

Case Management Procedures in the Federal Courts of Appeals

Second Edition

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NOTE

The caseload data included in this report were collected in December 2010. More recent data are available at www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx.

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Introduction

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The Federal Rules of Appellate Procedure provide a generally unified scheme of appellate practice and procedure for the courts of appeals. Yet, the courts of appeals, with their unique traditions and circumstances, use a variety of procedures to manage their dockets and to ensure high-quality and consistent appellate decisions.¹ The Judicial Conference of the United States recognized that circuit-based experimentation with case management could provide an abundant source of ideas for improving the appellate courts' practices and procedures. In its 1995 *Long Range Plan for the Federal Courts*, the Conference stated, "It is important that the appellate courts take advantage of the varied experiences of other circuits by exchanging information about the operation and results of the use of particular case management techniques and systems."² In addition, the Conference recommended that the federal court system "collect and analyze information on various courts of appeals' case management practices."³

The Judicial Conference's charge to the courts of appeals in the mid-1990s to exchange information about case management practices is no less important today. Over the last decade, the courts of appeals have experienced many changes, including the adoption of an electronic case filing system and significant increases in bankruptcy appeals and pro se filings. The courts have also had to deal with the challenges of multiple and prolonged judicial vacancies. All of these changes have had an impact on how the courts of appeals conduct their business.

In this second edition of *Case Management Procedures in the Federal Courts of Appeals*, we present information on the case management practices of the courts of appeals that were in effect in 2010 and 2011. In order to describe how the courts of appeals do their work, we reviewed the Federal Rules of Appellate Procedure, the circuit courts' local rules and internal operating procedures, practitioner handbooks, published articles, and other supplemental information provided by court staff. Using these materials, we prepared for each court's review a profile of that court's case management practices. These profiles were refined as additional information was obtained. Some courts supplied information with a high level of detail; others provided summaries of their courts' operations. We distilled this information in an effort to present a balanced view of how the appellate courts operate without restating each circuit's entire body of local rules and internal operating procedures.

This publication has two parts. Part I highlights key areas in which case management approaches of the courts of appeals vary. Part II comprises circuit-by-circuit descriptions of how the courts of appeals manage their caseloads.

1. See generally Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 Duke L.J. 315 (2011). The author analyzes the practices of five circuit courts using qualitative research from a series of interviews of appellate judges, clerks of court, court mediators, and staff attorneys. Variations across the five circuits are described. The author concludes that disuniformity in case management is more defensible in the appellate courts than in substantive and procedural law, but that current practices can and should be improved through increased transparency and information sharing among the circuits.

2. Judicial Conference of the U.S., *Long Range Plan for the Federal Courts*, Dec. 1995, Recommendation 35, at 67, <http://www.uscourts.gov/uscourts/FederalCourts/Publications/FederalCourtsLongRangePlan.pdf>.

3. *Id.*, Recommendation 36, at 67.

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Part I: Key Variations

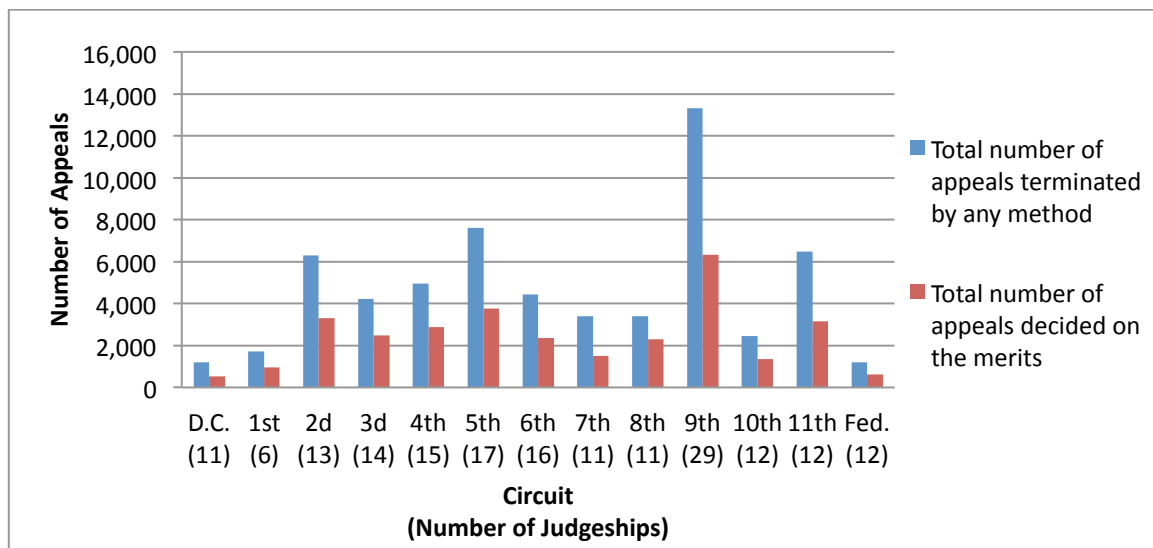
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In this part we describe generally major aspects of case management in the courts of appeals. In a number of instances we give examples of a court's case management approach with particular types of cases, such as bankruptcy appeals. We have not attempted to be exhaustive, and if a court is not mentioned in connection with a particular practice, that does not mean the court is not following that practice. Typically, the mention of a court reflects the fact that the court's published rules or internal operating procedures specifically describe the practice. Because courts' operating procedures vary in specificity, some courts may use practices that are not described in official publications.

