case is docketed, the court sends counsel notice of preliminary filing requirements and, if no transcript is necessary, a briefing notice and information regarding the required format for briefs and appendices. Counsel appointed under the Criminal Justice Act are provided with information regarding payment and record-keeping provisions under the CJA.

B. Screening

Screening for jurisdiction

The clerk's office conducts a basic jurisdictional review at the time the case is docketed. Any jurisdictional issue that has not been resolved before briefing is reviewed during preargument screening of the case.

Screening for argument/nonargument disposition

Role of staff. All pro se appeals and all habeas corpus and § 2255 appeals in which a certificate of appealability is needed are referred to the staff attorneys for workup once the informal briefs are filed. In counseled appeals, the staff attorneys review the briefs to determine whether preargument review of the case by a panel is warranted. If so, the staff attorney refers the case to a randomly generated submission panel for possible disposition without argument. If any judge of the submission panel desires to hear argument, the case is placed on the calendar.

Role of judges. An argument panel may direct submission of a case on the briefs prior to argument if all judges on the panel agree that the case should be submitted and agree as to the disposition of the case.

Role of parties. When briefing is complete and before argument is set, any party may move to submit the case on briefs. These motions are not granted as a matter of course. A party may include a statement at the end of its brief concerning the need for oral argument.

Screening for case weighting or issue tracking

When a case is referred to the calendar it is assigned an estimated difficulty rating which is used during computer assembly of the calendar. The court does not screen cases for issue tracking.

C. Office of the Circuit Mediator

The Office of the Circuit Mediator provides settlement assistance to reduce the caseload of the judges of the circuit, save taxpayer money, and save the time and money of litigants and their counsel. The chief circuit mediator reviews all eligible cases shortly after docketing to determine whether a preargument conference might assist the court or the parties. Counsel for the litigants also are encouraged to request a conference if they believe mediation will be helpful. If a conference is scheduled under the program, the court requires lead counsel for each party to participate. For most initial conferences, clients are not required to attend. Each conference is conducted by a circuit mediator.

III. Briefing and Motions Practice

A. Briefing

General

The clerk sends the parties a formal briefing schedule when the record is complete or when the clerk determines that no hearing was held for which a transcript is necessary. The time for designating the contents of the joint appendix and the filing of briefs is controlled by the briefing order, not the receipt of the record. Records in formally briefed cases are retained in the district court unless requested by a circuit judge, in which event the record is transmitted to the court of appeals within twenty-four hours.

The court supplies a form that can be used for informal briefs in pro se appeals or applications for a certificate of appealability. The parties are not limited to the form, but once an informal briefing schedule is established, a party may file a formal brief only with court permission.

Briefs on digital media

The court does not require parties to file briefs using digital media.

B. Motions practice

Composition and operation of motions panels

The court does not use a standing motions panel. All motions that are decided by judges (not delegated to the clerk) are referred to randomly constructed three-judge panels; substantive motions are decided by the submission panels that decide nonargued cases. Motions are considered and decided on the papers, generally after workup by the office of staff counsel, and oral argument is rarely ordered.

Procedural motions

In cases where all parties are represented by counsel, the court requires counsel who file a motion to state that counsel for the other parties have been informed of the intended filing of the motion. The statement must indicate whether the other parties consent to the granting of the motion or intend to file responses in opposition. A consent statement enables the court to rule on unopposed motions without awaiting a response. Although any party may file a response to a motion within seven days after service, a party need not respond to a motion unless the court so requests. If the court acts upon a motion without a response, any party adversely affected by such action may ask the court to reconsider, vacate, or modify its action. Any party filing a motion may file a reply, but the court does not ordinarily await a reply before reviewing the motion and response, so it encourages any party intending to reply to notify the court.

The clerk may enter orders for the court on certain procedural motions relating to the preparation or printing of the appendix and briefs on appeal, or which are ordinarily acted on without notice or hearing. Any party adversely affected by an order entered by the clerk may request reconsideration of the clerk's action by the court.

Substantive motions

The court's rules advise counsel not to routinely file motions for summary affirmance, reversal, or dismissal but to use them only for extraordinary cases. The rules also urge counsel who contemplate filing a motion to dispose summarily of an appeal to carefully consider whether the issues raised on appeal are in fact manifestly unsubstantial and appropriate for disposition by motion. Motions for summary affirmance or reversal are seldom granted.

Motions for summary disposition are to be filed only after briefs are filed. If such motions are submitted before the completion of the briefing schedule, the court will defer action on the motion until the case is ready

for full consideration. Motions to dismiss based on the ground that the appeal is not within the jurisdiction of the court or for other procedural grounds may be filed at any time. The court may also sua sponte summarily dispose of any appeal at any time.

Emergency motions

In cases of emergency, a single judge of the court may act on a request for emergency relief but may not dismiss or otherwise ultimately determine an appeal. The court's rules urge counsel, except in true emergencies, to follow the preferred procedure of filing all motions with the clerk for presentation to the court. The action of a single judge may be reviewed by the court or a panel.

Special topics or problems regarding motions

To enable the clerk to finalize the calendar, the court requires that counsel file any motion affecting oral argument no later than ten days after notice that the case has been tentatively assigned to a particular argument session. If counsel files such a motion after the case has been assigned a firm calendar date, counsel must explain why the motion was not filed within the ten-day tentative calendar period.

IV. Nonargument Decision-Making Practices

The office of staff counsel prepares recommendations for disposition of cases not calendared for oral argument. Staff counsel present these recommendations, in either oral or written form, to the submission panels. After receiving the materials, the lead judge notifies the other panel members of his or her views concerning the proper disposition of the case and invites the other members' responses. The non-lead judges conduct such discussions with each other and with the lead judge as may be necessary and eventually signal their concurrence or non-concurrence with the lead judge's action. Lead judge responsibility is rotated among the panel members.

Each judge has the absolute authority to direct that any submitted case be calendared for argument.

V. Argument Panel Operations

The clerk maintains a list of mature cases available for oral argument and on a monthly basis merges those cases with a list of three-judge panels generated by a computer program designed to achieve random assignment of judges to panels.

A. Panel composition, sitting schedules, and panel rotation

For its regular court terms, the court sits in Richmond, Virginia, for five consecutive days in October, November, December, February, March, April, May, and June. Summer panels are scheduled if needed. Unless only one panel is sitting in a given location, the composition of each panel usually changes each day during a court week to further the court's goal of ensuring each judge the opportunity to sit with every other judge an equal number of times. Each panel regularly hears oral argument in four cases each day during the court week.

Each active judge generally sits eight or nine weeks per year, five days per week, with four cases per day.

Each side is normally given twenty minutes to argue. In Social Security disability, black lung, and labor cases resting on a determination of whether substantial evidence supports the agency decision, and in criminal appeals of Sentencing Guideline issues, each side is normally allowed fifteen minutes for argument.

B. Assignment of cases to panels

The court tries to assign judges who have had previous involvement with a case on appeal (e.g., on a motion or prior appeal in the same matter) to hear the case, although there is no guarantee that a judge with prior involvement will be assigned. Otherwise, assignment of cases to panels is random and is separate from the assignment of judges to panels. The independent assignment of cases to panels is to ensure that particular judges do not receive—or appear to receive—a disproportionate share of particular case types.

C. Staff role in working up cases for argument calendar

Central staff attorneys are not typically involved in orally argued cases. Elbow clerks prepare bench memoranda for their judges.

D. Judicial preparation for argument: materials and timing

The clerk distributes briefs for the cases assigned to a hearing panel at the time the panel assignments are made, about four to five weeks in advance of the argument.

E. Disclosure of panel identity

The composition of the oral argument panel is not disclosed until the morning of oral argument.

VI. Opinion Preparation and Publication Issues

A. Criteria for publication and nonpublication

The court's policy is that an opinion delivered by the court will be published only if the opinion satisfies one or more of the standards for publication:

- It establishes, alters, modifies, clarifies, or explains a rule of law within the circuit; or
- It involves a legal issue of continuing public interest; or
- It criticizes existing law; or
- It contains a historical review of a legal rule that is not duplicative; or
- It resolves a conflict between panels of the court or creates a conflict with a decision in another circuit.

The court's policy is to publish opinions only in cases that were fully briefed and orally argued. Opinions in such cases are published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication and all members of the court have acknowledged in writing their receipt of the proposed opinion. A judge may file a published opinion without obtaining all acknowledgments only if the opinion has been in circulation for ten days.

B. Criteria for summary opinions

The court uses summary opinions when all panel judges agree that an opinion in an orally argued case would have no precedential value and that summary disposition is otherwise appropriate. A summary opinion identifies the decision appealed from, sets forth the court's decision and the reasons for it, and resolves outstanding motions in the case. It does not discuss the facts or elaborate on the court's reasoning.

C. Prefiling circulation of opinions

All opinions in argued cases are circulated at least ten days before filing.

D. Availability of not-for-publication opinions

Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel. Any individual or institution may receive copies of all published and certain unpublished opin-

ions of the court by paying an annual subscription fee for this service. In addition, copies of such opinions are sent to all circuit judges, district judges, bankruptcy judges, magistrate judges, district court clerks, U.S. attorneys, and federal public defenders upon request. All opinions are available on the Appellate Bulletin Board System (ABBS), for a minimum of six months after issuance. The Federal Reporter periodically lists the result in all cases involving unpublished opinions. Copies of any unpublished opinion are retained in the file of the case in the clerk's office, and a copy may be obtained from the clerk's office for $2.00.

E. Citation of not-for-publication opinions and procedures when allowed

Citation to unpublished dispositions is disfavored except as necessary for their preclusive effects. However, lawyers may cite an unpublished disposition of any court if they believe it has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well. In these instances, counsel must serve a copy on other parties and the court, as by attaching a copy to a brief.

F. Miscellaneous opinion and publication issues

Opinion assignments are made by the chief judge on the basis of recommendations from the presiding judge of each panel on which the chief judge did not sit.

Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without a change in the result.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for grant of en banc hearing or rehearing

Hearing or rehearing en banc will not be ordered except when consideration by the full court is necessary to secure or maintain uniformity of its decisions or when the proceeding involves a question of exceptional importance.

B. Treatment of petitions for rehearing en banc

A petition for panel and en banc rehearing must be submitted in the same document.

C. Independent action by the court

The court occasionally grants en banc rehearing on its own initiative before or after issuance of an opinion by a three-judge panel.

D. Process for rehearing en banc

Before a poll, the clerk is generally directed to obtain a response to a petition for rehearing en banc.

For purposes of a vote granting a rehearing en banc, *majority* means a majority of all judges of the court in regular active service who are presently serving, without regard to whether a judge is disqualified from acting in the case. Along with those eligible to vote, the papers are also sent to any visiting judge who sat on the original panel.

A grant of a petition for rehearing en banc vacates the panel opinion and judgment.

The court schedules en banc sittings as needed during its regular court sessions throughout the year. An en banc rehearing is heard by all eligible and participating active judges and any senior judge of the court who sat on the panel that decided the case originally. A judge who joins the court after argument of a case to an en banc court is not eligible to participate in the decision, but a judge who joins the court after submission of a case to an en banc court without oral argument will participate in the decision of the case.

E. Sanctions for nonmeritorious petitions

The court does not have a standard practice of imposing sanctions for nonmeritorious petitions for rehearing. It does forbid the filing of papers requesting further relief after rehearing has been denied or the time for filing a petition for rehearing has expired.

F. Other ways the court works to avoid conflict and inconsistency

All opinions in argued cases, both published and unpublished, are reviewed by the entire court prior to issuance.

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal cases

The court expedites criminal cases by requiring appellant's brief within thirty-five days, appellee's brief within twenty-one days thereafter, and appellant's reply within ten days. The court also affords criminal cases priority on the calendar.

B. Habeas corpus cases and certificates of appealability

All non-capital habeas and § 2255 appeals in which a certificate of appealability has not been granted are set on an informal briefing track, even if the petitioner is represented by counsel. After the informal briefs are filed, the office of staff counsel reviews them and refers them to submission panels.

For capital habeas and § 2255 appeals in which the district court has not granted a certificate of appealability, counsel must file a motion for certificate of appealability along with a formal brief.

If the panel determines further briefing or oral argument is needed from an indigent pro se litigant, the court will appoint counsel.

An application for a certificate of appealability may be referred to a panel of three judges. If any judge is of the opinion that the certificate should issue, the court will grant the certificate, indicating the issues that satisfy the required showing. The court may then affirm, reverse, or remand without further briefing, or it may direct full briefing and oral argument.

If the district court has denied a certificate of appealability on some issues, the appellant may renew the motion in the court of appeals and address the issues in the brief.

Special procedures for capital habeas corpus cases

The clerk's office assigns capital cases in rotation. In cases in which an execution date has been set, counsel are required to lodge with the clerk's office copies of district court filings and any pertinent state court materials so that these materials can be provided to the panel on an expedited basis.

Pursuant to Judicial Council Order 113, the court is expected to decide capital appeals within 120 days of filing of the last brief. For this reason, briefs are provided to the panel as they are filed and the case is calendared for argument at the earliest possible session.

IX. Special Procedures for Pro Se Cases

The court permits informal briefing in pro se cases and provides pro se litigants with a special form for such briefs. If the court determines that a pro se appeal warrants argument, counsel will be appointed for formal briefing and oral argument.

X. Appellate Procedural Issues Arising Under the Prison Litigation Reform Act

A. The PLRA's filing fee provisions and in forma pauperis status

The PLRA's filing fee provisions are governed by 4th Cir. R. 24 for prisoner appeals and by 4th Cir. R. 21(c) for mandamus petitions. Under Rule 24, a prisoner appealing a judgment in a civil action must pay the full $105 fee required for commencement of the appeal. A prisoner who is unable to prepay the fee may apply to pay the fee in installments by filing with the court of appeals (1) an application to proceed without prepayment of fees; (2) a certified copy of the prisoner's trust fund account statement or institutional equivalent for the six-month period immediately preceding the filing of the notice of appeal; and (3) a form consenting to the collection of fees from the prisoner's trust account.

Under 4th Cir. R. 21(c) a prisoner filing a petition for writ of mandamus, prohibition, or other extraordinary relief in a matter arising out of a civil case must pay the full $100 docket fee.

If a prisoner proceeding under 4th Cir. R. 24 or 4th Cir. R. 21(c) fails to file the forms or make the payments required by the court, the appeal will be dismissed pursuant to 4th Cir. R. 45.

B. The PLRA's "three strikes" provision and in forma pauperis status

A prisoner who has, on three or more prior occasions while incarcerated or detained in any facility, brought an action or appeal in a federal court that was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which relief could be granted may not proceed on appeal without prepayment of fees unless the prisoner is under imminent danger of serious physical injury.

United States Court of Appeals for the Fifth Circuit

I. General Information

The Fifth Circuit encompasses Louisiana, Mississippi, and Texas. The Fifth Circuit Court of Appeals is headquartered in New Orleans.

The court has seventeen authorized judgeships. In FY 1998, the court had five sitting senior judges and twelve vacant judge-months.

A. Judges and panels

Orientation and assignments for new judges

All new judges receive a brief orientation from all court units. As a general rule new judges receive the same caseload as experienced judges, except that new judges do not act on death penalty cases for six to twelve months.

Visiting judges

The court has prepared a visiting judge's manual for those judges who sit with the court of appeals by designation or on intercircuit assignment. The manual includes the court's internal operating procedures and policies, and it covers, for example, recusal or disqualification, briefs and records, case conference and designation of writing judge, and court facilities.

Panels

In addition to regular oral argument panels, each judge sits on a "conference calendar" panel for a four-day period once a year (*see* § IV, *infra*). The judges also serve on a "jurisdiction calendar" and on a three-judge "screening panel" that is constituted for a full year. Senior judges may serve on both argument and screening panels.

B. Central staff

Staff attorneys' office

The court employs forty-nine staff attorneys in New Orleans. They are supervised by a chief staff attorney and five supervisory staff attorneys. Many staff attorneys are now considered permanent employees, since the court relaxed its policy of keeping staff attorneys for only two years.

Appellate conference program

The court employs a senior conference attorney and two other conference attorneys. *See* § II.C, *infra*.

II. Intake, Screening, and Settlement Programs

A. Intake

Information provided by attorneys

Civil and criminal appeals. No docketing or preargument statement is required.

Agency appeals. The court requires a docketing statement in petitions for review of orders of the Federal Energy Regulatory Commission. This statement must list each issue to be raised in the review and any other review proceeding pending as to the same order in any other court, and must be submitted with copies of the order to be reviewed. The court also requires certain information in petitions for review of orders by the Benefits Review Board.

Information provided to attorneys

A docketing notice is sent to attorneys along with an appearance form, and the attorneys are advised of a schedule by which to proceed with the appeal (e.g., to pay fees, order transcripts). If not already admitted, attorneys are advised to obtain admission to practice before the court.

B. Screening

Screening panels composed of three active judges, with the assistance of staff attorneys, screen cases to determine if an appeal is to be decided with or without argument.

Screening for jurisdiction

A staff attorney loaned to the clerk's office performs an initial jurisdictional screen at the time of case opening. Thereafter, a supervisory staff attorney reviews fully briefed cases; in the course of this review, the attorney looks for jurisdictional problems. The court has a "jurisdiction calendar" that meets each month to dispose of cases with jurisdictional defects.

Screening for argument/nonargument disposition

Screening is performed by judges, with the assistance of staff attorneys, to determine if an appeal is to be decided with or without oral argument.

Classifications. The court classifies cases as follows:

- Class I cases are so lacking in merit as to be deemed frivolous and subject to affirmance or dismissal under Fed. R. App. P. 34(a)(1) and 5th Cir. R. 42.2 & 47.6.
- Class II constitutes the court's summary calendar. This includes cases in which counsel waive oral argument. The largest number of cases in this class are those in which three judges decide that oral argument will be neither required nor helpful, the judges being persuaded that the appeal can be decided on the record and the briefs without oral argument. In Class II cases the dispositive issue or set of issues usually has been recently authoritatively decided, or the facts and legal arguments are presented adequately in the briefs and record and the decisional process would not be aided significantly by oral argument. Typically, nearly 70% of the appeals are decided without oral argument.
- Classes III and IV represent the court's oral argument calendars. The great body of cases classified for oral argument are placed in Class III, in which each side receives twenty minutes to argue. Class IV provides oral arguments of thirty minutes per side. If a case is classified for oral argument, counsel may, by motion in advance, request additional time, but this is discouraged unless more time is absolutely necessary.

Screening procedure. When the briefs and record are filed, a supervisory staff attorney reviews them to determine if the case, on its face, appears to be one that needs oral argument. If so, the staff attorney returns the case to the clerk without a memorandum. The case then goes to an active judge for screening (except for direct criminal appeals, which proceed directly to the oral argument calendar). If that judge concurs that argument is warranted, the case is placed on the next appropriate oral argument calendar, in Class III or Class IV as the screening judge directs. If the screening judge disagrees and concludes the case does not warrant argument, the judge retains the case and prepares a disposition for consideration on the summary or conference calendar. Only a judge may send a case to the oral argument calendar.

In the cases processed by staff attorneys, if the supervisory staff attorney concludes on initial review that the case does not clearly warrant argument, a "screening memorandum" is prepared. The staff attorney has a choice of two types of memoranda, depending on which track appears to

be the appropriate one for the case. If the case is tracked to the summary calendar, the staff attorney memorandum will fully state the facts with record citations, describe the issues, and analyze the record and authorities cited along with any uncited authorities that would aid the court. The staff attorney recommends a disposition and explains the recommendation. A supervisor reviews the memorandum and the authorities and record citations.

If the staff attorney concludes that the appeal should go to the oral argument calendar, and a supervisor agrees, the staff attorney prepares a memorandum explaining the recommendation that argument should be heard.

Cases referred to staff. Cases routed first to staff attorneys include pro se cases, prisoner cases challenging the conditions of confinement, habeas corpus cases, civil federal question cases, immigration cases, cases in which the United States is a party, civil rights cases except Title VII, and Social Security cases.

Cases referred to judges. Some case types are sent directly to chambers for a single judge to decide whether to grant argument. At present they include diversity and Title VII cases, cases from the Tax Court, bankruptcy cases, and some agency cases (e.g., NLRB).

Party role in obtaining oral argument. Counsel for the appellant must include in the principal brief a statement of reasons why oral argument would be helpful, or a statement that the appellant waives oral argument. The appellee must submit a similar statement. The court gives these "due, though not controlling" weight in deciding whether to hear argument.

Screening for case weighting or issue tracking

The court does not assign weights to cases. However, the staff attorneys maintain a tracking system for their memoranda in a searchable automated system.

C. Appellate conference program

The court has an appellate conference program administered by a senior conference attorney who is assisted by two other conference attorneys. The attorneys conduct settlement conferences in civil cases selected by them, referred by the court, or assigned to the program at the request of counsel. Conferences, which may be conducted in person or by telephone, are ordinarily scheduled before briefing to explore settlement and to simplify, clarify, and reduce appellate issues. The conference attorneys

may require the participation of counsel and natural parties or corporate representatives. A party's expressed desire not to settle is always respected, and discussions thereafter, if any are held, will relate only to other matters concerning the efficient management and disposition of the appeal.

III. Briefing and Motions Practice

A. Briefing

General

The briefing notice advises the parties of deadlines for filing briefs and record excerpts in accordance with the local rule.

Briefs on digital media

Since January 4, 1999, the court has required counsel preparing briefs on a computer to file an electronic version of the brief with the court and to serve an electronic copy on opposing counsel.