The following figures and tables present information about the caseloads of the courts of appeals,⁴ including data on appeals terminated on the merits, resident judge complement, type of judge participating in case dispositions, and median times from the filing of the notice of appeal to disposition of the case. The appellate case management practices summarized here, and set out in more detail in the circuit profiles in Part II of this report, reflect, to some degree, how the courts processed the more than 59,000 appeals terminated during the 12-month period ending September 30, 2010.

Figure 1 contains summary information about the total number of appeals that were terminated in FY 2010 and the total number of appeals that were decided on the merits.

Figure 1: Appeals Terminated by Circuit During the 12-Month Period Ending September 30, 2010



Sources: Admin. Office of the U.S. Courts, 2010 Federal Court Management Statistics, at 26. Data for the U.S. Court of Appeals for the Federal Circuit come from its website at <http://www.cafc.uscourts.gov/the-court/statistics.html>.

4. See Admin. Office of the U.S. Courts, Judicial Business of the United States Courts: Annual Report of the Director 14 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/judicialbusinesspdfversion.pdf> [hereinafter Admin. Office of U.S. Courts 2010 Annual Report].

Table 1 focuses on merits terminations in greater detail. During the 12-month period ending September 30, 2010, a little over half (52%) of the courts of appeals' cases were terminated on the merits. In seven circuits (the First, Second, Third, Fourth, Sixth, Eighth, and Tenth), the percentage of terminations on the merits exceeded this overall average. In five other circuits, the majority of appeals were terminated by procedural judgments.⁵

Table 1: Appeals Terminated on the Merits by Circuit During the 12-Month Period Ending September 30, 2010

Circuit	Total Appeals Terminated ^a	Percentage of Total Terminations on the Merits	Total on the Merits Appeals Terminated	Affirmed/ Enforced ^b	Dismissed	Reversed	Remanded	Other
All Circuits	59,526	51.9	30,914	24,588	2,751	2,372	574	629
D.C.	1,189	43.7	520	399	36	75	9	1
1st	1,706	56.6	965	820	50	86	9	—
2d	6,300	52.4	3,304	2,579	434	221	70	—
3d	4,235	58.6	2,483	2,112	94	202	73	2
4th	4,951	58.5	2,894	2,545	148	146	48	7
5th	7,624	49.5	3,773	2,679	751	261	82	—
6th	4,440	52.9	2,350	2,028	60	208	54	—
7th	3,398	44.5	1,512	1,088	145	208	42	29
8th	3,397	67.5	2,293	2,011	161	103	10	8
9th	13,340	47.4	6,324	4,688	404	566	98	568
10th	2,448	55.3	1,353	996	212	74	71	—
11th	6,498	48.4	3,143	2,643	256	222	8	14

Source: Admin. Office of U.S. Courts 2010 Annual Report, at 111–14 tbl.B-5.

Note: Data for the U.S. Court of Appeals for the Federal Circuit are not included.

a. Totals include reopened and remanded appeals as well as original appeals.

b. Affirmed includes merit terminations affirmed in part and reversed in part.

A. Court Organization and Staffing

1. Types of judicial panels

In addition to regularly constituted three-judge panels that hear orally argued cases, courts use various other types of judicial panels. These panels are described in detail in the individual circuit profiles in Part II of this report. Specially constituted panels, which may be standing or rotating, include motions panels, death penalty panels, and “screening” or “conference calendar” panels that decide nonargued cases. These panels and other

5. See Admin. Office of U.S. Courts 2010 Annual Report, *supra* note 4, at 115 tbl.B-5A, for a breakdown of procedural terminations, including but not limited to jurisdictional defects, Fed. R. App. P. 42(b) (voluntary dismissal), and defaults.

techniques used to process the appellate caseload are described in more detail in later sections of this report.

2. Available judges and use of visiting judges

Courts of appeals can compose panels from three categories of judges—active judges, senior judges of the court, and judges from outside the court.⁶ 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 number of available judges and in how they supplement them with judges from outside the court. Table 2 provides information on judgeships and sitting senior judges in each court of appeals during the 12-month period ending September 30, 2010. Two circuits (the Second and Ninth) have 12 or more sitting senior judges who assist the court in managing its caseload.

Table 2: Selected Judge Information by Circuit During the 12-Month Period Ending September 30, 2010

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th
Judgeships	11	6	13	14	15	17	16	11	11	29	12	12
Sitting senior judges	4	2	12	9	1	5	9	6	6	20	9	5
Vacant judgeship months ^a	24	5.5	42.3	10.9	40.4	12	12	10.3	0	35.2	15	4.7

Source: Admin. Office of the U.S. Courts, 2010 Federal Court Management Statistics, at 27.

Note: Data for the U.S. Court of Appeals for the Federal Circuit are not included.

a. Vacant judgeship months are the total number of months that vacancies occurred in any judgeship position in a circuit.

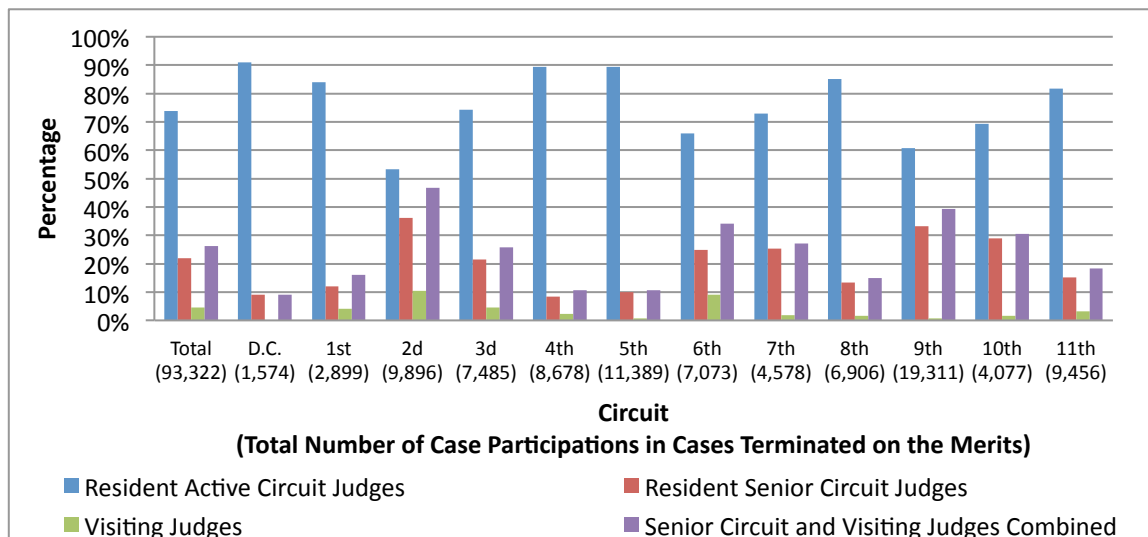
Figure 2 presents information on how frequently each type of judge participated in cases terminated on the merits after oral hearings or submissions on the briefs. Overall, the data show that approximately 26% of the work in the courts of appeals is performed by senior and visiting judges. Visiting judges can include circuit judges from another circuit as well as district judges from the same or another circuit.

In some circuits, the use of senior and visiting judges is substantial. For example, in the Second Circuit, resident senior judges participated in approximately 36% of cases terminated on the merits in FY 2010. Visiting judges participated in about 11% of cases terminated on the merits. Similarly, in the Ninth Circuit, senior judges participated in over a third of these cases. The Second and Ninth Circuits are also circuits with some of the highest numbers of vacant judgeship months: 42.3 months and 35.2 months, respectively (see Table 2).⁷

6. Judges from outside the court may be active or senior circuit or district judges or, on occasion, retired Supreme Court justices.

7. Vacant judgeship months are months in which the court was short an active judge.

Figure 2: Judge Participations in Cases Terminated on the Merits After Oral Hearings or Submission on the Briefs by Circuit During the 12-Month Period Ending September 30, 2010