B. Motions practice

Composition and operation of motions panels

Motions panels are drawn randomly from the pool of active judges. These panels also operate as screening panels. The composition of motions panels is changed at the beginning of each court year in July to permit the judges to sit with other judges in screening and handling administrative motions. During the summertime, when judges are on scheduled vacations or "respite" periods, a special summer motions panel is selected to handle motions.

After cases are assigned to an oral argument calendar, motions are circulated to the hearing panel rather than to the standard motions panels. Until the identity of the panel is made public, the clerk enters an order responding to the motion on behalf of the panel. Motions that are referred to a three-judge panel are rotated through the panel for decision, except emergency motions, which are sent to the entire panel simultaneously. Motions are generally decided on the papers without oral argument.

Procedural motions

The clerk is vested with discretion in accordance with the standards set forth in the applicable rules, and subject to review by the court, to grant, deny, or take other appropriate action for the court on numerous unopposed procedural motions identified in Rule 27.1.

Pursuant to Fed. R. App. P. 27(c), any single judge of the court is authorized, in the judge's discretion and subject to review by the court, to take appropriate action for the court regarding the procedural motions listed in Rule 27.2. Generally, a single judge can rule on opposed motions that a clerk could handle if unopposed.

Substantive motions

Motions requiring consideration by the judges are reviewed to ensure there is no recusal problem and then assigned in rotation to an active judge on a routing log. In single-judge matters the initiating judge acts on the motion and returns it to the clerk with an appropriate order. (A single judge may entertain a postdecision motion for a stay or recall of mandate pending an action for writ of certiorari. A single-judge motion is subject to review by the court.) For those motions requiring panel action, a single set of papers is prepared and the initiating judge transmits the file to the next judge with a recommendation. The second judge, in turn, sends the file to the third judge, who returns the file and an appropriate order to the clerk.

Emergency motions

The court directs attorneys who have emergency motions or applications, whether addressed to the court or to an individual judge, to file their petitions with the clerk rather than with an individual judge. In matters where attorneys have insufficient time to file a motion or application in person, by mail, or by fax, the attorneys may contact the clerk by telephone, filing the motion in writing with the clerk as promptly as possible. In emergency matters, counsel are to inform the court of any prior actions on the petition or related ones. Requests for extensions of time are handled ex parte by the clerk. The clerk immediately assigns an emergency matter to the next judge in rotation on the administrative-interim routing log and to the panel members.

IV. Nonargument Decision-Making Practices

The court uses two procedures for nonargument decision making: summary calendars and conference calendars.

Summary calendar

The summary calendar is operated in a serial, or round-robin, fashion. For many, but not all, of the cases on the summary calendar, the staff attorney prepares an in-depth research memorandum, which is forwarded to the judge designated as the initiating judge. In about half of those

cases, the staff attorney prepares a draft of a proposed disposition. The initiating judge may adopt the proposed disposition or prepare another. That judge then forwards the materials and the draft disposition to the second judge on the panel, who completes his or her review and, if in total agreement with the writing judge, forwards the materials and the draft to the third judge. When all three judges have agreed on a disposition, the decision is filed; if they do not agree, the case goes to the next available oral argument calendar.

Conference calendar

In cases involving one or two issues and not involving a fact-intensive record, the staff attorney prepares a memorandum and a short per curiam decision for the conference calendar panel. Panel judges meet in New Orleans, usually for four days. The night before and in the mornings, each judge reviews thirty cases, taking the lead in ten. In the afternoons, the judges meet with the staff attorneys, who present the cases. All three judges must agree on the disposition or the case goes to an active judge for screening. The case may then be resolved by the screening panel or it is referred to the oral argument calendar.

V. Argument Panel Operations

A. Panel composition, sitting schedules, and panel rotation

The clerk prepares a proposed court schedule for a full year and obtains the approval of the scheduling proctor and chief judge. The schedule does not include specific cases but only sets the weeks of court, considering the probable volume of cases and the availability of judges. Each active judge sits seven times on oral argument panels during each court term. Oral argument panels generally hear five cases per day for four days for each of the seven sittings. Senior judges usually sit on five oral argument panels during a court term.

Considering the seven weeks each active judge is to sit and the number of sittings available from the court's senior judges and visiting circuit or district judges, the scheduling proctor and clerk create panels of judges for the anticipated sessions for the coming court year. Panel membership is arranged to allow judges to sit with many different judges of the court.

Parties are usually allotted twenty minutes each for argument. In Class IV cases, thirty minutes may be allotted.

B. Assignment of cases to panels

The clerk prepares the calendars, seeking to balance the calendars by dividing the cases evenly by case type and complexity, so that each panel has essentially an equal proportion of different types of litigation. To ensure randomness of case assignment, information about the identity of the panel members is not disclosed within the clerk's office until the calendars for the month are actually prepared.

Cases are calendared according to their priority, giving preference to criminal appeals, habeas corpus petitions and motions attacking a federal sentence, recalcitrant witness proceedings, actions for temporary or preliminary injunctive relief, and other actions for which good cause is shown to expedite the calendaring.

C. Judicial preparation for argument: materials and timing

Immediately after issuing the calendar, the clerk sends the briefs to the panel members.

D. Disclosure of panel identity

The clerk may not disclose the names of the panel members until one week in advance of the session.

VI. Opinion Preparation and Publication

A. Criteria for judgment without opinion

The judgment or order being reviewed may be affirmed or enforced without opinion if the court determines that an opinion would have no precedential value and that one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears.

B. Criteria for publication and nonpublication

Policy statement

The court's general policy on publication is that the publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the

legal profession. Opinions that may be of interest to persons other than the parties to a case, however, should be published.

Criteria

According to the court's rules, an opinion is published if it:

i. establishes a new rule of law, alters or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;
ii. applies an established rule of law to facts significantly different from those in previous published opinions;
iii. explains, criticizes, or reviews the history of existing decisional or enacted law;
iv. creates or resolves a conflict of authority either within the circuit or between this circuit and another;
v. concerns or discusses a factual or legal issue of significant public interest; or
vi. is rendered in a case that has previously been reviewed and its merits addressed by an opinion of the United States Supreme Court.

An opinion may also be published if it is accompanied by a concurring or dissenting opinion, or reverses the decision below or affirms it upon different grounds.

How determined

The court's policy is that an opinion will be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication. If any judge of the court or party to the case requests it, the panel will reconsider its nonpublication decision and, if the panel members unanimously agree to publish, will issue a publication order.

C. Prefiling circulation of opinions

Generally, neither published nor unpublished decisions are circulated to nonpanel judges. However, a panel opinion that will create a conflict between circuits must be precirculated to all active judges.

D. Citability of not-for-publication opinions

Unpublished opinions that were issued before January 1, 1996, are precedential and may be cited. Unpublished opinions that were issued after January 1, 1996, are not deemed precedential. Parties may cite either type of opinion for its preclusive effect. Because they may be persuasive, however, unpublished opinions may be cited. Parties must attach any unpublished opinion they cite to the document it is thought to support (e.g.,

brief or motion). The party offering the opinion must also indicate its unpublished status.

E. Availability of not-for-publication opinions

The unpublished decisions of the court are reported in table form in the Federal Reporter but are not made available on LEXIS, Westlaw, or computer bulletin board.

F. Miscellaneous opinion and publication issues

The court's published opinions, as subsequently revised, are available on the court's Internet site.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for grant of en banc rehearing

Contents of the petition for rehearing en banc must demonstrate conflict with either Supreme Court or Fifth Circuit precedents, or exceptional importance of the issue(s) involved.

B. Treatment of petitions for rehearing en banc

The petition for rehearing and for rehearing en banc are separate. The court treats a petition for rehearing en banc as though it were also a petition for rehearing and the panel may elect to rehear the matter. A filing of a petition for rehearing en banc does not remove the case from plenary control of the panel; the panel may grant a rehearing without action by the full court.

C. Independent action by the court

Any active judge of the court, or any member of the panel that rendered a decision in a case, may request that the active members of the court be polled on whether the case should be reheard en banc, whether or not a party has filed a petition. This is done by a letter to the chief judge, with copies to the other active judges of the court and any other panel member.

D. Process for rehearing en banc

A response to a petition is not permitted unless requested by the court.

For purposes of a vote granting a rehearing en banc, a majority means a majority of all authorized active judges. When a request to poll the court is made, the chief judge circulates a ballot and each active judge votes, sending a copy to all other active judges of the court and any senior

judge of the court who was a panel member. The judge also indicates on the ballot whether oral argument should be granted. If a majority of active judges do not vote to rehear the case en banc, the chief judge so advises the writing judge, and the panel enters an appropriate order. If a majority votes for en banc rehearing, the chief judge instructs the clerk as to the appropriate order to enter. The order states that rehearing en banc has been granted, notes whether the case will be heard with or without oral argument, and specifies a briefing schedule for any supplemental briefs. Oral argument will be heard if a majority of the court votes for it.

A vote to rehear a case en banc vacates the panel opinion and stays the mandate, returning the case to the live docket as a pending appeal.

E. Sanctions for unmeritorious petitions

The court may sanction a party for filing a petition for rehearing or rehearing en banc when the suggestion or petition is without merit.

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal appeals

Briefing and oral argument are expedited in criminal appeals.

B. Habeas corpus cases and certificates of appealability

Certificates of appealability

Applications for certificates of appealability are initially made to the district court; the court of appeals will entertain them only after district court action. In death penalty cases, counsel must file any final certificate of appealability applications no less then five days (exclusive of Saturdays, Sundays, or holidays) before an execution or be subject to sanctions, unless a reasonable explanation for the late filing is provided. If a certificate of appealability is granted in a death penalty case, the assigned panel rules on the merits before denying a stay of execution, unless the panel rules that the appeal is frivolous and entirely without merit.

The court does not set forth specific requirements for the appointment of attorneys in habeas corpus actions. The local CJA plan indicates that direct appeal appointments are provided, but does not include counsel for certificate applications.

Certificates of appealability are handled by one judge; no distinction is made between grants and denials of certificates. Briefing is not done until the court decides the certificate of appealability issue.

In *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997), the court held that if an appellant does not expressly request that the district court's partial grant of a certificate of appealability be broadened to issues on which the district court denied the certificate, then the court of appeals will not consider those issues. In *United States v. Kimler*, 150 F.3d 429, 431 & n.1 (5th Cir. 1998), the court held that if, on the other hand, the appellant explicitly requests that the grant of a certificate of appealability be broadened to issues on which the district court denied the certificate, then the court may consider whether to grant a certificate of appealability on those issues.

Special procedures for capital habeas corpus cases

In capital habeas corpus cases, the court first determines whether it has a prior case involving that party (i.e., a case which was informally tracked by the court at some point because an execution date was imminent), or a prior appeal involving that party. If so, the panel assigned to the earlier matter is assigned the new habeas corpus appeal. The panel is sent a copy of the notice of appeal, the district court docket sheets, and any other documents available.

If the court does not have a record of a prior habeas corpus appeal or death penalty case involving that party, the clerk assigns a case number, obtains a panel from the log, and contacts panel members to determine their availability. The panel members receive a memorandum advising them a notice of appeal has been filed, along with a copy of the notice of appeal and district court docket entries.

Once docketed, an appeal in a death penalty case proceeds like any other habeas corpus appeal. Material that is received is forwarded directly to the panel. When the district court record is received, staff call the initiating judge for instructions on whether to issue a regular or expedited briefing schedule. The clerk's office can give extensions up to 30 days. Once all the briefs, including the reply brief, are received (or the time for filing expires), the case is submitted to the court.

The new appeal is assigned a case number and a panel is drawn from the log. In this situation, the panel members' availability on the scheduled date of the execution is determined. If one judge is unavailable, the backup judge is called in. An entry is made on the Death Penalty Tickler showing the party, the scheduled execution date, and the pertinent district court. This information is entered on monthly status reports for the clerk, chief operating officer, and judges.

The day before the scheduled execution date, staff contact all three judges to obtain telephone numbers where they can be reached. The death penalty case manager obtains similar information from the attorneys involved and gives them and the judges the telephone numbers where he or she can be reached.

IX. Special Procedures for Pro Se Cases

By unwritten policy and although discouraged, handwritten briefs are accepted.

X. Appellate Procedural Issues Arising Under the Prison Litigation Reform Act

A. The PLRA's filing fee provisions and in forma pauperis status

In *Strickland v. Rankin County Correctional Facility*, 105 F.3d 972, 974 (5th Cir. 1997), the court held that the PLRA's filing fee provisions apply to cases pending on appeal as of the PLRA's effective date.

In *Baugh v. Taylor*, 117 F.3d 197, 199–202 (5th Cir. 1997), the court held that it had jurisdiction to review a district court's denial of a motion for leave to appeal in forma pauperis under the PLRA.

In *Gay v. Texas Department of Corrections, State Jail Division*, 117 F.3d 240, 240 (5th Cir. 1997), the court held that "a person who files a notice of appeal while in prison is subject to the filing-fee requirements of the PLRA despite subsequent release from prison."

B. The PLRA's "three strikes" provision and in forma pauperis status

The court tracks, in both the clerk's office and the staff counsel's office, the number of strikes an individual has for PLRA purposes.

In *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996), the court held that complaints dismissed as frivolous before the PLRA was enacted count as strikes under the PLRA's three strikes provision. The court likewise held that the PLRA's three strikes provision applies to appeals pending on the PLRA's effective date. *Id.* at 386. The court also held that a strike under the PLRA includes "only those [dismissals for frivolousness] for which an appeal has been exhausted or waived." *Id.* at 388. Thus, the reversal of a dismissal for frivolousness on appeal nullifies a strike. *Id.* at 387. However, a frivolous appeal in and of itself counts as a strike, and so a dismissal for frivolousness followed by an appeal that is

deemed frivolous by the court of appeals constitute two strikes under the PLRA. *Id.* at 388.

In *Patton v. Jefferson Correctional Center*, 136 F.3d 458, 460 (5th Cir. 1998), the court held that the dismissal of an action as frivolous constituted a strike under the PLRA even though the action contained a habeas corpus claim as well as a § 1983 claim. The court has not yet resolved the issue of whether the dismissal of a frivolous habeas corpus claim, by itself, constitutes a strike under the PLRA.

In *Banos v. O'Guin*, 144 F.3d 883, 884–85 (5th Cir. 1998), the court held that the determination as to whether a prisoner is in "imminent danger" for purposes of avoiding the PLRA's three strikes provision must be made as of the time that he or she seeks to file a complaint or notice of appeal in forma pauperis.

United States Court of Appeals for the Sixth Circuit

I. General Information

The Sixth Circuit encompasses Kentucky, Michigan, Ohio, and Tennessee. The Sixth Circuit Court of Appeals hears oral arguments in Cincinnati.

The court has sixteen authorized judgeships and has requested four more. In FY 1998 it had eight sitting senior judges and 13.7 vacant judge-months.

A. Judges and panels

Orientation and assignments for new judges
An orientation manual is distributed to new judges and secretaries.

Visiting judges
Visiting judges are provided with information on the court, its staff, and its procedures.

Panels
Judges serve on regular argument panels that also decide motions and on motions panels when no argument panel is sitting. In addition, the court maintains a roster of judges, including active judges, the chief judge, and senior judges who elect to hear death penalty cases, who are available to constitute panels in death penalty cases.

B. Central staff

Staff attorneys' office
The court's staff attorney section has sixteen authorized attorney positions. It has eighteen lawyers, including one senior staff attorney and two supervisory staff attorneys. Pro se cases are assigned randomly among them. Some of the staff acquire expertise in a particular area (e.g., Social Security, black lung disease, bankruptcy, Sentencing Guidelines, and immigration), and counseled cases in which oral argument is waived may be assigned to staff according to expertise.

Office of the circuit mediators
The court employs five circuit mediators, who conduct all conferences. *See* § II.C, *infra*.

II. Intake, Screening, and Settlement Programs

A. Intake

Information provided by attorneys

In certain types of cases, the court requires counsel for appellants and appellees to prepare a one-page fact sheet to include in their briefs. The court requires a fact sheet in Social Security appeals, Title VII appeals, habeas corpus § 2254 appeals, and § 2255 motions to vacate.

Civil appeals. In civil appeals from the district court and appeals from the tax court, appellants represented by counsel must file within fourteen days a preargument statement that sets forth information regarding the nature of the appeal. The court provides a form for this purpose.

Agency appeals. Within fourteen days after filing a petition for review of an agency order or an application for enforcement, a petitioner or applicant represented by counsel must file a preargument statement on the form prescribed by the court, which is similar to that required in civil appeals.

B. Screening

Screening for jurisdiction

One attorney in the staff attorneys' office serves as a jurisdictional specialist and reviews all cases assigned to the staff attorneys to make sure there is proper appellate jurisdiction. Another attorney in the clerk's office performs a similar review for all counseled cases. When defects are discovered, the staff attorney prepares show cause orders and supplies the judges with proposed orders for appeals that should be dismissed for lack of jurisdiction.

Screening for argument/nonargument disposition

All counseled cases in which either or both counsel request argument are scheduled for argument. Generally, the staff attorneys select for nonargument disposition those cases in which the outcome is clearly governed by Supreme Court or Sixth Circuit precedent. Parties who want oral argument must include in their briefs a one-page statement that sets out the reasons argument should be heard. The parties may stipulate to waive oral argument as long as the court consents.

All pro se or prisoner appeals, criminal appeals where all counsel waive argument, civil cases where counsel waive argument explicitly or by silence, and *Anders* brief cases are referred to staff attorneys, who work them up for nonargument disposition. The case may be rerouted to the

oral argument calendar if the staff attorney discovers during research that the case appears to require oral argument. In addition, any judge reviewing the staff memorandum may determine that argument is needed.

Staff attorneys also work up easy direct criminal appeals and prepare screening reports for the panel judges, who conduct a telephonic oral argument.

Finally, staff attorneys review easy civil and criminal appeals that may not need oral argument. In those cases, the staff attorney prepares a short legal research memorandum and submits it with all briefs filed by the parties to a hearing panel.

Screening for case weighting

The senior staff attorney or one of the supervisory staff attorneys reviews the briefs for all cases on the oral argument calendar and gives them a weight to reflect their level of difficulty.

C. Office of the Circuit Mediator

The court's Office of the Circuit Mediators schedules preargument conferences to facilitate settlement for most appellate cases that meet program eligibility requirements and to identify, clarify, and simplify issues and resolve procedural problems. In addition, if a party requests a conference, the Office of the Circuit Mediators generally will schedule one in any non-prisoner case in which all parties are represented by counsel. Usually, once the office schedules a conference, participation in the process is mandatory; parties usually participate through counsel. Five attorneys employed in the Office of the Circuit Mediators conduct all conferences.

III. Briefing and Motions Practice

A. Briefing

General

Briefing schedules are set in each case in accordance with Fed. R. App. P. 26 and 31. These schedules identify the date by which the briefs must be filed. The court provides separate time requirements for appeals from death sentences.

Briefs on digital media

The court does not require briefs to be filed using digital media.

B. Motions practice

Composition and operation of motions panels

Motions panels, drawn by lot from the active judges, are assigned to review substantive motions filed with the court. When a regular weekly hearing panel is sitting, it serves as the motions panel as well. Motions are divided as equitably as possible among the hearing panels sitting during the week. During weeks when no panels are sitting, motions are divided among the next hearing panels to sit. One active judge of each panel is designated as lead judge in accordance with a rotation schedule set by the clerk. Each member of the panel receives a complete set of papers for those motions requiring panel action. Motions in cases assigned to the oral argument calendar are circulated to the hearing panel rather than to the standard motions panel. The senior active judge on the panel is designated the initiating judge for the panel. Among the matters considered by motions panels are jurisdictional matters; motions for stays, injunctions, and release on bail pending appeal; motions for remand; petitions for original writs; petitions for leave to appeal from interlocutory orders; and requests to reconsider prior procedural rulings by the clerk or a single judge.

Procedural motions

The clerk may prepare, sign, and enter orders or otherwise dispose of a number of matters listed in the court's local rules without submitting them to the court or a judge, unless otherwise directed. Any party adversely affected by an order so entered may move within ten days for reconsideration by a judge or judges of the court. Matters the clerk may dispose of in the first instance include motions and applications for orders that are procedural or relate to the production or filing of the appendix or briefs on appeal; orders for voluntary dismissal of appeals or petitions, or for consent judgment in National Labor Relations Board cases; orders for dismissal for want of prosecution of appeals or petition; orders appointing counsel under the CJA and in certain other cases; bills of costs filed pursuant to Fed. R. App. P. 39(d); and fourteen-day extensions of time in which to file a petition for rehearing or rehearing en banc.

Substantive motions

Motions to dismiss ordinarily may not be filed on grounds other than lack of jurisdiction. A party may file a response to a motion to dismiss within ten days from the date of service of the motion. No motion to af-

firm the judgment appealed from may be filed. Substantive motions are handled by motions panels; when the regular argument panel is serving as the motions panel, it decides substantive motions during the post-argument conference.

Emergency motions

Where counsel can anticipate the filing of an emergency motion, they are expected to notify the clerk in advance that the motion may be filed, its nature, and the relief to be sought. The court's local rules direct counsel to contact the clerk's office by telephone when circumstances preclude filing the emergency motion in Cincinnati. Hearings on emergency motions, as with other motions, are extremely unusual.

IV. Nonargument Decision-Making Practices

In cases scheduled for nonargument disposition under the court's Local Rule 34, a staff attorney prepares a research memorandum and a proposed dispositive order. The staff attorneys' office mails these materials, with the briefs, to panel judges at least thirty days before they sit as an argument panel. During the conference at the end of an argument day, the panel discusses both the argued cases and three or four cases prepared by the staff attorneys for decision without argument. If all three judges agree with the staff recommendation, the decision is filed, with any revisions required by the judges. If, after reviewing the case prepared for nonargument disposition, any judge wants oral argument on the case, the panel refers it to a regular sitting panel for oral argument.