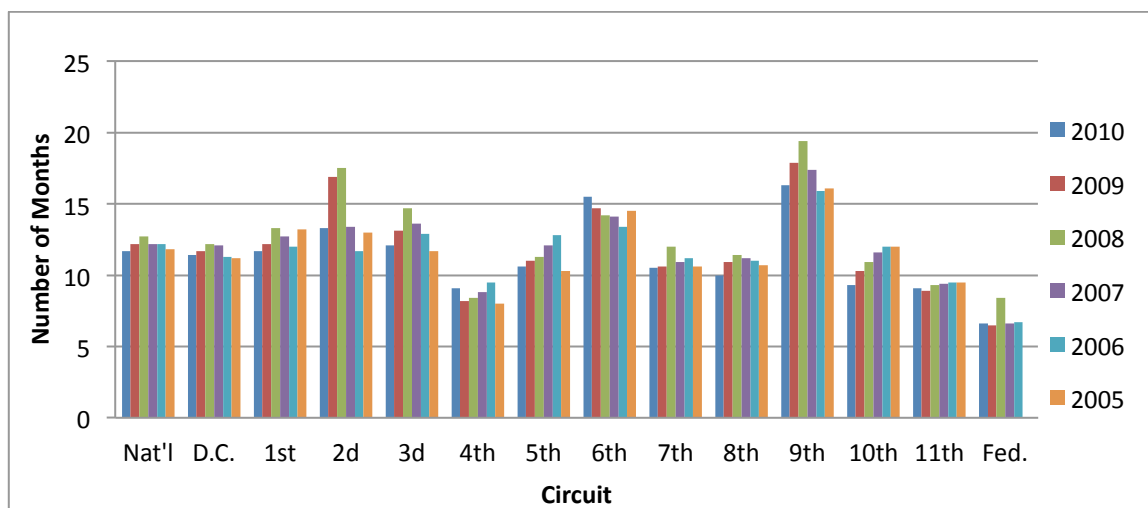


Source: Admin. Office of U.S. Courts 2010 Annual Report, at 45 tbl.S-2.

Note: Data for the U.S. Court of Appeals for the Federal Circuit are not included.

Figure 3 shows that during FY 2010, a case took an average of 11.7 months to move through the appellate court system. This represents a slight decrease from the averages for 2008 and 2009. Consistent with this trend, FY 2010 data show that 9 of the 13 courts of appeals saw a decline from the previous year in the length of time from the filing of the notice of appeal to disposition. In contrast, 4 circuits (the Fourth, Sixth, Eleventh, and Federal) experienced increases in median disposition times during FY 2010.

Figure 3: Median Time from Filing Notice of Appeal to Disposition by Circuit for the Years 2005–2010

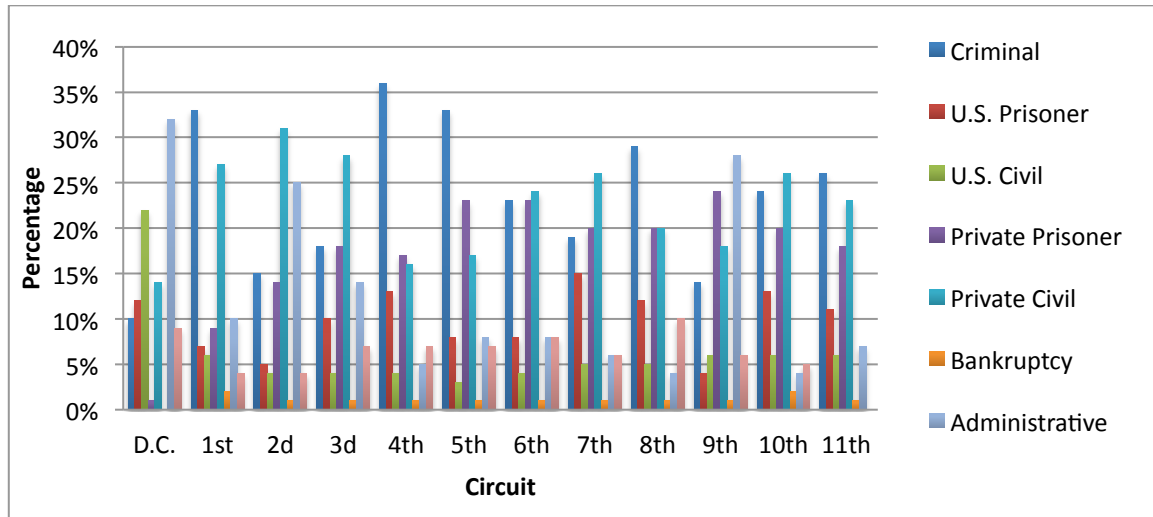


Source: 2010 Federal Court Management Statistics, at 3–25.

Note: The Federal Circuit characterizes these numbers as “median time from docketing to disposition.” Federal Circuit, Statistics, Caseload Analysis, available at <http://www.ca9.uscourts.gov/the-court/statistics.html>. Data for FY 2005 are not available for this circuit.

Figure 4 gives a snapshot of the filings in the courts of appeals for FY 2010. Variations of note include high percentages of administrative and U.S. civil cases in the District of Columbia Circuit, a high percentage of criminal cases in the First, Fourth, and Fifth Circuits, and a low percentage of private prisoner cases in the District of Columbia Circuit. Data on original proceedings are not available for the Eleventh Circuit.

Figure 4: Case Types as a Percentage of All Appellate Filings by Circuit During the 12-Month Period Ending September 30, 2010



Source: Admin. Office of U.S. Courts 2010 Annual Report, at 84 tbl.B-1.

Note: The figure includes original appeals as well as appeals reopened. The figure does not include data for the U.S. Court of Appeals for the Federal Circuit. Data on original proceedings are not available for the Eleventh Circuit.

B. Organization and General Duties of Nonjudicial Staff

In each court of appeals, staff who are not assigned to chambers, typically staff attorneys, clerks, and circuit mediators (who may have other titles, such as “conference attorney”), play a major role in processing cases. The Ninth Circuit 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 serves as a special master for the court. The Seventh Circuit’s nonjudicial staffing is distinctive in that 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 nonargument screening. Staff law clerks in the Seventh Circuit assist judges with motions work and cases for disposition on the merits. In addition, they occasionally work directly for judges who need additional assistance with their chambers work.

Generally, the authorized number of staff attorneys in the courts of appeals is set by a formula that uses total appeals filed as its basis, but the courts utilize their allocations in different ways. Some augment other positions with their allocations; others do not employ the full number of staff attorneys allocated.

Courts also differ in how they organize and use their staff attorneys. Staff attorneys are generally centralized at circuit headquarters, such as Boston, New York, St. Louis,

and Denver. In most courts, the staff attorneys operate under the supervision of a chief staff attorney or a senior staff attorney in the Office of Staff Counsel, Office of Legal Counsel, or similarly titled division.

In general, staff attorneys assist the courts of appeals by screening appeals and preparing cases for disposition without argument.⁸ In some courts, they concentrate on pro se cases, and in others they work on most civil and criminal appeals, if only to make a preliminary determination about whether the case should be set for oral argument.

In the Sixth Circuit, the primary function of the staff attorneys' office is to assist the court in processing all pro se appeals that do not require oral argument.

In the Fifth Circuit, staff attorneys perform initial screening, placing cases into categories ranging from "Class I" to "Class IV." The class designation affects whether a case is placed on the oral argument calendar. For example, the court has designated Class I cases as so lacking in merit as to be deemed frivolous and subject to dismissal. Class III and IV cases make up the court's oral argument calendars.

Similarly, in the Ninth Circuit, staff attorneys responsible for case management perform an "inventory" by weighing cases by type, issue, and difficulty after briefing is complete. The weight of a case indicates generally the amount of judicial time that will be required to dispose of the case. This inventory process allows the court to balance judges' workloads and to hear at a single session unrelated appeals involving similar legal issues.

In addition to their primary duties, which are described more fully in the detailed circuit profiles, staff attorneys may perform various other tasks. In the First Circuit, staff attorneys sometimes assist in drafting local rules and work with other court units on policy matters. In the Eighth Circuit, staff attorneys undertake special assignments at the direction of the judges.

In recent years, some courts have changed their policies with respect to the nature of the staff attorney's position. Typically, supervisory staff attorney positions have been career positions, and line staff attorneys have had limited terms or presumptive terms that could be extended under certain circumstances.⁹ However, some courts, including the Fifth and Tenth Circuits, have made specific line staff attorneys eligible for permanent employment.

C. Electronic Filing

In January 1996, the Administrative Office of the U.S. Courts began development of its Case Management/Electronic Case Filing (CM/ECF) system. CM/ECF is a comprehensive case management system that allows courts to maintain electronic case files and offer electronic filing over the Internet. Courts can make all case information immediately available electronically through CM/ECF. Some of the benefits of adopting an electronic filing system are

- reducing reliance on paper records;

8. See generally Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 Ariz. St. L.J. 1 (2007) (discussing the role of staff attorneys and the impact of their work—memoranda and draft dispositions—on the decision-making process).

9. For example, several courts have presumptive two- or three-year terms for staff attorneys; the Ninth Circuit has a five-year limit.

- enhancing the accuracy, management, and security of records;
- reducing delays in the flow of information; and
- reducing costs for the judiciary, the bar, and litigants.

In 2006, an amendment to Federal Rule of Appellate Procedure 25(a)(2)(D) authorized the courts of appeals to promulgate local rules governing electronic filing. In addition, any local rule had to contain an opt-out provision for parties when electronic filing would impose a hardship or when there are exceptional circumstances.¹⁰ In the following sections, we describe generally the courts of appeals' progress in adopting CM/ECF procedures and their requirements regarding electronic filing.

1. Which appellate courts use electronic filing?

As of May 2012, all of the courts of appeals fully use electronic filing (CM/ECF). Only the Eleventh Circuit hasn't adopted mandatory electronic filing for attorney filers in its circuit.

2. Who qualifies to file electronically in the appellate courts?

Attorneys must file electronically in all the appellate courts except the Eleventh Circuit unless exempted by local rule. In the courts of appeals with mandatory electronic filing, with the exception of the Seventh and Eighth Circuits, attorney filers must be members of the bar of the court in order to register as an electronic filer. Attorneys in the Eighth Circuit do not have to be members of the circuit's bar in order to register or file a document in a case. The Seventh Circuit stipulates that attorneys admitted pro hac vice and attorneys authorized to represent the United States without being admitted to the Seventh Circuit bar may register as attorney users of the court's electronic filing system.