V. Argument Panel Operations

A. Panel composition, sitting schedule, and panel rotation

Each active judge sits eight weeks a year, with six cases being argued on four days each week. In addition, each judge can expect to sit as part of a motions panel one day each sitting week. Argument panels also have submitted to them four cases per day without argument, pursuant to Fed. R. App. P. 34, in which the staff attorneys work up the case, along with motions to file successive habeas corpus petitions and requests for reconsideration of the earlier denial of a certificate of appealability. The circuit executive, at the direction of the chief judge, makes up the schedule of panels. Every six months, each judge is reassigned to a different division with a view toward giving every judge the opportunity to sit with as many different colleagues as possible. The schedules provide for panels within a

division to be scrambled and structured so that every judge sits with each of his or her colleagues in that division at least once every six months.

Usually, each side receives fifteen minutes for oral argument.

B. Assignment of cases to panels

The clerk calendars the cases to be orally argued before the court without knowing the composition of the panel to be assigned for a given session. The clerk balances the calendars by dividing the cases as evenly as possible among the panels according to case type.

Cases remanded from the U.S. Supreme Court for further proceedings are referred for disposition to the panel that decided the case. Where an appeal is brought to the court after an earlier appeal has returned a case to the district court, the original panel determines whether the second appeal should be submitted to it or to another panel at random for decision. Further, where a district judge or a senior judge from another circuit was on the original panel, the current judges on the panel decide whether to recall the judge or to fill the spot with one of the judges who is scheduled to sit at the time.

A death penalty appeal is assigned to a panel as soon as the case is docketed.

C. Judicial preparation for argument: materials and timing

About eight weeks before the hearing, the clerk sends the panel members copies of the briefs for the cases set on the calendar.

D. Disclosure of panel identity

Counsel and others may learn the identity of oral argument panels two weeks before the date of argument by consulting the calendar posted on the court's computer bulletin board system.

VI. Opinion Preparation and Publication

A. Criteria for judgment without opinion

The court may announce its decision from the bench. If so, this is followed by a short written order. On other occasions the court may enter a short order, similar to a judgment order, affirming the judgment for the reasons stated by the district court.

B. Criteria for publication and nonpublication

The court's general policy is a presumption in favor of publication of signed and per curiam opinions. A signed opinion is one in which the

author's name appears at the beginning of the opinion. These opinions are designated for publication unless a majority of the panel deciding the case determines otherwise after considering the court's publication criteria. An order is not designated for publication except at the request of a member of the panel. At the end of each argument day, the panel usually holds a conference concerning that day's cases. At that conference the presiding judge assigns opinion-writing responsibilities. In determining whether to publish a decision, panels consider:

i. whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;
ii. whether it creates or resolves a conflict of authority either within the circuit or between this circuit and another;
iii. whether it discusses a legal or factual issue of continuing public interest;
iv. whether it is accompanied by a concurring or dissenting opinion;
v. whether it reverses the decision below, unless:
   a. the reversal is caused by an intervening change in law or fact, or,
   b. the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;
vi. whether it addresses a lower court or administrative agency decision that has been published; or,
vii. whether it is a decision which has been reviewed by the United States Supreme Court.

C. Prefiling circulation of opinions

In an attempt to reduce intracircuit conflicts and clarify issues, drafts of all proposed opinions that are to be published are circulated among the entire court for comments.

D. Availability of not-for-publication opinions

Opinions not designated for full-text publication are listed in table form in the Federal Reporter and are generally available on LEXIS and Westlaw.

E. Citability of not-for-publication opinions

Citation to unpublished opinions is disfavored except when cited for their preclusive effects. However, citation is allowed if a party believes that an unpublished disposition "has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well." In that event, the party must serve a copy of the unpublished disposition on all parties as well as the court (e.g., as an addendum to a brief).

F. Miscellaneous opinion and publication issues

The court makes its prior panel rule explicit in its internal operating procedure 22.4.1: "Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court."

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for grant of en banc rehearing

A petition must identify a direct conflict between the panel decision and a prior decision of either the Supreme Court or the Sixth Circuit, or assert that the appeal involves a precedent-setting issue of exceptional public importance. The court's local rules caution counsel that errors in the determination of state law or in the facts of the case or the application of precedent to the facts may be grounds for panel rehearing, but not for rehearing en banc.

B. Treatment of petitions for rehearing en banc

A petition for rehearing that is not accompanied by a petition for rehearing en banc is reviewed by panel members only. A petition for rehearing en banc is treated as if it were also a petition for rehearing by the panel. A petition for rehearing en banc does not remove the case from plenary control of the panel. Rather, the petition goes first to the panel. The panel has fourteen days in which to comment on the en banc petition to the en banc coordinator in the clerk's office. If the panel substantially modifies its decision, it provides the coordinator with its modified decision. Counsel have fourteen days after the release of a modified decision in which to withdraw, modify, or maintain the pending petition for rehearing en banc, or to file a new petition. If the panel does not substantially modify its decision, the en banc coordinator circulates the petition and the panel's comments to the en banc court. Any active judge, and any senior or visiting judge who sat on the panel whose decision is the subject of the petition, is entitled to request a poll within fourteen days from the date of circulation of the petition and the panel's comments. If a poll is requested, there is a fourteen-day voting period.

C. Independent action by the court

Any member of the en banc court may request a poll without waiting for a party to file an en banc petition. When a sua sponte request is made, the clerk immediately circulates voting forms to the en banc court.

Any member of the en banc court may suggest that the en banc review be conducted without further briefing or oral argument.

D. Process for rehearing en banc

A response is not necessary unless the court requests one, but if a poll is requested, the clerk will ask for a response if one has not already been requested.

For purposes of a vote granting a rehearing en banc, a majority means a majority of all active judges, including judges who are disqualified from participating in the case. Only Sixth Circuit judges in regular active service may vote on the en banc petition. If the petition is granted, the en banc court consists of all the active judges of the court, any senior judge of the court who sat on the original panel, and any judge who was in regular active service at the time a poll was requested on the petition for rehearing en banc, even if that judge assumes senior status before the en banc proceeding is held.

A grant of a petition for rehearing vacates the panel opinion and judgment, stays the mandate, and returns the case to the docket as a pending appeal.

E. Other ways the court works to avoid conflict and inconsistency

In addition to circulating for-publication opinions before filing, writing judges indicate in a covering note, when appropriate, the fact that the opinion or decision will initiate or continue a conflict with one or more circuits.

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal appeals

There are no special procedures for handling criminal appeals, except that oral argument in some direct criminal appeals is conducted telephonically.

B. Habeas corpus cases and certificates of appealability

In re Certificates of Appealability, 106 F.3d 1306 (6th Cir. 1997), sets forth administrative procedures for all pending cases involving certificates of appealability. When the district court certifies issues for appealability, the order must state which specific issues are certified. If the order does not state the issues, the circuit clerk may remand the matter to the district court for compliance.

Certificates of appealability are generally handled as one-judge motions but are taken to a three-judge Rule 9 panel if necessary.

When the district court certifies only some issues, the court of appeals automatically reviews the remainder of the issues to determine whether to grant the certificate of appealability as to those issues as well. *See In re Certificates of Appealability,* 106 F.3d 1306, 1307 (6th Cir. 1997).

The court provides for the appointment of counsel when a litigant proceeding in forma pauperis files a habeas corpus petition, but its rules do not specify a time of appointment.

IX. Special Procedures for Pro Se Cases

See § X, *infra*.

X. Appellate Procedural Issues Arising Under the Prison Litigation Reform Act

A. The PLRA's filing fee provisions and in forma pauperis status

In Administrative Order No. 97-01, captioned *In re Prison Litigation Reform Act*, 105 F.3d 1131, 1138 (6th Cir. 1997), the chief judge of the Sixth Circuit instructed that, following release from prison, a former inmate is no longer treated as a prisoner for purposes of the PLRA's filing fee provisions.

In *McGore v. Wrigglesworth*, 114 F.3d 601, 607 (6th Cir. 1997), the court concluded that the date that a notice of appeal is deemed filed with the clerk of the district court is the governing date for purposes of computing the amount of the initial partial filing fee under the PLRA. The initial partial filing fee is assessed on the basis of the prisoner's trust fund account for the six months immediately preceding the filing of the notice of appeal.

B. The PLRA's "three strikes" provision and in forma pauperis status

In *Wilson v. Yaklich*, 148 F.3d 596, 604 (6th Cir. 1998), *cert. denied,* 119 S. Ct. 1028, 67 U.S.L.W. 3323 (U.S. Feb. 22, 1999), 98–715, the court held that a case dismissed as frivolous before the PLRA was enacted would count as a strike for purposes of the PLRA's three strikes provision.

United States Court of Appeals for the Seventh Circuit

I. General Information

The Seventh Circuit encompasses Illinois, Indiana, and Wisconsin. The Seventh Circuit Court of Appeals is headquartered in Chicago.

The court has eleven authorized judgeships. In FY 1998 it had six sitting senior judges and no vacancies.

A. Judges and panels

Orientation and assignments for new judges

The chief judge, other judges, and staff help orient new judges. Recently appointed judges have all selected as one of their secretaries an employee who has worked at the court for a number of years. Frequently, new judges have hired staff attorneys as their law clerks. The court considers it essential for orienting new judges to have someone on the judge's staff who is familiar with the formal and informal procedures of the court.

Visiting judges

The court has not used visiting judges for the last several years. When the court did, the judges were given a visiting judge manual and assigned a court secretary as liaison to the court. In addition, the chief judge and the circuit executive were liaisons.

Panels

In addition to argument panels, the court uses motions panels, "Rule 34" panels, and death penalty panels. Motions panels are constituted for one-week periods. Rule 34 panels are appointed for four months and may include both active and senior judges. These panels decide nonargued cases. Death penalty panels are assigned when the appeal is filed.

B. Central staff

Staff attorneys' office

The court is authorized twenty staff attorneys. In addition, some judges designate law clerk positions to serve in the staff attorneys' office. Other than supervisory staff, the staff attorneys are usually recent law school graduates or lawyers with only a brief stint in private practice. They are typically appointed for two-year terms. The staff attorneys assist the judges with motions work and preparation of cases for disposition on the

merits; one oversees all death penalty appeals. Staff attorneys also act as floating law clerks who work for judges who need temporary additional help.

Settlement conference program

The court employs two settlement conference attorneys and plans to hire a third. *See* § II.C, *infra*.

C. Technological resources

The court has both intranet and Internet web sites that include docket information, Federal Rules of Appellate Procedure, circuit rules, operating procedures, Criminal Justice Act plan, practitioner's handbook, and other relevant information. In large multicounsel cases the court has notified counsel that court orders will be sent to lead counsel and then posted on the web site to save time and money.

The court also uses imaging technology to scan all short records, including the trial court docket, the notice of appeal, and the appealed decision. This allows staff to electronically access that information to review for jurisdiction, settlement, or motions.

Courtrooms are wired for the hearing impaired.

II. Intake, Screening, and Settlement Programs

A. Intake

Information provided by attorneys

In all case types, appellants must file a docketing statement, either in the district court when the notice of appeal is filed or in the court of appeals within seven days thereafter. Appellees must file a docketing statement within fourteen days of the appellant's statement if they find the appellant's statement not to be complete and correct. Among other things, docketing statements (1) provide a complete jurisdictional history; (2) identify prior or related appellate proceedings; (3) describe any litigation in the district court that, although not appealed, arises out of the same criminal conviction or has been designated by the district court as satisfying the criteria of 28 U.S.C. § 1915(g); and (4) identify, in the case of a collateral attack on a criminal conviction, the prisoner's current place of confinement and the current warden.

Information provided to attorneys

When an appeal is filed, the clerk sends a packet of information about court procedures and rules to counsel listed in the district court.

B. Screening

Screening for jurisdiction

Court staff review each new appeal shortly after it is docketed to determine whether potential jurisdictional problems exist. Generally, staff review only the "short record," which consists of the notice of appeal, the docketing statement (if filed), the judgment or order appealed from, and the district court docket sheet. If court staff detect a problem, an order is issued identifying the problem and giving the appellant a choice of explanation or voluntary dismissal; the appellees, too, may be asked for their views on jurisdictional problems. After the parties respond, court staff present the papers to the motions panel for decision.

Screening for argument/nonargument disposition

If one judge wants oral argument, the case will be argued. A party can seek to waive oral argument by filing a formal motion with proof of service on all other counsel or parties. Additionally, a party may, but is not required to, include in the opening briefs a statement of reasons why oral argument is or is not appropriate under the court's criteria.

After briefs are filed, the clerk's office sends the circuit executive all counseled criminal and civil appeals and pro se appeals other than those by prisoners. He makes a preliminary determination whether oral argument is needed and, if so, how much time should be allocated. Staff attorneys receive all pro se prisoner appeals, nonprisoner pro se appeals in which argument will not be heard, and counseled cases in which the litigants stipulate to submit without argument. Staff attorneys prepare these cases for nonargument disposition.

Screening for case weighting or issue tracking

When the circuit executive reviews the briefs in the cases routed to him, he gets a general sense of the difficulty of cases and the issues they present, and he uses this information in the case-assignment process (*see* § V.B, *infra*).

Screening for other case-management issues

Along with the review to identify cases that should be consolidated for briefing or for argument before the same panel, court staff also review newly docketed appeals to ensure that indigent defendants in criminal appeals have court-appointed counsel and to determine whether the appeal is successive pursuant to Internal Operating Procedure 6(b).

C. Settlement conference program

The court has a settlement conference program to encourage and facilitate the settlement of civil appeals. About three program-eligible appeals in five are selected at random to participate in the settlement conference program. In addition, if a party to a case not selected but otherwise eligible requests a settlement conference, the settlement conference office will schedule one, time permitting. Once a case is selected, participation in any conference scheduled under the program, including any follow-up conferences, is mandatory. The court's settlement conference attorneys conduct all conferences.

III. Briefing and Motions Practice

A. Briefing

General

Briefing schedules are automatically set unless the appeal has multiple appellants, appellees, or appeals. In those cases a court staff member conducts a scheduling conference. Unless the court orders otherwise, the time for filing briefs, except in agency cases, runs from the date the appeal is docketed, regardless of the completeness of the record at the time of docketing.

Briefs on digital media

Unless a brief is not available on digital media, the court requires parties to file one copy of their briefs on digital media and to serve one copy on a disk to each separately represented party.

B. Motions practice

Composition and operation of motions panels

Motions panel responsibilities are rotated among the judges. If a single judge to whom a motion is presented orders a response, the motion and response will ordinarily be presented to the same judge for ruling. Oral argument is rarely heard on any motion and then only by court order.

Procedural motions

The court's internal operating procedures categorize motions as routine or nonroutine. Both kinds are reviewed initially by a staff attorney. If a nonroutine motion requires immediate action, the staff attorney immediately presents it to the motions judge and, if necessary, a panel. If it does not require immediate action, the staff attorney may wait a few days

for a response, or may order a response, before forwarding the motion to the motions judge or panel.

For routine motions (e.g., nondispositive motions, such as motions to extend time, motions to dismiss by agreement, motions to supplement the record) a staff attorney reviews the motion, any supporting affidavits, and responses. The staff attorney then prepares an order in the name of the court either granting or denying the motion or requesting a response. The staff attorney also issues orders dismissing appeals for failure to pay the docketing fee, for failure to file docketing statements, and for failure to file appellant's or petitioner's brief. While preparing the order, the staff attorney consults with the motions judge if necessary. Once a case has been assigned for oral argument or submitted, or after an appeal has actually been orally argued or submitted for decision without oral argument, the staff attorney must consult the presiding judge of the panel regarding motions in that case that would otherwise be considered routine and brought to the motions judge.

A party aggrieved by the court order may petition for reconsideration by motion. The court staff then presents the motion to reconsider to the motions judge or panel.

Substantive motions

A staff attorney reviews substantive motions and presents them to the motions judge or the motions panel as appropriate. The judge or panel decides the motion and directs the staff attorney to prepare the order. If the order states detailed reasons for the decision, the staff attorney takes the original order to the motions judge for approval. Any other judge on the motions panel may also ask to see the order before it is entered.

Matters that generally require three judges to act include dismissal or other final determination of an appeal or other proceeding, unless the dismissal is by stipulation or is for procedural reasons. Three judges are also required to deny a motion to expedite an appeal when the denial may result in the mooting of the appeal. Stays and injunctions also require three judges. Motions requiring at least two judges include requests for bail, denials of certificates of appealability, and denials of leave to proceed on appeal in forma pauperis. A single judge may decide other motions and may decide motions ordinarily decided by more than one judge if it is in the interest of expediting a decision or for other good cause.

Emergency motions

Staff attorneys bring emergency motions to the motions judge and panel immediately after they are filed. There is a procedure for selecting a substitute judge when a member of the panel is not available.

Special topics or problems regarding motions

If a party properly files a response to a motion after the court has ruled on the motion adversely to the respondent, the court construes the response as a motion to reconsider and issues a new order stating this fact and ruling on the motion.

IV. Nonargument Decision-Making Practices

After the circuit executive preliminarily determines that a case is suitable for disposition without oral argument, a staff attorney studies the briefs and record and prepares a draft memorandum order in the style of a proposed reasoned order (not a bench memorandum). The staff attorney then meets with a Rule 34 panel of three judges to present the case. After the judges decide which judge will take primary responsibility for the case, the staff attorney works with the authoring judge in preparing the opinion or order. If a judge opts to place the case on the oral argument calendar rather than decide it at the Rule 34 conference, the staff attorney may continue to work on the case after it is argued. The Rule 34 panel will decide if a case to be argued should be heard by that panel or by a randomly drawn panel. That decision is based on whether judicial time will be saved by leaving the case with the Rule 34 panel. If the panel determines that a pro se case should be argued, the court will usually appoint counsel to brief and argue the appeal.

V. Argument Panel Operations

A. Panel composition, sitting schedules, and panel rotation

The court schedules argument on about 125 days a year. On about twelve of those days, two panels sit. On the other days, there is only one panel. Panel membership changes daily. Assignment of judges to panels is random except that the circuit executive uses a computer-generated table to ensure that over a two-year period a judge sits approximately the same number of times with every other judge of the court.

Each active judge serves on approximately thirty-four panels each year. Judges sit one or two days per week. An argument panel generally hears six appeals each day, with argument in each limited to ten to twenty

minutes per side unless extended because of complexity. On eighteen days a year, the court holds short argument days with nine cases of about ten minutes per side. These cases generally involve a simple issue, and the staff attorneys prepare a memorandum on each case and work with the authoring judge in preparing the decision. Having either six or nine cases a day makes assignment of the authoring judge responsibilities more equitable.

The court has allowed counsel who cannot get to the court because of an emergency to argue using a high-quality courtroom speakerphone. Counsel can use any telephone anywhere. Often the attorney will use the telephone in a trial judge's chambers, thus eliminating scheduling conflicts between trial and appellate courts.

B. Assignment of cases to panels

The circuit executive reviews the briefs and sets the time for oral argument in each appeal to be argued. He then assembles a week's worth of cases with six cases to be argued on each of the five days, balancing civil and criminal cases and easy and difficult cases. The calendar is circulated to the judges, who note the days they cannot sit because of date conflicts or conflicts in individual cases. Panels of judges are then randomly assigned for each day. The court's local rules set out the priority for scheduling cases on argument calendars.

In setting the calendar, the court considers several factors, including the following:

- *Issue similarity.* The court schedules appeals with the same issue for argument before the same panel on the same day.
- *Counsel convenience*. The court entertains requests from out-of-town counsel to schedule more than one appeal for argument by that attorney on the same or successive days.
- *Remands.* A case remanded from the Supreme Court for further proceedings is ordinarily reassigned to the same panel that heard the case previously. If a member of that panel was a visiting judge and it is inconvenient for the visitor to participate further, that judge may be replaced by random designation.
- *Death penalty cases*. An argument in a death penalty appeal is scheduled before the panel that was randomly assigned when the appeal was docketed. All subsequent matters and appeals are heard by that panel.

- *Successive appeals*. When the court has heard an earlier appeal in the same matter, the briefs in the later matter are sent to the same panel. Unless there is insufficient overlap between the two appeals, the first panel decides the subsequent appeal on the merits. If the subsequent appeal presents different issues but involves the same essential facts, the panel decides the subsequent appeal unless it concludes that judicial economy considerations do not support retaining the case, in which event the panel returns the case for reassignment.
- *Successive collateral attacks*. A panel that decides a federal or state habeas corpus appeal also rules on second or successive appeals.
- *Cases handled by motions panels*. When a motions panel decides that a motion or petition should be set for oral argument or the appeal expedited, it may decide to handle the appeal or have it assigned to a new panel. The standard used is whether the initial panel had to study the appeal in depth to decide the motion; if so, the panel retains the case to save time.

C. Staff role in working up cases for argument calendar

Staff attorneys participate in some argued cases, particularly those heard on "short argument days." Staff attorneys prepare bench memoranda for distribution to the judges before argument and may help prepare the disposition order or opinion, but they do not attend the judges' conference.

D. Judicial preparation for argument: materials and timing

The clerk distributes the briefs and other necessary materials to the panel judges substantially in advance of the argument date. Each judge reads the briefs prior to oral argument. There is no preassignment of opinion writing responsibility.

E. Disclosure of panel identity

Panel identity is announced the day of argument except when there is a subsequent hearing in an already argued case or a successive appeal.

VI. Opinion Preparation and Publication

A. Types of dispositions and criteria for publication

The court may dispose of an appeal by a reasoned order or by an opinion; opinions may be signed or per curiam. Orders are not published and may not be cited. Opinions are published.