Pro se filers are handled differently across the circuits. The Fifth, Sixth, and Eleventh Circuits do not allow pro se litigants to file electronically. The First Circuit limits electronic filing to pro se litigants who are not incarcerated. The Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits allow pro se litigants to file electronically, but these litigants typically must file a motion requesting permission to file electronically in a specific case.

3. What are the appellate courts' requirements for using CM/ECF?

In addition to requiring bar membership, a number of circuits require registrants to complete mandatory introductory training before granting them electronic filing privileges. The First Circuit requires potential electronic filers to complete two series of lessons that are 30 to 35 minutes in length. These lessons demonstrate how to file an appearance form, a motion, a response, and a brief, as well as provide filing tips and advice on how to avoid common errors.

The Fourth Circuit requires registrants to successfully complete online training before using CM/ECF. The training consists of two parts: (1) the Fourth Circuit Court of

10. Specifically, Fed. R. App. P. 25(a)(2)(D) states:

Electronic filing. A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

Appeals Attorney ECF Training Electronic Learning Module, which is 30 minutes in length, and (2) the Review and Certification Form. Registrants must then answer at least 8 out of 10 questions correctly before their ECF account will be activated. In addition to requiring mandatory training, the Fourth Circuit requires registrants to complete the court's electronic case filing registration form.

The Fifth Circuit requires registrants to complete at least two interactive electronic learning modules, which are available on the court's website. At the end of each module, registrants are prompted to send an e-mail to the court that includes their name, CM/ECF user name, and the name of the module.

4. What additional training do the appellate courts offer for CM/ECF?

Although most of the courts do not require extensive CM/ECF training, all courts with mandatory electronic filing offer some type of training for CM/ECF. The most common training offered by the courts for CM/ECF entails electronic learning modules or video tutorials on various aspects of the CM/ECF system. Public Access to Court Electronic Records (PACER) offers three training videos: *Windows Navigation*, *An Introduction to CM/ECF*, and *PACER Report*. The courts often include these PACER modules with their own training videos or electronic learning modules on their websites.

Another CM/ECF training tool on the courts' websites is a practice database, on which individuals can perform a sample log-in and enter mock case numbers in order to familiarize themselves with the CM/ECF system. The Third, Fourth, Sixth, Seventh, and D.C. Circuits have practice CM/ECF databases on their websites that allow individuals to practice filing documents by using test cases and sample events.

Several circuit courts offer detailed training manuals and in-person training opportunities. The Second, Fifth, and Sixth Circuits offer detailed training manuals on their websites. The Third and Ninth Circuits provide in-person training for using CM/ECF. The Third Circuit offers quarterly training on CM/ECF, which includes a general introduction to CM/ECF, group instruction on electronic filing, hands-on training, and practice with electronic filings. The Ninth Circuit offers monthly in-person training for electronic case filing. The training session lasts one hour and is approved by the State Bar of California as one hour of Minimum Continuing Legal Education (MCLE) credit.

5. User feedback about CM/ECF

The First and Third Circuits have on their websites surveys for electronic filers to evaluate CM/ECF. The First Circuit asks respondents to evaluate the efficiency and ease of use of CM/ECF. The Third Circuit offers a CM/ECF Next Generation survey on its website that is designed to help the Administrative Office of the U.S. Courts identify and recommend improvements in the next generation of the CM/ECF system. This survey is similar, but not identical, to the survey used by the First Circuit.

6. Impact of electronic case filing

A number of circuits report that the adoption of an electronic case management system has greatly improved the administration of specific types of cases. For example, the Ninth Circuit's 2009 Annual Report noted that the electronic case management system

allows for the use of form-generated orders for greater efficiency and uniformity. The system is being used to produce many of the initial orders issued in pro se appeals, such as orders to show cause relating to jurisdiction, fees and summary disposition. In addi-

tion, the court can now use the same system for filing pleadings and tracking cases within the court, instead of a separate system.

Finally, the court is now scanning all paper filings, including *pro se* filings, so that everything in every *pro se* case is now available for judges, court staff, and litigants to view on . . . [the] PACER . . . system.¹¹

D. Case Management

1. *Starting the appellate process*

To facilitate screening, mediation, and other pre-decision phases of appellate case management, most courts have adopted formal requirements for the format and content of information to be submitted in the early stages of an appeal. The most common screening tool is the “docket 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. In the Second Circuit, this form is called the “Civil Appeal Pre-Argument Statement,” while in the Eighth Circuit it is titled the “Appeal Information Form.” Information on these forms assists court staff in determining, for example, whether the case is suitable for an appellate mediation program, whether it is likely to require oral argument, or whether the transcript procurement process is on track.