A majority of the panel may decide to dispose of an appeal by unpublished order. The court's local rules recognize that a single federal judge has the right to make an opinion available for publication, but note that under circuit policy, "it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish." The court's rules set out a detailed description of how it implements its opinion publication policy, the purpose of which is to reduce the proliferation of published opinions.

The court's general criteria for publishing indicate that a published opinion will be filed when the decision:

(i) establishes a new, or changes an existing, rule of law;
(ii) involves an issue of continuing public interest;
(iii) criticizes or questions existing law;
(iv) constitutes a significant and non-duplicative contribution to legal literature
  (A) by a historical review of law,
  (B) by describing legislative history, or
  (C) by resolving or creating a conflict in the law;
(v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or
(vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.

In addition, opinions in cases decided on a divided vote are usually published, as are opinions in cases decided en banc.

When the decision does not satisfy the criteria for publication, the panel files it as an unpublished order. The order ordinarily contains reasons for the judgment, but may not if the court has announced its decision and reasons from the bench. A statement of facts may be omitted from unpublished orders or may not be complete or detailed.

B. Criteria for judgment without opinion

Other than some denials of petitions for writs of mandamus or summary enforcement of National Labor Relations Board decisions, there are no matters without a reasoned decision.

C. Prefiling circulation of opinions

The court does not circulate opinions to nonpanel judges before filing except for opinions circulated pursuant to Circuit Rule 40(e), which all active judges must review. *See* § VII.C, *infra*.

D. Availability of not-for-publication opinions

Unpublished orders are made available for listing periodically in the Federal Reporter but show only title, docket number, date, district or agency appealed from with citation to prior opinion (if reported), and judgment or operative words of the order, such as "affirmed," "enforced," "reversed," or "reversed and remanded." Unpublished orders can be found on LEXIS and Westlaw. They are distributed to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and the news media, and are available to the public on the same basis as any other pleading in the case.

E. Citability of not-for-publication opinions

The court does not permit parties to cite its unpublished orders in any written document or oral argument to any federal court within the Seventh Circuit, except to support a claim of res judicata, collateral estoppel, or law of the case. The court's rules also forbid courts of the Seventh Circuit to cite such orders.

F. Miscellaneous opinion and publication issues

Changing publication status

Any person may request that an unpublished order be issued as a published opinion, by filing a motion stating why publication would be consistent with the publication guidelines in the court's rules.

Presumptive times for action

The court has set for itself goals and presumptive times for action to expedite preparation and release of opinions. The court anticipates that in most cases judges will take less time than the standard, but that in some cases circumstances will make adherence to the norm imprudent, noting that "Every judge should, and may, take the time required for adequate study and reflection." The details of these goals and presumptive times are taken from the court's internal operating procedures.

a. A judge assigned to write a draft after a case has been identified at conference as suitable for disposition by a brief unpublished order should circulate the draft to the other members of the panel within twenty-one days of the date the case was argued or submitted.

b. A judge assigned to write a published opinion should circulate the draft to the other members of the panel within 90 days of the date the case was argued or submitted. When the case is unusually complex, extended research is required, or other special circumstances

apply, however, the writing judge may extend this time to 180 days by giving appropriate notice to the other members of the panel.

c. Responding to drafts circulated by other judges is the first order of business. Every judge should respond—by approval, memorandum suggesting changes, or notice that a separate opinion is under active consideration—within ten days of the circulation of a draft.

d. As a rule, writing separate concurring or dissenting opinions takes precedence over all business other than initial responses to newly circulated drafts. Separate opinions should be circulated to the panel within twenty-eight days of the initial response.

e. Once the opinion has issued, judges should act promptly on any further motions. In particular, members of the panel should vote within ten days on any petition for rehearing. Under Internal Operating Procedure 5, judges have ten days to request an answer to a suggestion of rehearing en banc, and ten days to call for a vote on the suggestion once the answer has been received. Once a judge has called for a vote, all other judges should register their votes within ten days. Once this time (including extensions described below) has passed, and sufficient votes have been received to grant or deny the petition for rehearing or suggestion of rehearing en banc, the court will enter an order to that effect without waiting for additional responses.

f. Each judge should establish a tickler system designed to ensure adherence to these norms. When one chambers does not receive a draft, vote or response within the time presumptively established, secretaries or law clerks should inquire. This step not only catches communications lost in transmission but also serves as a backup reminder system.

g. A judge who believes that additional time is required to permit full consideration should notify the other members of the panel to that effect. If the judge believes that more than thirty days (in the case of opinions) or ten days (in the case of other actions), in addition to the time presumptively established by this procedure, is essential, the judge also should notify the chief judge of the delay and the reasons for it.

h. The presiding judge of a panel should reassign the case if the judge initially assigned to draft the order or opinion has not circulated the draft within the time provided by paragraphs (a) and (b) of this procedure, plus the extra time allowed by paragraph (g), unless in consultation with the assigned author and the chief judge the presiding judge decides that reassignment would delay disposition still further.

i. If two members of the panel have agreed on an opinion, and the third member does not respond within the time provided by paragraph (c), or does not complete a separate opinion within the time presumptively established by paragraphs (d) and (g), the writing judge should inquire of the third member whether a response is imminent. If further delay is anticipated, the majority should issue the opinion with a notation that the third judge reserves the right to file a separate opinion later.

j. When the presumptive time for action established by this procedure is ten days, the time may be extended on notice that a judge is unavailable to act on judicial business. The time specified by this notice is added to the time presumptively established by this procedure.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for grant of en banc rehearing

In seeking en banc review, a party must state concisely at the beginning of the petition why the appeal is of exceptional importance or the decision of the U.S. Supreme Court, the Court of Appeals for the Seventh Circuit, or other court of appeals the panel decision is claimed to be in conflict with.

B. Treatment of petitions for rehearing en banc

The court treats a petition for rehearing en banc, however ambiguously styled, as both a petition for rehearing by the panel and a petition for rehearing en banc. Petitions for rehearing that do not seek rehearing en banc are distributed only to the panel. A petition for rehearing en banc is distributed to all judges entitled to vote on it.

C. Independent action by the court

Although most opinions are not circulated before filing, the court's Rule 40(e) requires circulation to active judges of the court if a proposed panel opinion adopts a position that would overrule a prior decision of the court, or would create a conflict between or among circuits. In the discretion of the panel, a proposed opinion that would establish a new rule or procedure may be similarly circulated before it is issued. Upon review, any active judge may call for a vote on whether the court should take the case en banc. If there is no majority vote to do so, the opinion, when published, contains a footnote that reflects the circulation and the decision not to rehear the matter en banc.

D. Process for rehearing en banc

The court usually requests a response to a petition for rehearing en banc. Generally, the response occurs prior to polling. The request must be made within ten days by any active judge or panel judge.

For purposes of a vote granting a rehearing en banc, a majority is defined as a majority of all active judges not disqualified.

A grant of a petition for rehearing en banc vacates the panel opinion and stays the mandate, returning the case to the docket for scheduling.

The court schedules two or three days per year for en banc sittings.

E. Sanctions for unmeritorious petitions

The court has no written rule on this, but Fed. R. App. P. 38 grants the court authority to award damages and costs in frivolous appeals.

F. Other ways the court works to avoid conflict and inconsistency

Sometimes cases in a closely related area of the law but with different issues and different parties are scheduled for the same day before the same panel of judges. Multiple appeals from the same district court case are usually consolidated for argument, but sometimes they are separately argued on the same day before the same panel. If a case presents the same issue as a case currently pending before the court or before the Supreme Court, the later case is held pending the decision in the controlling case. After the lead case is decided, the court asks parties to file supplemental statements in light of the decision.

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal appeals

Immediately after the appellant's brief is filed, court staff review criminal appeals for purposes of setting oral argument time and calendaring these cases promptly.

B. Habeas corpus cases and certificates of appealability

Requests to file successive habeas corpus petitions in the district court

A motion pursuant to 28 U.S.C. § 2244(b)(3) to file a successive habeas corpus petition in the district court is docketed within one day of receipt and is immediately given to one of two staff attorneys assigned to this duty. The staff attorney reviews the application immediately. The court does not wait for the filing of a response and a reply before considering the application, but considers those documents when filed. If the appli-

cation is facially insufficient, the staff attorney presents it orally to the presiding judge of the panel. Otherwise, the staff attorney prepares a memorandum discussing the merits of the application, makes a recommendation, and usually attaches a draft order, all of which go to the panel of judges. The memorandum alerts the judges to the thirty-day deadline for a ruling. The staff attorney will then issue the order according to the panel's directions. There are strict time limits for the staff attorney's work.

Certificates of appealability

The court generally requires an application for a certificate of appealability to be presented first to the district court for a ruling. However, the court of appeals may accept cases directly when it deems it appropriate. *See Williams v. United States,* 150 F.3d 639, 640 (7th Cir. 1998).

When a prisoner files an application for a certificate of appealability (or a notice of appeal that is construed as such an application), the court issues an administrative order regarding fee status, docketing statements, or potential jurisdictional problems. Once the appeal passes the administrative screening mechanisms, the appeal is assigned to a staff attorney along with any pending motions. The staff attorney makes a preliminary determination of whether the applicant has made a substantial showing of the denial of a constitutional right and then makes an oral or written presentation to one or more judges. Denial of a certificate of appealability requires at least two judges.

The court of appeals limits appealable issues to those in the certificate of appealability, but the court may amend the certificate to add issues. Sylvester v. Hanks, 140 F.3d 713 (7th Cir. 1998). If a judge decides to grant the certificate of appealability on a specific issue and the prisoner has appeared pro se and is indigent, the staff attorney may recommend that counsel be appointed. The staff attorney helps the judges with drafting any orders. If a certificate is granted, the case proceeds to briefing and decision on the merits.

In death penalty cases, requests for a stay of execution and an application for a certificate of appealability are handled together.

Special procedures for capital habeas corpus cases

In death penalty appeals, panels are randomly assigned when the appeal is docketed, and the panel retains the case through all appeals. There is one staff attorney who oversees these cases.

IX. Special Procedures for Pro Se Cases

See § X, *infra*.

X. Appellate Procedural Issues Arising Under the Prison Litigation Reform Act

A. The PLRA's filing fee provisions and in forma pauperis status

At the time a prisoner civil rights appeal is docketed, a modified Circuit Rule 3(b) fee letter is issued, which advises the pro se prisoner to pay the fee or file a motion in the district court for leave to appeal and pay the fee in installments. The letter outlines the prisoner's obligations throughout the fee status process. The letter also abates further proceedings until the fee status is resolved. Court staff specifically assigned to PLRA cases monitor the case and route it appropriately once the fee status has been determined. If the prisoner pays the entire fee or makes the court-approved initial installment payment on the fee, the case is checked for jurisdiction. If there is jurisdiction, a briefing schedule is set. If a motion for appointment of counsel is filed with the request to allow the payment of the fee in installments, both are considered by the court at the same time.

In *Robbins v. Switzer*, 104 F.3d 895, 897–98 (7th Cir. 1997), the court concluded that, upon release from prison, a former inmate's obligation to pay filing fees on appeal continues to be governed by the PLRA.

The PLRA's filing fee provisions do not apply to appeals pending on the date of the PLRA's enactment. Thurman v. Gramley, 97 F.3d 185, 188 (7th Cir. 1996).

B. The PLRA's "three strikes" provision and in forma pauperis status

Civil cases from prisoners are screened pursuant to 28 U.S.C. § 1915(g) for purposes of determining whether the litigant has had three or more cases dismissed for being frivolous, malicious, or failing to state a claim. For purposes of the PLRA's three strikes provision, the court counts as a strike a dismissal for frivolousness before the PLRA's enactment. Once a third strike is declared, appeals already pending proceed because the PLRA's three strikes provision applies only to the filing of new cases or new appeals and not to the disposition of pending appeals. Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996).

United States Court of Appeals for the Eighth Circuit

I. General Information

The Eighth Circuit encompasses Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. The Eighth Circuit Court of Appeals is headquartered in St. Louis; panels also sit regularly in St. Paul, Minnesota, where the court maintains a branch office. Sessions are held occasionally at other locations in the circuit, including special sessions at law schools around the circuit.

The court has eleven authorized judgeships. In FY 1998 it had seven sitting senior judges and 10.8 vacant judge-months.

A. Judges and panels

Orientation and assignments for new judges

The court does not have a formal orientation program or any written materials that it furnishes to a new judge. The court assigns a "buddy" judge, usually someone in the new judge's city or state. New judges may take a slightly reduced caseload for a very short period of time, but most new judges choose to take a full caseload immediately.

Visiting judges

The court provides a package of materials to visiting judges, including information about clerk's office procedures and opinion preparation. However, since the materials are unique to the court's requirements (and because the court mails the package to each judge weeks in advance of the session), the court has no plans to post the information on the J-Net.

Panels

In addition to argument panels, the court uses nonargument (screening) panels and administrative panels. The court has at least three screening panels operating at any one time. These panels consider the cases submitted without oral argument, both pro se and counseled. The panels are generally appointed for a term of six months, and all active judges except the chief judge serve on them; senior judges also occasionally serve. Administrative panels handle motions and other preliminary matters not delegated to the clerk, including emergencies. The panels consist of three judges, although one or two judges may decide some matters. *See* § III, *infra*.

B. Central staff

Staff attorneys' office

The court has a staff attorney allocation of 18.7 supervisory and line attorney positions. All staff attorneys are located in St. Louis and are supervised by a senior staff attorney.

Clerk's office

The clerk's office is divided into several case-processing units, one each for case opening, case monitoring, calendar and records management, and postsubmission case management.

Settlement program director

The court employs a program director, who conducts all settlement conferences. *See* § II.C, *infra*.

II. Intake, Screening, and Settlement Programs

A. Intake

Information provided by attorneys

In civil cases other than those brought under 28 U.S.C. § 2241, 2254, or 2255, appellants must file an appeal information form (Form A), elect a method of producing the record, designate the record in appropriate cases, and submit a statement of issues. Within ten days of filing the notice of appeal, an appellant must certify that the transcript has been ordered or that no transcript is required.

Appellees may file a supplemental statement (Form B) and have similar requirements regarding additional record designation and transcript orders, if any.

These forms allow the court to track the nature of its caseload, provide the settlement director with necessary information about the case, and call the parties' attention to Fed. R. App. P. 4(a)(4), to prevent premature appeals.

Information provided to attorneys

Prefiling. The court's internal operating procedures are designed to forestall inappropriate filings and jurisdictional defects by recommending that counsel consider several matters before filing an appeal: Is there subject matter jurisdiction? Has the district court fully resolved all issues in the case? If not, is the order appropriate for interlocutory appeal under § 1292(b), or has the district court entered a final order under Fed. R. Civ. P. 54(b)? Is there a pending motion listed in Fed. R. App. P. 4(a)(4)

that would make the appeal premature? Is the appeal timely? Have the points of error been properly preserved? Does the appeal have real merit, or is it frivolous? Is counsel appealing from the appropriate final order?

Postfiling. The court provides schedules summarizing the stages of typical criminal and civil appeals. Briefing checklists and other practice aids are provided at the time the case is docketed. The clerk's office will also lend counsel sample briefs and appendices to help them comply with form requirements.

B. Screening

The chief judge may appoint the clerk, the senior staff attorney, or a panel of judges to screen cases awaiting disposition. In practice, screening is performed by the clerk's office. The court uses three disposition tracks: without oral argument, with abbreviated argument, and with full argument. The panel assigned to handle the case may change the case's classification.

Screening for jurisdiction

Cases are screened by the clerk, chief deputy, and deputy-in-charge of the branch office for jurisdictional problems. Jurisdictional issues are referred to the Motions Practice Unit (a subdivision of the staff attorneys' office) or directly to an administrative panel. Jurisdictional questions may be raised by an appellee's motion to dismiss an appeal on the ground that it is not within the court's jurisdiction; in general, such a motion must be filed within fifteen days of the docketing of the appeal.

Screening for argument/nonargument disposition

All pro se or prisoner appeals, *Anders* brief cases, and criminal appeals involving only Sentencing Guideline issues are automatically referred to staff attorneys, who work them up for nonargument disposition.

Appellants are required to file with their opening brief a one-page statement explaining why oral argument should or should not be heard and, if argument is requested, an indication of the argument time requested. The appellee may respond but is not required to do so. If oral argument is denied, a party may file a written request, within five days, for the panel to reclassify and grant oral argument.

The clerk of court, the chief deputy, and the deputy-in-charge screen all civil cases when the appellee's brief is filed. Cases not scheduled for oral argument at that stage go to a nonargument (screening) panel, which may, at the request of any judge on the panel, refer the case back to

the clerk's office for placement on the oral argument calendar. Cases in which both parties waive argument are generally not argued, but the court may order argument.

The clerk screens criminal cases when the appellant's brief is filed. Cases raising only Sentencing Guideline issues are noted by the clerk during the screening process and routed to the staff attorney for more extensive screening.

If the parties file no objection to the screening decision to decide the case without oral argument, the case goes to a nonargument (screening) panel with a staff attorney memorandum. If a party did object to the classification as a nonargument case, the screening panel rules on the objection. Whether or not there is such an objection, if the panel agrees with the staff recommendation that the case be decided without argument, the panel decides the merits of the appeal. If the panel concludes that the case should be argued, the case is scheduled for oral argument before a panel that will include at least two of the three judges who sustained the objection. The cases are referred to the panels on a rotating basis as they are prepared, and case materials are mailed simultaneously to all three judges.

C. Settlement program

The court's settlement program is designed to help the parties achieve a consensual resolution and to limit or clarify issues on appeal. The director of the settlement program reviews all program-eligible cases for settlement potential. For most cases, this includes discussing settlement possibilities with parties' counsel. If it appears that a joint settlement conference is warranted and if the parties consent, the director schedules a conference and serves as a mediator. Participation in the program is completely voluntary.

III. Briefing and Motions Practice

A. Briefing

General

The clerk's office issues a briefing schedule when an appeal is docketed. If a cross-appeal is filed, the clerk issues a revised schedule but generally does not change the original time for filing appellant's brief. The court has an expedited calendar for cases that appear uncomplicated or present a single issue. Participation in this program is voluntary; the court may request shorter briefs on an expedited schedule, but will not require par-

ties to waive the normal time or brief length provisions of the Federal Rules of Appellate Procedure.

Supplemental briefs are not permitted without leave of court. If the court needs additional information or argument on specific issues after the case is argued or submitted, it will request supplemental briefs. However, counsel may by letter call the court's attention to an intervening decision or other development, in accordance with Fed. R. App. P. 28(j).

Briefs on digital media

In addition to other briefing requirements, the court requires parties who prepare their briefs on a computer to provide the clerk and each separately represented party with a 3.5-inch computer diskette containing the full text of the brief. The party must also certify that the diskette has been scanned for viruses and is virus-free.

B. Motions practice

Composition and operation of motions panels

The three-judge administrative panels decide presubmission motions and other preliminary issues the clerk is not authorized to handle. Among the matters these panels decide are (1) motions for leave to appeal under 28 U.S.C. § 1292(b); (2) motions for leave to proceed in forma pauperis; (3) applications for a certificate of appealability under 28 U.S.C. § 2254 when the district court has denied a certificate; (4) motions for appointment of counsel; (5) motions for production of the transcript at government expense; (6) motions for bond pending appeal; (7) applications for stay pending appeal and applications for peremptory writs of mandamus and prohibition; (8) motions to dismiss for lack of jurisdiction; (9) procedural issues; and (10) emergency and special matters.

Although these motions are typically referred to an administrative panel, some matters may be decided by one or two judges.

By local rule the court has designated certain types of procedural motions to the clerk for decision. Generally, these motions involve case-management issues such as extension of time, preparation of the record, the status of parties, and withdrawal of retained counsel. While many referrals come directly from the clerk's office, the Motions Practice Unit also makes referrals, such as motions for leave to proceed in forma pauperis, motions for appointment of counsel, and applications for certificates of probable cause.

Oral argument on motions is not allowed unless the court requests it, which it seldom does.

Emergency motions

The court instructs counsel to telephone the clerk for instructions in emergency matters. Panels may be convened for emergency situations. At the court's initiative, conference telephone calls are used for the initial presentation of an emergency stay request or writ application. If necessary, application for temporary emergency relief may be made to a single circuit judge, but the court prefers to have counsel consult with the clerk's office whenever possible.

IV. Nonargument Decision-Making Practices

Cases screened by staff for nonargument disposition are sent to a nonargument (screening) panel with a staff attorney memorandum. If a party has objected to the nonargument classification, the screening panel rules on the objection. Whether or not there is such an objection, if the panel agrees with the staff recommendation that the case be decided without argument, the panel decides the merits of the appeal. If the panel concludes that the case should be argued, the case is scheduled for oral argument.

V. Argument Panel Operations

A. Panel composition, sitting schedules, and panel rotation

Along with active circuit judges of the court, argument panels may include senior judges, district judges, and visiting judges. The clerk's office prepares a proposed calendar seven to eight weeks before each argument session. After revising the draft calendar as necessary to accommodate judges' conflicts, the clerk mails it to counsel about one month before the session.

The court of appeals normally sits for one week of each month from September through June. Each panel normally hears arguments in five cases each day. The composition of argument panels changes every month and within each court session. Judges are not constantly reshuffled within a session, and it is not unusual for the same judges to sit together for several days of the session. However, some rearrangement is common, as senior judges, district judges, and other visitors frequently do not sit for the entire session.

B. Assignment of cases to panels

Cases are assigned to panels in the argument panel construction process described above. Cases ready for argument are automatically placed on

the next available argument calendar, but criminal, habeas corpus, and court-expedited cases get the highest priority.