2. *Preargument conferencing, mediation, or settlement programs*

Pursuant to Federal Rule of Appellate Procedure 33,

[t]he court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

All of the courts of appeals have some form of appellate mediation or conference program for resolving appeals by settlement with little or no judicial intervention.¹² In general, the mediation or settlement programs operate separately from the court’s decisional processes. In most of the courts, referrals of eligible cases to settlement programs occur either after docketing or before the parties have filed their briefs. Unless settlement is actively pursued immediately after appeal, the passage of time may interfere with any realistic settlement possibility. In some instances, parties may confidentially request mediation, but the mediation program director will ultimately determine which cases are appropriate for mediation.

Eligibility for mediation varies across the circuits. In some circuits, the majority of counseled civil appeals are eligible, including bankruptcy appellate panel cases in the Sixth Circuit and immigration cases with specific characteristics in the Ninth Circuit.

11. 2009 Ninth Circuit Ann. Rep. 18, available at <http://www.ce9.uscourts.gov/publications/AnnualReport2009.pdf>.

12. The courts of appeals’ settlement programs are described comprehensively in Robert J. Niemic, *Mediation & Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers* (Federal Judicial Center, 2d ed. 2006).

Additionally, in the Ninth Circuit, mediation is not necessarily limited to the case that is in that circuit. The rules allow that as long as all parties are in agreement, discussions may include additional parties and related cases in other courts, as well as parties that are not part of any litigation. In other circuits, only specific types of civil appeals are selected for mediation. For example, in the D.C. Circuit, fully counseled civil cases are not automatically directed to its mediation program. Rather, cases are reviewed individually for their settlement potential. Generally, in all of the circuits, pro se, prisoner rights, social security, 28 U.S.C. § 2255 (federal custody), and habeas corpus cases are not eligible for settlement or mediation conferences.

Most of the courts of appeals use staff attorneys as mediators. In contrast, the D.C. Circuit uses volunteers from the local bar, and a few courts use retired or senior state or federal judges. The Third Circuit recently introduced a program to appoint pro bono counsel for pro se litigants for purposes of mediation only. If mediation is unsuccessful, the representation may continue if pro bono counsel and the party agree, or the party may continue to proceed pro se. The Ninth Circuit allows parties to stipulate to having one or more issues in their appeal referred to an appellate commissioner for a binding determination. In some cases, abbreviated and accelerated briefing may occur along with a guarantee of oral argument before the appellate commissioner.

Table 13, at the end of Part I of this report, summarizes some of the key features of and essential information about these mediation and conference programs. More detailed information can be found in the individual circuit profiles in Part II.

3. Case screening

The term “screening” has different meanings in different courts. At one time screening meant diverting a case from the oral argument track to a nonargument track. Accordingly, “screened cases” 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 whether the case will undergo oral argument or will be 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.

Generally, circuit judges decide whether a case will be orally argued. Federal Rule of Appellate Procedure 34 permits a case to be decided without oral argument only if the panel unanimously agrees that the case does not need oral argument. As a practical matter, in almost all courts, cases that are screened into the argument or nonargument track by staff are subject to panel review. Also, except in the Second Circuit, courts seldom or never allow pro se litigants to argue orally. Initial screening in some courts means finding out whether the parties are represented by counsel—if not, the case goes into the nonargument track.

a. Screening by staff. In the majority of courts, staff play a critical role in screening for jurisdictional defects. In the D.C. and First Circuits, the Clerk’s Office initially screens appeals for jurisdiction, while in the Fifth Circuit, a staff attorney conducts an initial jurisdictional review. In the Third Circuit, jurisdictional screening is performed either

by the Clerk’s Office or by the Staff Attorneys’ Office. In the Ninth Circuit, staff attorneys assigned to the motions and pro se units screen all appeals for jurisdictional defects.

As noted earlier, some staff attorneys screen appeals into an argument or nonargument track. However, certain types of appeals (e.g., direct criminal appeals raising issues other than sentencing guideline application and capital cases) are not subject to staff screening but go directly to the argument track or to a judge for screening. Staff used to perform screening may be central staff attorneys, attorneys in the Clerk’s Office, or (in one court) the circuit executive. There is some variation 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 utilize a staff screening model have central staff attorneys screen cases to determine 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.

b. Screening by judges. In a few courts, judges have a primary role in case screening. In the Tenth Circuit, judges perform all screening. Each active judge is on a three-judge “screening panel” (these panels are reconstituted annually), and each member of the panel has primary responsibility for one-third of the cases assigned to that panel. The screening 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. One or both of the other judges on the panel may disagree with decision (b) or (c) and call for argument. In the Third Circuit, judges similarly screen counseled cases for argument or nonargument disposition, but they 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). 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 3 shows for each court the persons primarily responsible for initial screening of cases for argument or nonargument disposition.