C. Staff role in working up cases for argument calendar

The court's central staff attorneys infrequently assist judges with argued cases.

D. Judicial preparation for argument: materials and timing

The clerk sends the briefs and designated record to argument panels about four weeks before the argument. Some judges draft preargument memoranda in some cases; all judges read the briefs before argument.

E. Disclosure of panel identity

The panel (subject to change) that will hear an argued case is disclosed when counsel are notified of the argument date, usually about four weeks before argument.

VI. Opinion Preparation and Publication

A. Types of dispositions and criteria for publication

The court rarely rules from the bench. It issues signed opinions, per curiam opinions, and dispositive orders. The nature of the opinion to be issued is normally decided during the case conference and assigned by the presiding judge to a panel member.

The court's general policy is that it is unnecessary for the court to write an opinion in every case or to publish every opinion written. A disposition without opinion or with an unpublished opinion does not mean that the case is considered unimportant but that a published opinion would not add to the body of law or have value as precedent.

The court or a panel determines which of its opinions are to be published, but any judge may make his or her opinions available for publication. The decision to publish an opinion is ordinarily made before opinion preparation.

The court's publication plan recommends publication when a case or opinion:

1. establishes a new rule of law or questions or changes an existing rule of law in the circuit;
2. is a new interpretation of, or conflicts with, a decision of a federal or state appellate court;
3. applies an established rule of law to a factual situation significantly different from that in published opinions;

4. involves a legal or factual issue of continuing or unusual public or legal interest;
5. does not accept the rationale of a previously published opinion in that case; or
6. is a significant contribution to legal literature through historical review or resolution of an apparent conflict.

Additionally, the court always publishes opinions in cases decided by the court en banc.

B. Summary action

The court may on its own motion summarily dispose of any appeal without notice. The court will dismiss the appeal if it has no jurisdiction or if the appeal is frivolous and entirely without merit. The court may affirm or reverse a decision summarily when the questions presented do not require further consideration, and an opinion will not be written in such cases.

In nonfrivolous cases, the court may also affirm or enforce the judgment reviewed without an opinion if an opinion would have no precedential value and the matter before the court is disposed of because

1. a judgment of the district court is based on findings of fact that are not clearly erroneous;
2. the evidence in support of a jury verdict is not insufficient;
3. the order of an administrative agency is supported by substantial evidence on the record as a whole; or
4. no error of law appears.

In such instances, the appeal may be disposed of with a single word ("Affirmed" or "Enforced") and a citation to the applicable circuit rule.

C. Prefiling circulation of opinions

Neither published nor unpublished opinions are circulated to nonpanel judges before they are issued.

D. Availability of not-for-publication opinions

Unpublished opinions are available on the Web site maintained by Washington University School of Law (http://ls.wustl.edu/8thCourt/index.html), the court's Appellate Bulletin Board System (similar to PACER), and on LEXIS and Westlaw. Interested parties may purchase a subscription to the court's slip opinions, including those not prepared for publication.

E. Citability of not-for-publication opinions

The court does not favor citation to its unpublished opinions unless citation is necessary for their preclusive effect. However, the court's rules permit citation "if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well." When unpublished opinions are cited, their unpublished status must be indicated, and the offering party must attach a copy of the opinion to the document it supports. If a party cites an unpublished opinion for the first time at oral argument, the party must attach a copy of the opinion to the "supplemental authority" letter required by Fed. R. App. P. 28(j).

F. Miscellaneous opinion and publication issues

The court strives to issue its opinion within sixty days after oral argument or submission to a nonargument panel in civil appeals.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for grant of en banc rehearing

A successful petition for rehearing en banc must raise an issue of grave constitutional dimension or exceptional public importance, or arise from a panel opinion that conflicts with Supreme Court or Eighth Circuit precedent. Counsel for represented parties must sign a statement declaring a belief "based on reasoned and studied professional judgment" that one or both of these grounds is present and identifying the conflicting cases or exceptionally important question.

B. Treatment of petitions for rehearing en banc

Any petition for rehearing en banc will be considered both a petition for rehearing by the panel and for en banc rehearing. The panel retains plenary control and may grant rehearing without action by the full court. Additionally, a petition for rehearing may, at the request of any judge on the panel, be treated as a rehearing en banc.

Successive petitions for rehearing and motions to reconsider the denial of a petition for rehearing are not permitted.

C. Process for rehearing en banc

Any judge may request a poll for rehearing en banc. The time limit is the same as that prescribed for petitions by parties—fourteen days.

Circuit rules do not depart from Fed. R. App. P. 35; a response is not permitted unless the court orders one. When a petition is filed, it is distributed to each judge on the panel and every active judge on the court.

For purposes of a vote granting a rehearing en banc, a majority means a majority of all active judges not disqualified from participating in the case. The grant of a rehearing en banc vacates the panel opinion.

En banc rehearings are held during the regular sessions of court.

D. Sanctions for unmeritorious petitions

The court may sanction a party $250 for filing a petition for rehearing or rehearing en banc when it is without merit.

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal appeals

The court's revised Plan to Expedite Criminal Appeals, applicable to appeals filed on and after December 1, 1991, is designed to ensure that criminal appeals are decided within five months after the notice of appeal is filed.

B. Habeas corpus cases and certificates of appealability

In *Tiedeman v. Benson*, 122 F.3d 518 (8th Cir. 1997), the court determined that a certificate of appealability is defective if the district court does not state the issue or issues found to be substantial. In some circumstances, the court will remand the case so that the district court may correct the defect. In others, the court may summarily affirm the judgment or, as in *Tiedeman*, vacate the certificate and treat the case as if the district court had not issued the certificate. The notice of appeal would then serve as a certificate request directed to the court of appeals. Also, the court of appeals routinely considers requests by habeas corpus petitioners to expand certificates of appealability to include issues which the district court denied certification.

Two judges may deny a certificate of appealability, but a motion to reconsider, vacate, or modify the order, if filed within ten days after its entry, will be referred to a three-judge panel. However, that panel will include all judges who previously acted on the matter.

The court does not set forth specific requirements for the appointment of counsel in habeas corpus actions.

Special procedures for capital habeas corpus cases

The state attorney general or U.S. attorney must notify the clerk when a warrant for execution is issued. In an application for second or successive habeas corpus relief, the prisoner must provide the grounds for relief, a list of all pending litigation, the captions and case numbers of all previous

habeas corpus proceedings and their outcomes, and copies of all state or federal opinions or judgments. The court requires a response from the attorney general or U.S. attorney. The petitioner must also copy the clerk with any complaint in any federal court civil action which challenges or seeks to stay the execution.

IX. Special Procedures for Pro Se Cases

In all pro se appeals, the entire district court record is made available for review. The court requires the district clerk to transmit the original record to the court of appeals, along with two copies of the notice of appeal and two certified copies of the district court docket entries.

X. Appellate Procedural Issues Arising Under the Prison Litigation Reform Act

A. The PLRA's filing fee provisions and in forma pauperis status

In *In re Melvin Leroy Tyler*, 110 F.3d 528, 529 (8th Cir. 1997), the court concluded that the PLRA's filing fee provisions apply to mandamus petitions filed in the court of appeals.

B. The PLRA's "three strikes" provision and in forma pauperis status

In *Ashley v. Dilworth*, 147 F.3d 715, 715 (8th Cir. 1998), the court held that the determination of whether a prisoner is in "imminent danger" for purposes of avoiding the PLRA's three strikes provision must be made as of the date he or she seeks to file the complaint or appeal in forma pauperis.

United States Court of Appeals for the Ninth Circuit

I. General Information

The Ninth Circuit encompasses Alaska, Arizona, California, Hawaii, Idaho, Montana, Nebraska, Oregon, Washington, Guam, and the Northern Mariana Islands. The Ninth Circuit Court of Appeals is headquartered in San Francisco, but panels also hear appeals in Seattle, Portland, Pasadena, and in such other places as the court may designate.

The court has established three regional administrative units to assist the chief judge of the circuit with administrative responsibilities. They are the Northern, Middle, and Southern units. The senior active judge in each unit serves as the administrative judge of the unit.

The court has twenty-eight judgeships. In 1998 it had seventeen sitting senior judges, but eighty-nine vacant judge-months.

A. Judges and panels

Orientation and assignment of new judges

The court has an orientation manual for new judges, which is given to the new judge immediately upon confirmation, or sooner upon request. The chief judge assigns each new judge a "buddy" judge, usually located in the same city, who serves as a mentor to the new judge and is available to answer all questions.

Shortly after confirmation, the new judge and staff are invited to the court's San Francisco headquarters for a two- to three-day orientation program, which usually takes place during one of the court's sitting weeks. This program gives the judge, the judge's secretary, and the judges' law clerks an introduction to court operations and a better understanding of how the court works from the inside. The new judge also sits in and observes both an oral argument calendar and a conference calendar, and attends a welcoming lunch.

The chief judge and the clerk arrange for the new judge's sitting assignments. The assignments are made on a judge-by-judge basis. For example, district judges who have sat with the court of appeals may take on a heavier caseload more quickly than a judge who comes from law practice or academia.

Visiting judges

The court has prepared a visiting judge's manual for those judges who sit with the court of appeals by designation or intercircuit assignment. The manual, sent along with case materials, explains what the judge should expect when sitting with the court, who does what and when, and whom to call with questions. In addition, most presiding judges contact the visiting judges before oral argument to let them know what to expect during the sitting week and thereafter.

Panels

In addition to the standard argument panels, the court employs a monthly conference panel. The clerk assigns judges to this panel on a rotating basis for a term of one month. The panel is normally composed of three circuit judges in active service, but any senior circuit judge who is willing to serve may be assigned to the panel. The three judges serving on the panel rotate as lead judge, second judge, and third judge. The conference panel handles all substantive motions ready for decision and cases deemed suitable for decision without oral argument (called "screening cases").

B. Central staff

The court has consolidated all of its staff offices under the direction of the clerk of court, who also serves as the court executive. The court reports that consolidation has resulted in the development of an efficient, unified, and nonduplicative approach to case processing, and that there have been economic efficiencies wrought by a single financial officer's oversight of the court budget.

Staff attorneys' office

The court has a staff attorney authorization of forty-eight, headed by the senior staff attorney, who is also the court's chief deputy clerk. Staff attorneys work for the entire court rather than for individual judges. About three-quarters of the attorneys are hired for one- or two-year periods, subject to a maximum five-year employment cap. The others include case-management attorneys, a pro se attorney, and a death penalty law clerk.

In addition to providing recommendations to the court on substantive motions, writs, and appeals decided without oral argument, staff attorneys process a wide variety of procedural motions, requests for initial hearing en banc, motions for reconsideration, petitions for panel re-

hearing, petitions for rehearing en banc, and other postjudgment matters.

Staff attorneys also prepare and distribute substantive law outlines in areas of prisoner litigation, habeas corpus, Sentencing Guidelines, immigration, and jurisdiction. In addition, they prepare bench memoranda in cases assigned by judges and perform a variety of research and drafting projects at the direction of the chief judge, clerk/court executive, or senior staff attorney/chief deputy clerk.

Appellate commissioner

The appellate commissioner rules on or reviews and makes recommendations on a variety of nondispositive matters, such as application by appointed counsel for compensation under the Criminal Justice Act and motions for attorneys' fees. The commissioner handles those motions that were formerly handled by a duty judge. The appellate commissioner may also serve as a special master as directed by the court and holds hearings as necessary. The commissioner is assisted by one staff attorney.

Circuit court mediators

Shortly after the appeal is filed, circuit court mediators review the civil appeals docketing statement to determine if a case appears suitable for the court's settlement program. In furtherance of this inquiry, they may hold assessment conferences by telephone. The mediators are permanent members of the court staff and are experienced appellate lawyers who have had extensive mediation and negotiation training. Currently, the court is authorized eight such positions.

Clerk's office

The clerk/court executive and several supervising deputies operate the main clerk's office in San Francisco and permanent, but not full-service, clerk's offices in Seattle, Pasadena, and Portland.

C. Technological resources

The clerk's office maintains an electronic bulletin board service, which contains court opinions, court rules, court calendars, and special notices.

The court has recently installed videoconference systems in its San Francisco and Pasadena courthouses. Systems have been purchased and will be installed shortly in the Seattle and Portland courthouses. Thus far, videoconferencing has been used primarily for administrative meetings. It is just beginning to be used by judges on conference calendars to hear

motions and nonargument cases. At this point, there are no plans to use it to replace traditional oral argument hearings.

Both the San Francisco and Pasadena courthouses have cameras installed in the courtrooms, which are set up to function automatically to record oral arguments in all cases. The systems permit broadcasting to other locations within the building. The Ninth Circuit accepts media requests to televise oral arguments, and these cameras can also be used for that purpose.

A new state-of-the-art teleconference system has been installed in the Pasadena courtrooms and conference rooms, and a similar system is planned for San Francisco.

The court is beginning to electronically scan documents filed by parties in death penalty cases in which an execution date is scheduled. Those documents are then sent to all judges' chambers as "PDF" documents via the court's electronic mail system.

The court is in the process of upgrading the computer equipment in visiting judges' chambers throughout the circuit. When this is complete, visiting judges will be able to access their home computer systems from chambers or from their own notebook computers.

The court is planning to experiment with electronic case files in criminal appeals arising from the Central District of California. The tentative plan is to have the parties post all their filings to a court Web page. The experiment is being designed to assess the human and technological changes required for the court's move toward electronic case filing.

II. Intake, Screening, and Settlement Programs

A. Intake

Information provided by attorneys

In civil counseled appeals, the attorney who files the notice of appeal must file with it a civil appeals docketing statement, attaching copies of judgments, orders, opinions, findings of fact, and conclusions of law deemed relevant to the major issues counsel intends to raise on appeal.

The requirement to file a civil appeals docketing statement does not apply to a petition in which the appellant is proceeding without assistance of counsel, or to a petition for review of Board of Immigration Appeals decisions under 8 U.S.C. § 1105(a).

Information provided to attorneys

At case opening, the court sends counsel a schedule and materials setting forth the basic path the case will take, along with general instructions on how to proceed. The schedule sets specific dates for ordering and filing the transcript and for the briefs. In appeals filed by unrepresented litigants, the case-opening information includes a copy of the court's informal brief form and instructions regarding its use.

B. Screening

Screening for jurisdiction

At case opening, attorneys assigned to the motions and pro se units screen all appeals for jurisdictional defects. Cases found to be jurisdictionally deficient are promptly presented to the next available motions/conference panel with a recommendation that the appeal be dismissed. In cases that progress through briefing, case-management attorneys again perform a jurisdictional review. When defects are found, the cases are handled on the motions/conference calendar.

Screening for case weighting or issue tracking

On the due date for the appellee's brief, in addition to the jurisdictional review noted above, the case-management attorneys prepare inventory cards for each case. These cards identify the issues being raised by the appeal and note which panels have cases raising similar issues, as well as the disposition status of each related case. This information is stored in a database that allows text searches and enables the staff to track issues pending before panels, to assign cases raising similar issues to the same panels where possible, and to facilitate case-management decisions about related cases so that they may be presented to the same conference panel.

Case-management attorneys also assign a weight to each appeal. The weights—S, 3, 5, 7, and 10—reflect the complexity of each appeal and the amount of judge-time the staff attorney predicts will be spent on the matter. S-weight cases are cases in which the law is well settled and it appears that oral argument would not assist the decision process. Ten-weight cases are the most complex. The court's weighting and issue-tracking systems help to equalize the workload among panels and facilitate consistent disposition of similar issues.

Screening for argument or nonargument disposition

All S-weight cases are directed to the court's conference panel. (Pro se cases are presumptively classified as S-weight.) Staff attorneys send most

cases weighted other than S (i.e., 3, 5, 7, 10) to argument panels to be processed by judges and their clerks in chambers. Whenever a case is deemed suitable for submission without argument, the parties are so notified and given ten days in which to file an objection. In accordance with Fed. R. App. P. 34, to decide a case without oral argument the conference panel to which the case is assigned must unanimously agree that the appeal is frivolous; that the dispositive issues have recently been authoritatively decided; or that the facts and legal arguments have been adequately presented in the briefs and record, and argument would not substantially assist the decision-making process.

C. Circuit mediation program

The court attempts to settle civil cases by referring them to the circuit mediation program. Circuit mediators review all eligible cases and select those with settlement potential. In addition, counsel for a party may ask that a case be mediated, and occasionally an appellate panel refers a case to the program. Most nonprisoner civil cases are eligible for the program except (1) cases in which a party is appearing pro se; (2) most cases in which the appellant is incarcerated; (3) cases involving writs of habeas corpus or motions to vacate, set aside, or correct a sentence; (4) other petitions for a writ; and (5) all other original proceedings.

III. Briefing and Motions Practice

A. Briefing

General

In criminal cases, time schedules are set and issued by the district courts; in civil cases, the time schedules are established by the court of appeals at case opening.

Briefs on digital media

The court does not require parties to file a copy of briefs on digital media.

B. Motions practice

Composition and operation of the monthly conference panels

The conference panel sits in San Francisco for at least one week every month. In addition, the panel convenes by telephone or videoconference as circumstances or workload dictate. Motions are presented orally to the panel by the motions attorneys when the panel sits. For complex mo-

tions, the attorney may prepare and, in advance, transmit to the panel the moving papers, bench memoranda, and relevant portions of the record.

Procedural motions

All nondispositive procedural motions in cases that have not yet been calendared are acted on by clerk's office personnel under the supervision of the clerk or the appellate commissioner. The clerk's office may act on procedural motions whether opposed or unopposed, but if there is any question about what action should be taken on the motion, it is referred to the appellate commissioner. Common motions include motions for extension of time to file a brief, motions to consolidate appeals, and motions to file a brief exceeding page limits.

Substantive motions

Staff attorneys specializing in motions work process all substantive motions filed in cases that have not yet been assigned to a panel for disposition on the merits. Motions attorneys present most matters to three-judge panels or the appellate commissioner, depending on the type of relief requested or the recommendation being made. In addition, local rules give the motions attorneys authority to resolve several types of motions.

All three judges of the monthly conference panel rule on motions that are dispositive of the appeal. Motions not dispositive of the appeal are first referred to the lead judge and then to the second judge; if the two agree, that decides the motion. The third judge participates in nondispositive matters only at the request of the other members, or if one is disqualified or otherwise unavailable, or if the other members disagree on the disposition of the motion.

Emergency motions

When an emergency motion is filed with the clerk in San Francisco, it is immediately referred to the motions unit. A motions attorney contacts the lead judge of the conference panel or, if the lead judge is unavailable, the second judge and then the third judge. That judge may then either grant temporary relief or convene the conference panel (usually by telephone) to decide the motion. The clerk's office provides 24-hour telephone service for calls placed to the main clerk's office number. Motions attorneys regularly monitor the service to act on messages left outside regular office hours.

Special topics or problems regarding motions

The appellate commissioner decides motions for clarification, reconsideration, or rehearing of an action taken by clerk's office personnel. Opposition to a motion received after action has been taken by clerk's office personnel is treated as a motion for reconsideration. A motion for reconsideration of a circuit mediator's order is decided by the administrative judge for the unit from which the matter arose.

IV. Nonargument Decision-Making Practices

Pursuant to Fed. R. App. P. 34(a), a case may be decided without oral argument if a three-judge panel is of the unanimous opinion that the appeal is frivolous; that the dispositive issue or set of issues has been recently authoritatively decided; or that the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

For cases where no oral argument is calendared, staff attorneys working under the supervision of the senior staff attorney/chief deputy clerk and supervising attorneys review briefs and records, research legal issues, and prepare draft memorandum dispositions for oral presentation to the three-judge conference panels when they convene monthly in San Francisco. At any time in the process, either the staff attorney assigned to the case or any one of the judges on the conference panel may decide that the case does not meet the criteria for nonargument disposition, "upweight" it, and direct that it be assigned to an argument panel.

V. Argument Panel Operations

A. Panel composition, sitting schedules, and panel rotation

The clerk of court sets the time and place of court calendars, using a matrix composed of all active judges and those senior judges who have indicated their availability. The random assignment of judges by computer to particular days or weeks on the calendars is intended to equalize the workload among the judges.

At the time of assigning judges to panels, the clerk does not know which cases ultimately will be allocated to each of the panels.

Every year, each active judge, except the chief judge, is expected to sit on a total of nine monthly panels, either eight oral argument panels and one conference panel or seven oral argument panels and two conference panels. Senior judges choose how frequently they will sit and what types of cases they will hear.

When there are not enough circuit judges to constitute a panel, the court calls upon district or out-of-circuit judges to sit by designation. By court policy, district judges do not participate in the disposition of appeals from their own districts. In addition, the court attempts to avoid assigning district judges to appeals of cases which other judges from their district have presided over (either on motions or at trial) as visiting judges in other districts.

Argument times generally range between ten and twenty minutes per side.

B. Assignment of cases to panels

Court staff use the inventory card weights to distribute cases so as to give most panels twenty-four points worth of cases for each scheduled day of argument. With that constraint, cases generally are randomly assigned to panels scheduled to sit in the geographic region from which the case arose (e.g., a case arising from the Central or Southern District of California will be scheduled in Pasadena). A case heard by the court on a prior appeal may be set before the same panel upon a later appeal.

Direct criminal appeals receive preference and are placed on the first available calendar after briefing is completed. Civil appeals in the following categories also receive hearing or submission priority: recalcitrant witness appeals brought under 28 U.S.C. § 1826; habeas corpus petitions brought under Chapter 153 or Title 28; applications for temporary or permanent injunctions; appeals alleging deprivation of medical care to the incarcerated or other cruel or unusual punishment; and appeals entitled to priority on the basis of good cause under 28 U.S.C. § 1657.

C. Staff role in working up cases for argument calendar

The staff attorneys' role in argued cases is limited to special assignments or situations where the case was originally assigned as a staff matter (e.g., recalcitrant witness appeals, preliminary injunction appeals).

D. Judicial preparation for argument: materials and timing

After cases have been allocated to panels, the briefs and excerpts of the record in each appeal are distributed to each of the judges scheduled to hear the case. Judges usually receive the documents six weeks before the scheduled time for hearing, and the court's policy is that each judge read all the briefs before oral argument. The presiding judge of the panel assigns the cases among the three judges for preparation of bench memo-

randa. These memoranda are circulated to the other panel members about ten days before oral argument.

E. Disclosure of panel identity

The names of the judges on each panel are released to the general public on the Monday of the week preceding argument. At that time, the calendar of cases scheduled for hearing is posted. This provision permits the parties to prepare for oral argument before particular judges. Once the calendar is made public, motions for continuances are rarely granted.

VI. Opinion Preparation and Publication

A. Types of dispositions

The court uses three types of written dispositions: opinions, memoranda, and orders. An opinion of the court is a written, reasoned disposition of a case or motion that is designated as an opinion under Circuit Rule 36-2. It may be authored or per curiam. A written, reasoned disposition of a case or a motion that is not intended for publication under Circuit Rule 36-2 is designated a memorandum. Any other disposition of a matter is an order. A memorandum or order neither identifies its author nor is designated per curiam.

All opinions are published; no memoranda are published; orders are not published except by order of the court. "Publication" means to make a disposition available to legal publishing companies to be reported and cited.

B. Criteria for publication and nonpublication

A written, reasoned disposition is designated as an opinion (and therefore published) only if it

1. establishes, alters, modifies, or clarifies a rule of law, or
2. calls attention to a rule of law which appears to have been generally overlooked, or
3. criticizes existing law, or
4. involves a legal or factual issue of unique interest or substantial public importance, or
5. is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or
6. is a disposition of a case following a reversal or remand by the U.S. Supreme Court, or

7. is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the court and the separate expression.

C. Prefiling circulation of opinions

Opinions are not circulated before filing. The court is experimenting with a prepublication report in which the court is notified of opinions that will be filed two days later and whether any opinion affects cases pending before other panels.

D. Availability of not-for-publication opinions

Memoranda, which are unpublished, are available in full text on Westlaw and LEXIS. Orders are not made available except by special order of the court.

E. Citability of not-for-publication opinions

A list of all cases that have been decided by written, unpublished disposition is made available periodically to legal publishing companies. The list sets forth the concluding disposition in each case (e.g., "affirmed," "reversed," "dismissed," "enforced").

F. Miscellaneous opinion and publication issues

Within sixty days of issuance of the court's disposition, publication of any unpublished disposition may be requested by letter addressed to the clerk, stating concisely the reasons for publication. The request must be served on the parties to the case, who have ten days to notify the court of any objections. If granted, the unpublished disposition will be redesignated an opinion and published.

VII. Rehearing and Rehearing En Banc Practice

A case will be heard or reheard en banc only upon a majority vote of the nonrecused active judges. The court uses a limited en banc: Although all active judges participate in voting on whether a case should be taken en banc, the en banc court usually consists of the chief judge and ten other judges drawn by lot from the active judges of the court. In the absence of the chief judge, an eleventh active judge is drawn by lot, and the most-senior active judge on the panel presides. If a judge's name is not drawn for three consecutive en banc panels, that judge is automatically placed on the next en banc court.

A. Grounds for grant of en banc rehearing

The court's local rules indicate that rehearing en banc may be appropriate for the reasons set out in Fed. R. App. P. 35 and, more particularly, when the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity.

B. Treatment of petitions for rehearing en banc

A petition for rehearing en banc is treated like a combined petition for rehearing by the panel and a petition for en banc rehearing. Unless the court votes to take the case en banc, however, only the panel will consider it. If the panel grants a rehearing, the petition for rehearing en banc is considered rejected without prejudice to its renewal after the panel acts.

C. Independent action by the court

Because only eleven of the court's judges participate in the ordinary en banc proceeding, a majority of the court's judges may vote to have the case reheard by the full court after the en banc panel acts.

D. Process for rehearing en banc

The court usually requests a response to a petition for rehearing en banc before it will consider granting a rehearing.

Any active judge who is not recused or disqualified and who entered into active service before the call for a vote is eligible to vote. A judge who takes senior status after a call for a vote generally may not vote or be drawn to serve on an en banc court, except that (1) a judge who takes senior status during the pendency of an en banc case for which the judge has already been chosen as member of the en banc court may continue to serve on that court until the case is finally disposed of; and (2) a senior judge may elect to be eligible, in the same manner as an active judge, to be selected as a member of the en banc court when it reviews a decision of a panel of which the judge was a member.

The en banc coordinator notifies the judges when voting is complete. If the recommendation or request fails of a majority, the coordinator notifies the judges, and the panel resumes control of the case and enters an appropriate order denying en banc consideration. The order does not specify the vote tally unless the recommendation or request fails by an evenly divided court.

The order granting en banc review vacates the opinion of the three-judge panel absent an express indication to the contrary.

After the en banc court is chosen, the judges on the en banc court decide whether there will be oral argument or additional briefing. If there is oral argument, the chief judge (or the next most senior active judge) enters an order designating the date, time, and place for argument. If no oral argument is to be heard, the chief judge designates a date, time, and place for a conference of the en banc court. That date will ordinarily be the submission date of the case.

E. Sanctions for unmeritorious petitions

As provided by Fed. R. App. P. 38, if the court determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

F. Other ways the court works to avoid conflict and inconsistency

In addition to the issue-tracking process, the court has procedures to give nonpanel judges an opportunity to suggest amendments to panel opinions, either sua sponte or in response to a petition for rehearing. As mentioned earlier, the court is experimenting with a prepublication report indicating which opinions will shortly be filed and how issues resolved in them may affect pending cases.

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal appeals

Direct criminal appeals receive preference and are placed on the first available calendar after briefing is complete.

B. Habeas corpus cases and certificates of appealability

A certificate of appealability must first be considered by the district court—the court of appeals will not act on a request before the district court rules. The district court must state the reasons for granting or denying a certificate of appealability. United States v. Asrar, 108 F.3d 217, 218 (9th Cir. 1997).

If no specific request for a certificate of appealability is made, a notice of appeal will be deemed an application for a certificate of appealability. United States v. Asrar, 108 F.3d 217, 218 (9th Cir. 1997).

All express or implied requests by state or federal prisoners for issuance of a certificate of appealability to appeal the denial of a petition for writ of habeas corpus or a § 2255 motion are referred to the monthly

conference panel of the court. If any judge decides that the request should be granted, the certificate is issued.

The local rules do not address whether counsel is appointed to prepare a certificate of appealability or whether appointment is made after a certificate of appealability has been granted. Each case is reviewed by staff as part of the presentation of the certificate of appealability request, and recommendations regarding appointment of counsel are handled on a case-by-case basis. Appointment is not automatic.

Any judge can grant a certificate of appealability, but there is no rule that specifies the number of judges required to deny one.

Local rule now requires an application to "broaden" the certificate when the district court grants the certificate as to some but not all of the requested issues. These requests are presented by staff attorneys to the monthly conference panel. In case law concerning certificates of probable cause, the court reserved the right to review all issues, not just the issues certified by the district court. Van Pilon v. Reed, 799 F.2d 1332 (9th Cir. 1986). An advisory note to the local rule leaves open this same possibility with respect to certificates of appealability.

Special procedures for capital habeas corpus cases

All appeals from a final judgment in a case involving a death sentence are assigned to an argument panel of active judges of the court. Motions matters are resolved by the monthly conference panel, as in all other cases. Once a panel has heard an appeal from judgment in a first petition capital case, all subsequent requests for relief are assigned to that panel.

In cases where an execution date is imminent, the clerk may also draw an en banc panel, which would then be available to consider any matters if a majority of active judges votes in favor of en banc review.

When a case is pending before a death penalty en banc court, any additional appeal in the case is assigned to the panel responsible for the case, unless the question presented is such that its decision would resolve an issue then before the en banc court. In that event, the additional appeal is assigned to the en banc court. The en banc court in its discretion may review the panel decision. The chief judge determines whether the case is assigned to the panel or to the en banc court.

The court of appeals has a death penalty law clerk who works with the court's Capital Rules Committee, Executive Committee, and Advisory Rules Committee to draft general orders and rules pertaining to capital cases. In addition, the death penalty law clerk is responsible for processing writs and motions filed before a case is assigned to a merits

panel, as well as for providing research memoranda as directed by the chief judge or capital case coordinator.

IX. Special Procedures for Pro Se Cases

The court's pro se unit reviews all pro se appeals for jurisdictional defects and case-management needs. When it appears that a pro se case should be argued (e.g., because it raises novel or unresolved issues), the supervising attorney of the court's pro bono counsel program arranges for oral argument by a volunteer attorney. The supervising attorney also coordinates communication with the pro se law clerks in the district courts and maintains a substantive outline for use at the district court level.

X. Appellate Procedural Issues Arising Under the Prison Litigation Reform Act

A. The PLRA's filing fee provisions and in forma pauperis status

The court's pro se unit reviews and processes all pro se appeals for issues related to the implementation of the PLRA. The court first determines whether an appeal should proceed in forma pauperis, either because the district court has not revoked pauper status or because a conference panel of the court of appeals has granted or reinstated pauper status. Once it is determined that a prisoner's civil appeal will proceed in forma pauperis, the clerk issues an order directing the prisoner to complete and return an authorization form directing the relevant prison officials to assess, calculate, deduct, and forward to the district court the docketing and filing fees in accordance with 28 U.S.C. § 1915(b). If the prisoner does not return the form, the appeal is dismissed by the clerk pursuant to Circuit Rule 42-1. If the form is returned, the clerk issues an order serving the form on the relevant attorney general and directs him or her to serve it on the appropriate prison officials. At this point, the court deems the prisoner to be in full compliance with the statute and does nothing further to monitor the collection of the fees.

B. The PLRA's "three strikes" provision and in forma pauperis status

The court reviews its own docket to ascertain whether prior strikes exist, but only if it is determined that the appeal will otherwise proceed in forma pauperis. The court does not maintain a separate database or review the dockets of other courts.

In *Tierney v. Kupers*, 128 F.3d 1310, 1311 (9th Cir. 1997), the court held that pre-PLRA dismissals for frivolousness count as strikes under the PLRA's three strikes provision.

In *Canell v. Lightner*, 143 F.3d 1210, 1212 (9th Cir. 1998), the court held that the PLRA's three strikes provision does not apply to appeals pending on the PLRA's effective date.

United States Court of Appeals for the Tenth Circuit

I. General Information

The Tenth Circuit encompasses Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. The Tenth Circuit Court of Appeals hears oral arguments regularly in Denver and occasionally elsewhere in the circuit.

The court has twelve authorized judgeships. In FY 1998, it had five sitting senior judges until July and four thereafter. There were no vacant judge-months.

A. Judges and panels

Orientation and assignments for new judges

New judges are introduced to the court's work gradually. Usually they first hear orally argued cases, then they sit for a conference term, and they then are introduced to screening. The order depends on when during the year the new judge enters on duty. The chief and other judges serve as mentors, and the circuit executive provides a manual with helpful information about the court's procedures.

Visiting judges

All visiting judges receive a manual that covers procedures, gives guidelines for opinion format, and provides local maps and information.

Panels

In addition to argument panels, the court uses the following panels: screening; jurisdictional; conference calendar; bail, stay, and mandamus; clerk's; and capital. In this court, unlike most others, the judges have primary responsibility for screening cases.

Screening panel. All active judges and, at their option, senior judges, serve on screening panels. The chief judge creates four 3-judge panels each year; panels stay together for that year. These panels screen civil cases to determine whether they should be set for oral argument, routed to the court's nonargument "conference calendar" track, or disposed of summarily by the screening panel itself.

Jurisdictional panel. The clerk's office maintains a list of randomly constructed panels, which are used as needed to review cases that the

screening attorneys have flagged as presenting unresolved jurisdictional defects.

Conference calendar panel. Every other month three conference calendar panels convene to decide cases in which oral argument either is not requested or would not add anything significant to the analysis of the case. For each case, a "lead" or "mentor" judge is assigned; that judge works directly with a staff attorney who prepares the case. *See* § IV, *infra*. The nuclei of these panels are the four screening panels that serve in rotation throughout the year.

Bail, stay, and mandamus panel. The office of staff counsel maintains a list of randomly constructed two-judge panels to decide bail, stay, mandamus, and other substantive motions. Staff counsel present the matters to the panels. Panel members may request a third judge if the issues appear to be especially difficult or important or to break a tie vote.

Clerk's panel. Periodically, the chief judge assigns two judges to serve as a "clerk's panel" to decide procedural motions that, pursuant to Fed. R. App. P. 27, do not require a three-judge panel but may require judicial action prior to assignment of the case to a merits panel.

Capital panel. The clerk creates a list of panels of randomly selected active judges for assignment to capital cases. If no execution date has been set or the case does not otherwise require judicial attention, the panel is assigned and the case is scheduled for oral argument after briefing. If an execution date is imminent, the case is assigned to a panel upon filing.

B. Central staff

Staff attorneys' office

The court has a staff attorney allocation of 17.3 supervisory and line attorney positions. Currently, there are sixteen permanent line staff attorneys organized into four teams: three teams handle conference calendar cases; one team works on some conference calendar cases but also processes original proceedings, stays, emergencies, bail applications, and release applications.

In addition to assisting in the disposition of Rule 34 cases on the conference calendar, the office of staff counsel handles a group of procedural and substantive matters generally referred to as "special or original proceedings," including motions for bail or release pending appeal, motions for stay or injunctive relief on appeal, and petitions for writs of mandamus or prohibition. The office also processes Criminal Justice Act

vouchers for recommendation to the presiding judicial officer and the chief judge's specified delegate. Finally, the office has prepared and annually updates an extensive reference work that summarizes circuit case law on topics of general relevance. Court personnel, especially new chambers staff, use this reference work.

Clerk's office

Two attorneys specialize in screening cases for jurisdictional defects. *See* § II.B, *infra*. The clerk, chief deputy, and counsel to the clerk all play a role in processing motions.

Circuit mediation office

The court employs three circuit mediators. *See* § II.C, *infra.*

Miscellaneous duties of staff

Since enactment of the Prison Litigation Reform Act, attorneys (and sometimes law students) in the clerk's office prepare a fee status memorandum for the screening judge on all prisoner cases. All court units collaborate on law clerk orientation. The clerk's office reviews all capital case CJA vouchers and makes recommendations to the panel.

C. Technological resources

The court is equipped for videoconferenced arguments. *See* § V.A, *infra.*

II. Intake, Screening, and Settlement Programs

A. Intake

Information provided by attorneys

All appellants must file a docketing statement on a form furnished by the clerk's office within ten days after filing the notice of appeal. An original and four copies must be filed.

Information provided to attorneys

Information about case processing and the court's rules is provided to attorneys by a docketing letter. The letter is specific to the type of case that was docketed, that is, there is a different letter for civil and criminal cases. The court also provides a practitioner's guide free of charge. Attorneys who will appear for oral argument are told the identity of their panel the week before oral argument.

B. Screening

Screening for jurisdiction

Two attorneys in the clerk's office screen all cases for jurisdictional defects. If they find a jurisdictional defect, they contact the parties and instruct them to file a memorandum addressing the defect or to address the jurisdictional issue in the briefs. When jurisdictional briefs are requested, after their receipt a jurisdictional attorney prepares a memorandum and a proposed order and submits these to a randomly assigned jurisdictional panel. If the issue cannot easily be resolved by that panel, it is referred to the merits panel for disposition.

Screening for argument/nonargument disposition

Each judge on a screening panel reviews cases monthly and routes them to one of three tracks. Complex cases go to the oral argument track. Simple cases are held in chambers for the screening judge to prepare a proposed disposition and circulate it to the other two judges on the screening panel. All other cases are sent to the conference calendar track, where they are assigned to the office of staff counsel. Screening panels handle the vast majority of the court's pro se cases via summary disposition. They also handle most direct criminal appeals involving only sentencing issues or in which oral argument has been waived.

Any judge can send a case to the oral argument calendar at any stage in the summary disposition or conference calendar process.

Cases referred directly to judges or to the oral argument calendar. Certain types of appeals, such as capital cases and most direct criminal appeals, are placed directly on the oral argument calendar without screening.

Cases referred directly to staff attorneys. Some categories of cases, such as Social Security appeals, are forwarded automatically for disposition on the conference calendar track. Staff also handle all mandamus, stay, and bail cases. The cases placed on the conference calendar track are prepared by staff in consultation with a mentor judge.

Party role in obtaining oral argument. Parties who want oral argument must include in their briefs a statement that sets out the reasons why argument should be heard. The parties may stipulate to waive oral argument; waiver is subject to court approval.

Standards for granting or denying oral argument. Oral argument will usually be granted if

1. the appeal presents an issue of first impression;

2. the case is sufficiently complex to warrant explanation by counsel;
3. a judge is likely to want questions answered in order to clarify a particular issue;
4. events or case decisions entered subsequent to the filing of the last brief may have a significant effect on the appeal;
5. an important public interest may be affected;
6. the appeal contains an issue the reviewing judge believes the panel judges should consider independently before seeing another judge's work; or
7. both sides ask for oral argument.

Screening for case weighting or issue tracking

The court does not formally rank or weight cases or track issues.

C. Circuit Mediation Office

The court's Circuit Mediation Office explores settlement possibilities and attempts to resolve any matters that may interfere with the smooth handling or disposition of the case. The office may schedule a mandatory settlement conference, with certain exceptions, in any civil case. Conferences are conducted by one of the court's three circuit mediators, usually by telephone.

Most civil cases docketed in the court are eligible for a mandatory settlement conference except pro se cases, habeas corpus cases, and cases with unresolved jurisdictional problems. The Circuit Mediation Office selects cases randomly from the pool of eligible cases. Additionally, if counsel for any party requests a conference, the Circuit Mediation Office ordinarily will schedule one if all parties in the case are represented by counsel. In rare instances, the court will refer a case for mediation.

III. Briefing and Motions Practice

A. Briefing

General

All cases are screened for any extraordinary procedural requirements they may present (e.g., whether companion appeals or cross-appeals might be briefed together, whether the case presents procedural issues because of new legislation).

Briefs on digital media

The court does not require briefs to be filed on digital media.

B. Motions practice

Procedural motions

Subject to review by the court, the clerk or an authorized deputy may act for the court on a number of unopposed procedural motions listed in Circuit Rule 27.3 (e.g., motion for extension of time to file a pleading, motion to make corrections in a brief or pleading, motion to substitute parties). If any motion is opposed, the clerk submits the matter to the two-judge clerk's panel for disposition.

For difficult or problematic procedural motions, assigned staff consult with the clerk or chief deputy. If the issue requires judicial attention, it is referred to the clerk's panel with a recommendation.

Substantive motions

For substantive motions, including petitions for writs and bail motions, staff attorneys prepare explanatory memoranda and draft orders, then submit the matter to randomly selected panels for decision. Panels conduct their business by conference call and rarely convene. Potentially dispositive motions to dismiss for lack of jurisdiction are submitted by attorneys in the clerk's office.

Emergency motions

In emergencies, litigants are encouraged to contact the clerk. A non-Denver-resident judge may be approached in chambers, but the practice is discouraged. Frequently, a non-resident judge will fax an emergency motion to the clerk in Denver. The office of staff counsel is notified as soon as an emergency is apparent and works with a randomly selected panel, usually by providing research and drafting services, to resolve the problem. The panel confers by telephone.

Special topics or problems regarding motions

Litigants sometimes try to get the court to resolve issues prior to briefing, which would require the attention of more than one panel to a single case. The court tries to avoid this by referring such requests to the assigned merits panel and requiring the parties to proceed with briefing.

IV. Nonargument Decision-Making Practices

Three conference calendar panels convene in even-numbered months for a total of eighteen panels per year. Panel dates are generally scheduled one year in advance. Each panel is assigned approximately 25–35 cases each session. Ten to thirty percent of these cases are pro se; the remainder

are counseled. The team leader in the office of staff counsel randomly assigns cases to one of the standing conference panels and, within the panel, to a judge who will serve as "mentor" (or lead) judge.

About ten weeks before a conference calendar, briefs and other relevant papers are sent to the panel. With these materials, the judges and staff counsel get a proposed schedule that outlines dates by which mentor judges and staff should conduct initial discussions and dates by which the staff attorney's work should be sent to the mentor judge for review. Both the staff attorney and mentor judge review the briefs and materials. After the mentor judge reads the briefs, he or she instructs the designated staff attorney regarding the tentative disposition. Following these instructions, the staff attorney then prepares two documents: a draft dispositional document (usually an order and judgment) and a detailed analytical memorandum. Only when the mentor judge is satisfied with the dispositional document is it sent, along with the analytical memorandum, to other members of the panel for their consideration and review.

Possible outcomes from a panel session are

1. approval of the order and judgment (or opinion) that is drafted by staff counsel and approved by the mentor judge;
2. reworking of a case by a judge in his or her chambers prior to circulation of the opinion to the panel;
3. approval of the proposed order and judgment with amendments or additional changes agreed on by the panel;
4. return of the opinion to staff counsel for revision and recirculation (often with significant changes, including a different result) at a later time; or
5. reassignment of the matter for oral argument.

V. Argument Panel Operations

A. Panel composition, sitting schedules, and panel rotation

The circuit executive creates the oral argument panels, which are randomly generated by computer program. The program equalizes the number of times judges sit with one another over a period of one year. Argument sessions are set approximately one year in advance and are generally held in Denver during odd-numbered months. However, in some instances, sessions are held elsewhere. Four panels sit for five days, and each panel hears six cases per day. Each active judge, other than the chief judge, usually sits four days. Occasionally, en banc and special argument sessions are conducted in the afternoons.

Usually, oral argument is limited to fifteen minutes for each side. Extended argument of thirty minutes or more per side is routine in capital cases and occasionally will be allotted in other complex cases.

The court is experimenting with videoconferencing for oral arguments. For over a year, criminal cases originating in the Western District of Oklahoma or the District of Wyoming have been heard via videoconference technology. At this stage, the court reports that the quality is not equivalent to an in-person argument, but believes the potential savings to be considerable.

B. Assignment of cases to panels

After the screening judge identifies cases suitable for oral argument, he or she sends them to the clerk to be placed on the next available oral argument calendar. Ninety days prior to oral argument, the calendar program is run to match randomly assigned panels to clusters of cases prepared by the clerk. The clerk sends the proposed calendar along with the entry of appearance form containing a certificate of interested parties to each panel member. With the proposed calendar, the clerk sends a form requesting notice of any recusal or conflict, which the panel judges return within a week. The clerk then makes the necessary adjustments and publishes and circulates the final calendar.

C. Staff role in working up cases for argument calendar

Some judges have their law clerks prepare memoranda on cases scheduled for oral argument. Others have their law clerks do directed research after the judge reads the briefs.

D. Judicial preparation for argument: materials and timing

Approximately seven to eight weeks in advance of oral argument, the clerk sends the briefs and other materials to panel judges.

E. Disclosure of panel identity

The names of the judges on the panel are released to the public on the Monday before each session and can be obtained by telephone via an automated voice system maintained by the clerk's office. Once panel identity is disclosed, the court does not normally grant motions for continuances or for a change in argument date during the same session.

F. Recording

Oral arguments are routinely electronically recorded for the exclusive use of the court. Any other sound recording in the courtroom is forbidden. Upon leave of court, counsel or parties, at their own expense, may arrange for a qualified court reporter to be present and to report and transcribe oral arguments. The ordering party must file a copy of the transcript with the clerk.

VI. Opinion Preparation and Publication

A. Criteria for publication and nonpublication

The court does not routinely publish opinions that merely apply well-settled principles of law. Some orders and judgments provide a detailed explanation but are not published because they are not regarded as precedential. Disposition without published opinion does not mean that the case is considered unimportant. It does mean that the panel believes the case involves application of no new points of law that would make the decision of value as a precedent.

B. Criteria for judgment without opinion

The court finds it unnecessary to publish opinions in every case, but the court does not dispose of cases without giving any reasons. Even if an unpublished disposition is brief, the panel will provide the reason for its decision.

C. Citability of not-for-publication opinions

Unpublished opinions and orders and judgments of the court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel. Citation of these unpublished decisions is not favored. Nevertheless, if counsel or litigants believe that an unpublished opinion or order and judgment has persuasive value with respect to a material issue in a case and would assist the court in its disposition, that decision may be cited, provided that a copy of the decision is attached to the brief or other document in which it is cited, or, if cited in oral argument, is provided to the court and all other parties.

D. Availability of not-for-publication opinions

Not-for-publication opinions are available to publishers and can be found on ABBS, the Appellate Bulletin Board System. These opinions are also available on the Washburn University School of Law Library Web site at <http://lawlib.wuacc.edu/ca10/>.

E. Prefiling circulation of opinions

Opinions to be published are circulated to the entire court ten days before issuance.

F. Miscellaneous opinion and publication issues

When an earlier opinion in a case was published by a district court, administrative agency, or the U.S. Tax Court, the court will ordinarily designate its appellate disposition for publication. In such cases, if the panel wrote an order and judgment that would ordinarily not be published, the court may designate for publication only the result of the appeal.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for grant of en banc rehearing

The court's criteria for petitions for rehearing en banc are the same as those set out in Fed. R. App. P. 35.

B. Treatment of petitions for rehearing en banc

For the purpose of issuing the mandate, a petition for rehearing en banc is treated like a petition for rehearing.

A petition for panel rehearing alone is sent to the panel. A petition for rehearing that includes a petition for rehearing en banc is circulated to all active judges. The author of the disposition sought to be reheard E-mails a vote to the court.

C. Independent action by the court

If a panel finds it necessary to do more than distinguish earlier precedent, it may call for a hearing en banc. Occasionally, and usually after a Supreme Court decision that affects some circuit precedent, the panel, with the permission of the full court, will include a footnote explaining that the court is in agreement with the panel interpretation even if it does seem inconsistent with circuit precedent.

D. Process for rehearing en banc

Any judge may call for a response to a petition for rehearing. In that case, no order will enter until the response has been filed and circulated. Judges routinely request responses before polling the court on an en banc petition.

For purposes of a vote granting rehearing en banc, a majority is defined as a majority of the active judges who are not disqualified.

A grant of a petition for rehearing en banc vacates the judgment,

stays the mandate, and returns the case to the active docket pending disposition. The panel decision is not vacated unless ordered by the court.

Almost all en banc cases are orally argued. The court allots the usual time for argument, but questioning frequently extends the time.

E. Sanctions for unmeritorious petitions

Although rarely done, costs of up to $500 may be assessed as a penalty for filing a petition for rehearing or rehearing en banc that is without merit.

F. Other ways the court works to avoid conflict and inconsistency

During the ten-day prefiling circulation of opinions for publication, non-panel judges may raise questions or suggest changes to the authoring judge. Judges who have opinions pending that are likely to conflict with the circulated opinion may call for an en banc proceeding to avert the conflict.

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal appeals

Criminal appeals are expedited and are often set on a calendar before the appellee's brief is filed. The court encourages consolidated briefing, particularly by the government.

Under Tenth Circuit Rule 9.2, the court reviews an order respecting release or detention using memorandum briefs, which must be filed within ten days of the motion for release or notice of appeal. Memorandum briefs must contain a statement of facts necessary for an understanding of the issues presented and the grounds upon which relief is sought, including citation to relevant authorities and a statement as to the defendant's custodial status and reporting date as relevant. If there is any change in custodial status while the review process is pending, counsel must notify the court.

B. Habeas corpus cases and certificates of appealability

In screening, a request for a certificate of appealability is considered at the same time as the merits. It takes two of three judges on a panel to deny a certificate of appealability. One judge may grant the certificate.

In a pro se case, the screening judge might grant the request and route the case to the argument or nonargument disposition track. In counseled cases, it is the court's practice to call for briefs before granting a certificate. Where the appellee declines to file a brief, the screening judge may grant the certificate and order one.

Special procedures for capital habeas corpus cases

In a capital case, the court will consider granting a certificate of appealability if appellee does not file a brief. If the case needs judicial attention, a panel is assigned immediately. If not, the panel is assigned when appellee's brief is filed. The court has a *Barefoot* rule—a stay of execution will be granted to prevent a capital case with an arguable issue from becoming moot.

All capital cases are subject to special procedures. In the spring of 1999, the court initiated a two-part case-management process for capital cases. A prebriefing conference is held to address procedural, certificate of appealability, record, scheduling, and briefing issues. The conference continues ex parte to establish a litigation budget for appeals where a Criminal Justice Act panel attorney is involved. If there is a scheduled execution date, a certificate to that effect must be filed and the district clerks must notify the court of it immediately. The district courts are encouraged to obtain electronic copies of pleadings so that they can be circulated to the circuit judges by electronic mail. The court will often sit en banc to hear a request for a stay, which prevents further delay if the stay is denied.

IX. Special Procedures for Pro Se Cases

Most pro se cases are decided by the screening panels. Pleadings are liberally construed by both the clerk and the court. Almost anything will serve as an appellant's brief. Because the court prefers disposition on the merits, if a pro se appellant's papers appear to reflect a good faith effort, the appeal is submitted rather than dismissed for procedural irregularities.

X. Appellate Procedural Issues Arising Under the Prison Litigation Reform Act

A. The PLRA's filing fee provisions and in forma pauperis status

In an emergency general order, *In re: Procedures Regarding the Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act* (10th Cir. 1996), the Tenth Circuit adopted procedures to implement the PLRA's filing fees on appeal as follows:

> [I]f the prisoner tenders no filing fee, or less than the full fee, when a notice of appeal is filed, the district court shall obtain sufficient information to determine the prisoner's eligibility for, and make the assessment of, a partial filing fee under the Act. If the prisoner has

> sufficient funds, the entire filing fee shall be assessed immediately. The partial fee determination must take place regardless of whether the prisoner's status was examined at the time the complaint or other initial pleading was submitted to the district court. The appeal should be processed and submitted to this court in the normal course, as required by Federal Rule of Appellate Procedure 3(d), without waiting for the determination of the prisoner's eligibility for paying less than the full filing fee. When the district court makes its determination it shall enter an order and send a copy to this court...
>
> The appellant shall authorize the custodian to deduct payments from the institutional account and the custodian will pay the assessment. Notice shall be given to this court if the prisoner does not provide the information required under the Act or does not authorize payment from his or her institutional account.

Id. at 1.

In *Green v. Nottingham*, 90 F.3d 415, 418 (10th Cir. 1996), the court held that the PLRA's filing fee provisions apply to the filing of petitions for writs of mandamus on appeal.

B. The PLRA's "three strikes" provision and in forma pauperis status

Pursuant to the PLRA, the clerk's office maintains a database of frequent filers and circulates a list of them to the circuit judges on a monthly basis.

The court recapitulated the three strikes rule:

> To summarize and provide guidance for future cases, we count strikes for purposes of 28 U.S.C. § 1915(g) as follows:
>
> 1. Habeas corpus and 28 U.S.C. § 2255 proceedings are not civil actions . . . [so] the dismissal of a habeas corpus or § 2255 petition does not count as a strike . . .
> 2. A district court dismissal . . . does not count as a strike until after the litigant has exhausted or waived his opportunity to appeal.
> 3. If we affirm a district court dismissal . . . [it] then counts as a single strike.
> 4. If we reverse a district court dismissal . . . [it] does not count as a strike.
> 5. If we dismiss as frivolous the appeal of an action the district court dismissed . . . both dismissals count as strikes.
> 6. If we dismiss as frivolous a prisoner's appeal of an action for which the district court entered judgment for defendant, the dismissal of the appeal counts as one strike.

Jennings v. Natrona Cty. Detention Center, 175 F.3d 775, 780–81 (10th Cir. 1999).

In *Green v. Nottingham*, 90 F.3d 415, 420 (10th Cir. 1996), the court held that dismissals of frivolous complaints prior to the PLRA's enactment count as strikes for purposes of the PLRA's three strikes provision.

In *Garcia v. Silbert*, 141 F.3d 1415, 1416 (10th Cir. 1998), the court ruled that the PLRA's three strikes provision does not apply to appeals pending on the PLRA's effective date.

In *Cosby v. Knowles*, No. 97-1400, 1998 U.S. App. LEXIS 7845, at *4 (10th Cir. April 23, 1998) (unpublished), the court held that dismissal of an appeal based on the denial of an appellant's request to proceed in forma pauperis, where the appellant failed to submit a certified statement of his or her prison trust fund account does not count as a strike for purposes of the PLRA.

United States Court of Appeals for the Eleventh Circuit

I. General Information

The Eleventh Circuit encompasses Alabama, Florida, and Georgia. The Eleventh Circuit Court of Appeals is headquartered in Atlanta, but panels also hear appeals in Jacksonville, Miami, Montgomery, Tallahassee, and Tampa, or any other location that has adequate facilities.

The court has twelve authorized judgeships. In FY 1998, the court had seven sitting senior judges and 1.8 vacant judge-months.

A. Judges and panels

Visiting judges

Visiting judges are sent a "Visiting Judge's Procedure Manual," which describes the court's procedures and local practice for visiting judges, with particular emphasis on court policies relating to opinions.

Panels

Panels of three judges are drawn to serve as screening panels to determine whether cases should be placed on the nonargument calendar and to receive submission of and decide nonargument cases. In addition to nonargument and oral argument panels, the court maintains several assignment logs for the random assignment of interim matters to judges and court panels. These assignment logs include an administrative motions log, a capital case log, and a summer panels log.

B. Central staff

Staff attorneys' office

The staff attorneys' office consists of a senior staff attorney, a deputy, 4 supervising staff attorneys, about 35 "line" staff attorneys, and 7.5 support staff personnel. Line staff attorneys serve terms of up to three years.

In addition to other duties described *infra*, the staff attorneys' office provides orientation for law clerks on the organization and function of the court's units and an overview of selected areas of the law, such as Sentencing Guidelines. The office also maintains a law clerk manual and provides other substantive resource materials to law clerks, such as a quick reference citator and jurisdictional outline. The attorneys also work on special projects as assigned by the court's judges.

Circuit mediation office
The court employs four mediators. *See* § II.C, *infra*.

II. Intake, Screening, and Settlement Programs

A. Intake

Information provided by attorneys
A civil appeal statement must be filed within ten days after the filing of the notice of appeal, unless the appellant/petitioner is pro se or is incarcerated and appeals from habeas corpus actions under 28 U.S.C. § 2241, 2254, or 2255. The court also requires a civil appeal statement in reviews of administrative agency orders (excluding INS) and appeals from the U.S. Tax Court. No statement is required for criminal appeals.

Information provided to attorneys
When the appeal is docketed in the court of appeals, attorneys are notified and provided with the court of appeals docket number. When the briefing schedule is established, attorneys are provided with relevant briefing informational materials. When the opinion issues, attorneys are advised of the rules pertaining to costs, rehearing, and mandate.

B. Screening

Screening for jurisdiction
Four staff attorneys work solely on cases involving jurisdictional matters. Once the court receives the notice of appeal, the district court's docket entries, and the order or judgment appealed from, a staff attorney reviews the case for appellate jurisdiction. If probable appellate jurisdiction exists, the staff attorney notes it, and the case proceeds. If the staff attorney identifies a jurisdictional issue, the staff attorney submits a jurisdictional question describing the issue to the clerk's office, which forwards it to the parties, affording them an opportunity to file responses to the apparent jurisdictional problem. When the parties respond, or file a motion to dismiss based on jurisdiction, the staff attorney writes a memorandum to the court, summarizing the parties' positions, stating the applicable law, and proposing a disposition of the case.

Screening for argument/nonargument disposition
The parties are required to file a short statement of reasons for or against oral argument. If a party requests oral argument and the staff attorney concurs, the case will be assigned to an oral argument calendar, although the assigned oral argument panel may determine that argument is not

necessary. If the parties stipulate that oral argument is not necessary, the case will initially be placed on the nonargument calendar regardless of Fed. R. App. P. 34 criteria. Where parties have stipulated to waive oral argument, a unanimous opinion is not necessary. However, any judge of the screening/nonargument panel may assign the case to the oral argument calendar. If a party requests oral argument and the panel declines to hear argument, the decision in the case must be unanimous.

After the briefs are filed and the case is ready for disposition, the senior staff attorney or deputy reviews each appeal to determine whether the case should proceed directly to the oral argument calendar. The case is routed in one of five ways, to the (1) oral argument calendar (absent any objections by the parties, the screening attorney may forward the case directly to the oral argument calendar when the issues are novel or exceedingly complex, the record on appeal is extensive, or there are numerous parties); (2) screening panel with a recommendation for the oral argument calendar; (3) screening panel with a recommendation for nonargument disposition; (4) screening panel without a recommendation; or (5) staff attorneys' office for preparation of a screening memorandum. If the first judge receiving the case agrees with the staff attorney recommendation for nonargument disposition, the case is forwarded with a proposed opinion to the remaining judges on the screening panel.

Currently, the staff attorneys' office writes screening memoranda on all pro se appeals, including federal and state prisoner cases challenging either the fact or duration of a sentence or conditions of confinement; nearly all Sentencing Guideline cases; all Social Security cases, black-lung cases, and *Anders* cases; and certain other cases. The staff attorneys' office sends the memorandum, via the clerk's office, to the initiating judge, who writes the proposed opinion and forwards the case to the other judges on the panel for consideration.

A staff attorney investigates pro se petitions for writ of mandamus, including motions for leave to proceed in forma pauperis (IFP) in conjunction with such petitions, and examines motions for reconsideration of denials of mandamus petitions. The staff attorney prepares a memorandum that addresses the issues raised by the petitioner, states the result of the investigation or examination, and recommends disposition. Memoranda on original mandamus petitions, whether fee-paid (including those paid by consent form under the PLRA) or with IFP motions, are sent to a single judge, via the clerk's office; memoranda on requests for reconsideration of denials of mandamus petitions go (again via the

clerk's office) to an initiating judge who writes an order and circulates it to the remaining members of the panel.

Screening for case weighting or issue tracking

When a judge or staff attorney assigns a case to an oral argument calendar, it is weighted in the sense of being assigned either fifteen minutes per side or thirty minutes per side for oral argument.

C. Circuit Mediation Office

The court's Circuit Mediation Office (CMO) offers the parties and their counsel a confidential, risk-free opportunity to evaluate their case with an informed, neutral mediator. The CMO helps to explore possibilities for voluntary settlement, narrow and refine the issues on appeal as much as possible, and assist in the resolution of any procedural issues. Most civil cases are eligible for mediation. Parties may confidentially request mediation in eligible cases; otherwise, CMO staff select a cross-section of eligible cases and schedule mediation conferences in those cases selected. In addition, hearing panels may refer cases to the CMO for mediation either before or after oral argument. Once the CMO schedules mediation, participation is generally mandatory; however, a party may request that the CMO remove a case from mediation. The court's circuit mediators conduct the mediation conferences.

III. Briefing and Motions Practice

A. Briefing

General

The time for filing an appellant's brief begins to run on the date the court reporter files the transcript, or, if no transcript is to be prepared, on the date the appeal is docketed in the court of appeals. The original record stays with the district court for the parties' use until the appellee's brief has been filed; then it is sent to the court. In lieu of an appendix, the court proceeds on the original record requiring only that parties file copies of certain defined papers from the record, referred to as "record excerpts."

Briefs on digital media

The court does not require briefs to be filed on digital media, but permits parties or amici to provide the court with an electronic copy of a filed paper brief, so long as all parties are represented by counsel. If any party is pro se, the court will accept the electronic copy only if all parties con-

sent in writing. The court's rules set out detailed procedures for parties wishing to file electronic briefs.

B. Motions practice

Composition and operation of motions panels

Motions panels are constituted at the beginning of each court year in October. Presubmission motions that require consideration by judges are assigned to motions panels. The clerk submits the motion papers to the judges assigned in rotation from a routing log, the effect of which is to route motions randomly to judges. In matters requiring panel action, the papers are sent to the first judge (initiating judge), who transmits them to the second judge with a recommendation. The second judge in turn sends them on to the third judge, who returns the file and an appropriate order to the clerk. After cases are assigned to the oral argument calendar, motions are circulated to the hearing panel rather than to the administrative motions panels. The senior active judge on the hearing panel is considered to be the initiating judge, except that after oral argument, a circuit judge of the Eleventh Circuit who is designated to write the opinion will become the initiating judge.

Motions panels decide motions without hearing argument except in unusual circumstances.

Procedural motions

The clerk is authorized, subject to review by the court, to act for the court on a number of unopposed procedural motions listed in Circuit Rule 27-1(c).

Substantive motions

A single judge or a panel of two judges may act on nondispositive motions. A motions attorney prepares memoranda on selected motions before the case is submitted to a merits panel. Staff attorneys prepare memoranda on IFP and appointment-of-counsel pro se motions. These attorneys review the merits of the appeal and then orally present the motion to the assigned judges, either in person or telephonically.

Emergency motions

The court encourages counsel to file any emergency motions, whether addressed to the court or to an individual judge, with the clerk and not with an individual judge. To expedite consideration by the court in a genuine emergency, counsel may telephone the clerk and describe a motion that has not yet been filed in writing, but this is not a substitute for

the filing. Emergency motions are assigned in rotation from a separate emergency routing log, but the papers are forwarded to all panel members simultaneously.

Special topics or problems regarding motions

The court recently adopted two rules changes concerning emergency motions. One permits the clerk to authorize or direct the electronic filing of emergency motions. The other places certain conditions on the filing of emergency motions outside of normal working hours.

IV. Nonargument Decision-Making Practices

Panels of three judges are assigned in rotation from a routing log to serve as screening panels, to determine whether cases should be placed on the nonargument calendar and to decide nonargument cases. These panels are constituted at the beginning of each court year in October.

In specified categories of nonargued cases, staff attorneys prepare a memorandum and proposed order. Once prepared, the cases go to one of the screening panels. Other cases not worked up by the staff attorney are routed directly to the panel. If the judge to whom an appeal is directed for consideration as to whether oral argument should be granted determines that the appeal does not warrant oral argument, that judge forwards the briefs, the record, and a proposed opinion to the two other judges on the panel in round-robin sequence. If any judge on the panel believes that oral argument is necessary, the case is placed on the next available oral argument calendar. Otherwise, the judges on the panel dispose of the matter. Recently, the court began experimenting with a new procedure that involves a staff attorney making oral presentations to special panels of senior judges in a limited category of appeals. Any judge on the panel may refer any case to oral argument.

V. Argument Panel Operations

A. Panel composition, sitting schedules, and panel rotation

To ensure complete objectivity in assigning cases, the circuit executive and a scheduling committee of active judges take into account a fixed number of weeks for each active judge and the available sittings from the court's senior judges, visiting circuit judges, and district judges. In recent years, the court has conducted 41–44 oral argument sessions each year, with about 20–22 sessions in Atlanta, Georgia, 12–14 in Miami, Florida, 3–5 in Jacksonville, Florida, and 2–3 in Montgomery, Alabama. The

names of the active judges for the sessions of the court are drawn by lot from a matrix for the entire court year.

This schedule is only available to judges and the circuit executive for their advance planning; it is not available to the clerk. The clerk is not furnished with the names of the panel members for any session until after the court calendars of cases have been prepared and approved.

The court generally hears argument Tuesday through Friday, and a regular session consists of twenty cases, with five cases scheduled per day. To the extent possible, cases assigned to an oral argument calendar are selected from the area where the session is to be held.

Court policy allows up to fifteen minutes of oral argument per side in most cases. For more complex cases, the court allows thirty minutes per side.

B. Assignment of cases to panels

Absent an order expediting the appeal, cases are calendared according to a "first-in, first-out" rule.

The clerk's office prepares oral argument calendars approximately one month in advance of oral argument. The clerk attempts to balance the calendars by dividing the appeals scheduled for oral argument among the panels by case type so that each panel for a particular week has an equitable number of different types of litigation for consideration.

C. Staff role in working up cases for argument calendar

Some judges have their law clerks prepare memoranda on cases scheduled for oral argument.

D. Judicial preparation for argument: materials and timing

As soon as the calendar is set and the clerk receives the names of the panel members, the clerk sends the panel members an initial list of cases and a "recusal package" consisting of the first page of the appellate docket sheet (showing the case style and names of attorneys in the case), and a copy of the certificates of interested persons/corporate disclosure statements. Copies of the briefs, record excerpts, and "administrative papers" are separately sent shortly thereafter. Usually this allows about one month for the judges to prepare.

E. Disclosure of panel identity

The clerk's office does not disclose the identity of the panel until one week before the argument session.

VI. Opinion Preparation and Publication

A. Types of disposition

The court usually disposes of appeals on the merits with one of the following:

1. signed published opinion;
2. per curiam published opinion;
3. per curiam unpublished opinion; or
4. Rule 36-1 affirmance without opinion.

B. Criteria for judgment without opinion

If an opinion would be of no precedential value, the court may issue an affirmance without opinion when the judgment of the district court is based on findings of fact that are not clearly erroneous; when the evidence in support of a jury verdict is sufficient; when the order of an administrative agency is supported by substantial evidence on the record as a whole; when summary judgment, directed verdict, or judgment on the pleadings is supported by the record; or when judgment has been entered without a reversible error of law.

C. Criteria for publication and nonpublication

A majority of the panel determine whether an opinion should be published, and opinions that the panel believes to have no precedential value are not published. The court's general policy is that the unlimited proliferation of published opinions is undesirable because it tends to impair the development of the cohesive body of law. Judges of the court are asked to exercise appropriate discipline to reduce the length of opinions by using techniques that result in brevity without sacrificing quality.

D. Prefiling circulation of opinions

Opinions are not normally circulated to nonpanel judges before filing, but a judge or panel may choose to circulate an opinion in special cases.

E. Citability of not-for-publication opinions

Although unpublished opinions may be cited as persuasive authority, they are not considered binding precedent. Reliance on unpublished opinions is not favored by the court. They may be cited as persuasive authority provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion, or response in which such citation is made.

F. Availability of not-for-publication opinions

All nonpublished opinions and affirmances without opinion under 11th Cir. R. 36-1 are printed in table form in the Federal Reporter. The opinions are not available on LEXIS, Westlaw, or a bulletin board service.

G. Miscellaneous opinion and publication issues

At any time before the mandate has issued, the panel, on its own motion or upon the motion of a party, may by unanimous vote order a previously unpublished opinion to be published. The timely filing of a motion to publish stays issuance of the mandate until disposition of the motion, unless otherwise ordered by the court. The time for issuance of the mandate and for filing a petition for rehearing or rehearing en banc begins running anew from the date of any order directing publication.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for grant of en banc rehearing

A petition for rehearing en banc must present a precedent-setting error of exceptional importance or demonstrate direct conflict with Supreme Court or Eleventh Circuit precedent.

B. Treatment of petitions for rehearing

A petition for rehearing en banc is treated as if it were a combined petition for rehearing by the panel and a petition for en banc rehearing.

A filing of a petition for rehearing en banc does not remove the case from plenary control of the panel. Rather, the panel may, on its own, grant rehearing by the panel without full court action; if the panel denies and no poll is requested by any other judge, the panel will issue a boilerplate order denying both the petition for rehearing and the petition for rehearing en banc.

C. Independent action by the court

Any judge on the panel or any active judge of this court can suggest en banc rehearing by a letter to the chief judge.

D. Process for rehearing en banc

A party may not respond to a petition unless requested to do so by the court.

For purposes of a vote granting a rehearing en banc, a majority means a majority of all active judges, both qualified and disqualified.

A grant of petition for rehearing en banc vacates the panel opinion and stays the mandate, returning the case to the live docket as a pending appeal.

When rehearing en banc is granted, case managers are appointed. The case managers include the judge of the authored panel opinion, the judge who requested en banc, and the judge who dissented.

Oral argument is generally granted for an en banc hearing unless fewer than three judges want it.

E. Other ways the court works to avoid conflict and inconsistency

Judges give priority to reviewing published opinions soon after issuance.

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal appeals

There are no special procedures for managing criminal appeals.

B. Habeas corpus cases and certificates of appealability

The district court must first consider and rule upon the propriety of issuing a certificate of appealability before a request for a certificate will be acted upon by the court of appeals. Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997).

District courts must treat notices of appeal, filed following denials of a motion to vacate or a petition for habeas corpus, as applications for a certificate of appealability. *Id.*

In an appeal brought by an unsuccessful habeas corpus petitioner, appellate review is limited to the issues specified in the certificate of appealability. Murray v. United States, 145 F.3d 1249, 1251 (11th Cir. 1998).

The staff attorneys' office reviews those cases in which the district court denied a certificate of appealability or in forma pauperis status, including review for application of Antiterrorism Effective Death Penalty Act (AEDPA) and issue identification/limitation for grants of certificates of appealability. The staff attorneys' office also reviews all successive applications quickly, as the court must rule on those within thirty days of filing. In the course of drafting screening memoranda, the staff attorneys' office also reviews for exhaustion, procedural bars, and to determine whether a petition is successive or abusive within the meaning of Rule 9(b) of the rules governing habeas corpus cases.

An applicant seeking leave to file a second or successive habeas corpus petition or motion to vacate, set aside, or correct sentence must use the appropriate form provided by the clerk of court, except in a capital case.

When a pro se pauper brings any habeas corpus action, counsel will normally be appointed before calendaring of the case for oral argument. While the rule provides for counsel upon approval of the certificate of appealability, there is no rule requiring counsel to assist in preparation of the brief or application, although the local CJA plan may allow for appointment.

Certificates of appealability are handled by one judge; no distinction is made between grants and denials.

Special procedures for capital habeas corpus cases

Capital cases are submitted only to panels of active judges from a randomly drawn assignment log used exclusively for that purpose. Capital cases are assigned to a panel upon docketing, and if a case has previously been before the court it will be returned to the prior panel. However, an active judge who has taken senior status will be replaced on the panel. Capital cases are specially scheduled for oral argument and are not placed on regular oral argument calendars. The clerk's office employs a full-time capital case clerk who is responsible for all case-processing duties in capital cases.

IX. Special Procedures for Pro Se Cases

See § X, *infra*.

X. Appellate Procedural Issues Arising Under the Prison Litigation Reform Act

A. The PLRA's filing fee provisions and in forma pauperis status

In order to implement the provisions of the Prisoner Litigation Reform Act, the court has developed a "Prisoner Consent Form" to be completed, signed, and filed by the prisoner. The form authorizes the prison to withdraw funds from the prisoner's account to pay the filing and docketing fees in installments.

B. The PLRA's "three strikes" provision and in forma pauperis status

In *Rivera v. Allin*, 144 F.3d 719, 730 (11th Cir.), *cert. dismissed*, 119 S. Ct. 27 (1998), the court held that dismissals for frivolousness prior to the PLRA's enactment should be counted as strikes for purposes of the PLRA's three strikes provision.

United States Court of Appeals for the Federal Circuit

I. General Information

The Federal Circuit has national jurisdiction over certain case types. It sits mostly in Washington, D.C., but in other cities on occasion (e.g., Detroit, Pasadena, and San Francisco). Panels sit at district courts, courts of appeals, and law schools to expose law students and others to the work of the court. They also meet with district judges. Routinely the Federal Circuit Bar Association holds a workshop during the out-of-town sessions in which the judges participate.

The court has twelve authorized judgeships. For most of FY 1998 (beginning December 1997), it had eleven active judges.

A. Judges and panels

Orientation and assignments for new judges

Orientation programs offered by the AO and FJC are available to new judges. The court does not have its own orientation program.

New judges are assigned the normal caseload and normally sit within the first month after being sworn in.

Visiting judges

In recent years, the court has not had visiting judges.

Panels

The court sits in regular argument panels. These panels also decide the submitted cases.

B. Central staff

The office of the senior staff attorney (SSA) and the office of senior technical assistant (STA) together are called the "Central Legal Office." Together, they have a senior staff attorney, a career supervisor staff attorney, a senior technical assistant, and a career deputy senior technical assistant, along with two line staff attorneys in the SSA's office, and two line technical assistants.

II. Intake, Screening, and Settlement Programs

A. Intake

Information provided by attorneys

In an appeal arising from an administrative agency action, attorneys must initially provide an original and three copies of the petition for review, a copy of the administrative agency decision, and the filing fee.

All counsel must become a member of the bar of the court and file an entry of appearance and certificate of interest.

Information provided to attorneys

When an appeal is docketed, all counsel and pro se litigants are provided with a docketing packet which includes the notice of docketing, rules of practice, admission form (counsel only), entry of appearance form, and a discrimination waiver form (Merit Systems Protection Board cases only).

B. Screening

Screening for jurisdiction

There is no jurisdictional screening. A jurisdictional issue may be considered in the context of a party's motion or by argument presented in a party's brief, by a motions panel sua sponte, or by a merits panel sua sponte.

Screening for argument/nonargument disposition

The court staff does not screen cases for argument or nonargument disposition. All counseled cases are automatically scheduled for oral argument, and all pro se cases are automatically set for submission without argument.

Screening for case weighting or issue tracking

The court does not assign caseweights or track pending issues.

C. Settlement programs

The court does not have preargument conferences or a mediation program. However, Federal Circuit Rule 33 requires parties in counseled cases to discuss settlement and to file a joint statement of compliance with the requirements of the rule.

III. Briefing and Motions Practice

A. Briefing

General

The docketing notice refers the parties to the court's rule regarding briefing schedules. The court issues a separate briefing schedule only when the court sua sponte consolidates appeals, or when a special briefing schedule is warranted.

Briefs on digital media

The court permits parties to file briefs and appendices on CD-ROM, but requires a corresponding paper brief as well.

B. Motions practice

Composition and operation of motions panels

The chief judge appoints a three-judge motions panel that is constituted for one month. The chief judge appoints each active judge, in turn, to act as lead judge for a monthly motions panel. In recent years, the court has had eleven or twelve active judges. Thus, each active judge serves as lead judge about one month a year and sits as a panel member on approximately two other monthly panels a year. One or two of the court's senior circuit judges sometimes serve as panel members also.

Other than motions that may be acted on by the clerk or motions that are directed to a merits panel, all motions are decided by motions panels. The clerk directs these motions to the senior staff attorney's office, which in turn presents them to the motions panel.

Procedural motions

The clerk is authorized to act on motions, if consented to or unopposed, listed under Federal Circuit Rule 27. A party who is adversely affected by an order the clerk entered before receiving a response may ask the court to vacate or modify the order.

Substantive motions

The clerk is also authorized to dispose of some substantive motions, including motions to dismiss an appeal or petition, if the parties consent to it or do not oppose the motion.

Emergency motions

Because the court does not review capital cases, its emergency motions differ from some of those in other circuits. The procedures for handling

emergency motions are the same as those for nonemergency motions, except that the court gives them immediate attention, as required.

IV. Nonargument Decision-Making Practices

Cases where the petitioner or appellant is pro se are automatically scheduled for submission on the briefs, not for oral argument. (However, a pro se party may move for oral argument and, if one judge agrees, oral argument will be allowed.) These submitted cases are assigned to a merits panel that also hears argued cases. The briefs of all panel cases, both argued and nonargued, are sent to the panel members four to six weeks before argument. In some instances, the presiding judge of the panel will preassign a pro se case to himself or herself or to another panel member before argument day. In those cases, an opinion may be prepared before argument day.

V. Argument Panel Operations

A. Panel composition, sitting schedules, and panel rotation

Panels consist of three judges, two of whom may be senior judges. A computer program randomly selects the judges who serve on each panel.

Appeals are usually calendared for oral argument within two months after the briefs and joint appendix are filed. Counsel are informed of the firm date of the hearing approximately 5–6 weeks in advance of the session. Arguments are typically fifteen minutes per side, but may be extended if the panel wants to hear more.

B. Assignment of cases to panels

Section 46(b) of 28 U.S.C. provides that each panel will hear a representative cross section of all types of cases within the court's exclusive jurisdiction. A computer program divides the "ready" cases (cases in which all briefs and the appendix are filed) by origin so that each set contains a representative cross section of cases. These include both argued and nonargued cases.

A subsequent appeal or petition in a case is in some cases assigned to the panel that decided the earlier appeal or petition.

Cases in which the appellant is proceeding pro se (most frequently Merit Systems Protection Board cases) are not heard, but are considered at the same time as orally argued cases. Thus, on a typical day in a typical four-day argument week, a panel might hear four argued cases and decide two fully briefed pro se cases without argument.

C. Staff role in working up cases for argument calendar

Central staff has no role in working up cases for the argument calendar.

D. Judicial preparation for argument: materials and timing

Each judge receives the briefs and appendices for his or her cases four to six weeks before the hearing or submission date. Each judge prepares individually for oral argument.

E. Disclosure of panel identity

The names of the judges on the panel are not made public until the day of argument or the submission on the briefs.

VI. Opinion Preparation and Publication

A. Types of dispositions

Dispositions of appeals may be announced in precedential or nonprecedential opinions. Dispositions of motions and petitions are announced in precedential or nonprecedential orders.

B. Criteria for judgment without opinion

The court may enter a judgment of affirmance without opinion when it determines that

- (a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;
- (b) the evidence in support of a jury verdict is sufficient;
- (c) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
- (d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or
- (e) a judgment or decision has been entered without an error of law and an opinion would have no precedential value.

Rule 36 affirmances are not generally issued in nonargued cases. They are used in cases where, for example, a Board of Contract Appeals (BCA) has applied settled law to complicated facts. The court uses Rule 36 affirmances less than it once did, but adheres to the belief that Rule 36 affirmances may be appropriate where the court has heard oral argument.

C. Criteria for publication and nonpublication

The court uses the terms *precedential* and *nonprecedential*. It does not use *published* and *nonpublished*.

The court's view is that the current workload of the appellate courts precludes preparation of precedential opinions in all cases. Unnecessary precedential dispositions, with concomitant full opinions, only impede the rendering of decisions and the preparation of precedential opinions in cases which merit that effort. The purpose of a precedential disposition is to inform the bar and interested persons *other* than the parties. The parties can be sufficiently informed of the court's reasoning in a nonprecedential opinion. Disposition by nonprecedential opinion or order does not mean the case is considered unimportant, but only that a precedential opinion would not add significantly to the body of law. The court's policy is to limit precedent to dispositions meeting certain criteria, including but not limited to the following:

- the case is a test case;
- an issue of first impression is treated;
- a new rule of law is established; an existing rule of law is criticized, clarified, altered, or modified; or
- an existing rule of law is applied to facts significantly different from those to which that rule has previously been applied.

D. Prefiling circulation of opinions

At least seven working days before it is issued, each opinion prepared as precedential is circulated to all active and senior judges for comment and to the central legal office for comment respecting any appearance of conflict or confusion between the language in the opinion and that in earlier opinions of the court or its predecessor courts.

E. Citability of not-for-publication opinions

Nonprecedential opinions and orders may not be used or cited as precedent, except where necessary to support assertions of claim preclusion, issue preclusion, judicial estoppel, law of the case, or the like based on a decision of the court rendered in a nonprecedential opinion or order.

F. Availability of not-for-publication opinions

The court's nonprecedential opinions, like its precedential ones, are available on the court's bulletin board system, as well as from commercial services. They are not available by subscription from the court but may be purchased from the court's Administrative Services Office for $2.00 each.

G. Miscellaneous opinion and publication issues

Within sixty days after any nonprecedential opinion or order is issued, any person may request that the opinion or order be reissued as a precedential disposition, explaining why it should be reissued. The panel that rendered the disposition considers the request; if it grants the request, the panel may reprepare the opinion or order as appropriate before reissuing it.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for grant of en banc rehearing

En banc consideration is required to overrule a prior holding of the court or a predecessor court expressed in an opinion having precedential status. A majority of the judges who are in regular active service may, for any appropriate reason, conduct an en banc hearing or rehearing. Among the reasons for en banc action are (1) the necessity of securing or maintaining uniformity of the court's decisions; (2) the involvement of a question of exceptional importance; (3) the necessity of overruling a prior holding of this or a predecessor court; or (4) the initiation, continuation, or resolution of a conflict with another circuit.

B. Treatment of petitions for panel rehearing, petitions for rehearing en banc, and combined petitions

Petition for panel rehearing

Unless a petition for panel rehearing expressly requests en banc action, the petition is deemed to request only rehearing by the panel. Upon receipt, the clerk distributes the petition to the panel along with a vote sheet. The voting deadline is seven working days following the date of distribution. A panel member who desires no action on a petition need do nothing. If the clerk does not receive a vote sheet from a panel member by the day following the voting deadline, the panel member is deemed to have voted to deny the petition for panel rehearing. If the vote of the panel is to deny, the clerk issues an order denying the petition.

A judge may instruct the clerk to direct a response before the voting deadline. The new voting deadline is seven days after distribution of the response.

A panel member who desires action on the petition marks the vote sheet and transmits it to the clerk, with copies to the other panel members and any memorandum of reasons attached. If the vote of the panel is

to grant, the clerk issues an order granting the petition for panel rehearing fashioned to fit the circumstances.

Petition for rehearing en banc

When a party does not file a petition for panel rehearing, but only a petition for rehearing en banc, the petition for rehearing en banc is nonetheless distributed to the panel first in the manner of a petition for panel rehearing.

Combined petition for panel rehearing and rehearing en banc

The petition is distributed first to the panel along with a vote sheet. If the panel grants the entire relief requested, the en banc request is moot. If the panel denies panel rehearing, the combined petition is sent to the en banc court.

C. Independent action by the court

The court may order, sua sponte, that a case be heard en banc following a hearing by the panel, but before the entry of judgment and issuance of any opinions by the panel members.

D. Process for rehearing en banc

A panel member who desires no action on the rehearing petition does not need to do anything. If, by the day following the seven-working-day deadline, no judge requests a response, the clerk issues an order denying the petition. When a response is ordered, the clerk transmits the response with a sheet that allows any active judge to initiate a poll within seven working days. If a poll is initiated but fails to garner a majority of votes, the clerk issues an order denying the petition for rehearing en banc.

If a poll is initiated and a majority of the judges vote to grant the petition for rehearing en banc, the initiating judge transmits a memorandum setting forth the questions proposed to be considered. The en banc court meets to decide various issues, such as whether there will be further briefing or a request for amicus briefs.

Whether there will be oral argument in en banc cases is decided on a case-by-case basis.

VIII. Management of Criminal and Habeas Corpus Cases

The court does not review direct criminal appeals or habeas corpus cases.

IX. Special Procedures for Pro Se Cases

The central legal staff has no role in deciding pro se cases. After briefing is completed, the briefs are sent to the merits panel and the panel decides the case.

The court does not review criminal cases. However, occasionally a litigant is incarcerated. In those cases, the in forma pauperis motion is decided in accordance with the Prisoner Litigation Reform Act. (*See* § X, *infra*.)

There are no special procedures in nonprisoner pro se cases; however, the court provides a pro se guide to provide assistance to pro se litigants and allows them to file an informal brief on a form provided by the clerk.

The court has no procedures for the appointment of counsel.

X. Appellate Procedural Issues Arising Under the Prison Litigation Reform Act

A. The PLRA's filing fee provisions and in forma pauperis status

The Federal Circuit's Guide for Pro Se Petitioners and Appellants provides for the collection of the appellate court docketing fee according to the terms of the PLRA as follows:

> Section 5.
>
> . . . . If you are a prisoner and file a notice of appeal in this court, the Clerk's Office will forward to you a blank motion and affidavit for leave to proceed in forma pauperis and a supplemental authorization and affidavit form. You must complete and file the supplemental form, and the Clerk's Office will send a copy to the institution in which you are incarcerated. The form authorizes the institution to (1) furnish to this court a certified copy of your prison account statement and (2) calculate and disburse funds from the prison account, including the initial partial filing fee payment and subsequent monthly payments. Your institution will forward the certified statement, the initial payment, and the subsequent payments to this court. If you file the proper form, the failure of the institution to send the statement or to remit the payments shall not adversely affect your appeal. If, however, you do not submit the motion and affidavit for leave to proceed IFP and the supplemental in forma pauperis form within 14 days of the date of docketing, the prisoner's appeal shall be dismissed.

B. The PLRA's "three strikes" provision and in forma pauperis status

There is no local rule implementing the PLRA's three strikes provision.