Table 3: Initial Screeners for Argument or Nonargument Disposition by Circuit

Screeners	D.C.	1st	2d	3d	4th ^a	5th	6th	7th	8th ^b	9th ^c	10th	11th
Judges			•	•		•			•		•	
Central Staff	•	•			•		•			•		•
Clerk’s Office												
Circuit Executive								•				

a. In the Fourth Circuit, counsel located in the Clerk’s Office perform initial screening.

b. In the Eighth Circuit, the chief judge may appoint the clerk, senior staff attorney, or a panel or panels of judges to screen cases.

c. In the Ninth Circuit, this process is referred to as “inventory.”

4. What cases are granted oral argument?

Standards for granting oral argument in the courts of appeals are fairly uniform. Local rules and internal operating procedures generally restate in more or less detail the minimum standard set forth in Federal Rule of Appellate Procedure 34(a)(2): Oral argument must be allowed unless a three-judge panel unanimously determines that “(A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and the 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.

Case characteristics that are likely to favor oral argument include presence of counsel, novel issues, complex issues, extensive records, and numerous parties.

5. What other assessments are made during the screening process?

When screening new appeals to determine whether oral argument should be heard, many courts also make the following assessments:

- whether the appeal has jurisdictional defects warranting dismissal without determination on the merits by a three-judge panel;
- the appeal’s suitability for assignment 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, that is, 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 therefore should be routed to that panel or stayed pending the decision;
- whether the appeal presents an issue that is currently before the Supreme Court and should therefore be stayed pending the Court’s decision; and
- how much time should be allotted for oral argument.

6. Decisions without arguments

The decision to allow oral argument is 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. In the First, Second, and Third Circuits, the nonargument panels do not meet. The judges review the materials and then vote.

The Fifth Circuit uses summary calendars and electronic conference calendars. The summary calendar is operated in a serial, or round-robin, fashion. When all judges have agreed that no oral argument is warranted, the decision is filed; if any judge believes argument is necessary, the case is sent to the next available oral argument calendar. The

court also holds an electronic conference calendar to consider cases designated for conference by the Staff Attorneys' Office. The conference panel conducts its review electronically over a 10-day period. All three judges must agree to either affirm the judgment of the district court or dismiss the appeal; otherwise, the case is removed from the conference calendar and sent to the screening panel for further screening.

In the Eighth Circuit, cases screened by staff for nonargument disposition are sent to a nonargument screening panel accompanied by a staff memorandum. If a party objects to the nonargument classification, the screening panel rules on the objection and then determines whether the case should be decided without argument.

Across the courts of appeals, the role of staff in determining nonargument cases varies. Table 4 shows the roles of staff and their work products in support of this decision-making process. In most courts, the staff attorneys draft memoranda and propose dispositions of some type. Several courts have the staff attorney prepare a neutral memorandum. Some courts have the attorney draft an order that will, if adopted, dispose of the case and, when necessary, an opinion explaining the order. 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, in person or by telephone.

Table 4: Staff Role and Materials Prepared in Nonargument Decision Making by Circuit

Circuit	Staff-prepared materials distributed to judges	Staff role in panel consideration
D.C.	Memorandum and proposed judgment	Staff present case and discuss it with panel
1st	For pro se cases and fully briefed cases retained in the staff attorneys' office: memorandum and draft disposition or opinion	None
2d	For pro se prisoner cases: staff attorney draft bench memorandum	None
3d	None	None
4th	Proposed decisions	None
5th	Summary calendar: for many cases, in-depth research memorandum and proposed disposition Conference calendar: memorandum and short per curiam opinion	None
6th	Research memorandum and proposed dispositive order	None
7th	Staff attorney memorandum and proposed order (not bench memorandum)	Staff meet with full panel, then work with authoring judge
8th	Staff attorney memorandum	None
9th	Draft memorandum disposition	Staff orally present case and discuss it 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 meets with "mentor judge," then meets with full panel
11th	Memorandum	None

E. Motions Management

Depending on their nature, motions may be decided by three-judge panels, by one or two judges, or by staff. In most courts of appeals, motions in cases scheduled for argument are sent directly to the merits panel for decision. Motions in uncalendared cases go to a motions panel or to individual judges.

Courts often delegate initial decision-making authority for certain types of procedural motions to the Clerk's Office or central staff. For example, in the Ninth and Eleventh Circuits, the clerk or deputy clerk is authorized to act on procedural motions, such as motions to extend time for filing briefs, to supplement or correct records, or to file oversized or consolidated briefs. In the Federal Circuit, the clerk may also act on motions to which the parties consent or which are unopposed. Examples of these are a request to proceed *in forma pauperis* or to stay issuance of a mandate pending application to the Supreme Court for a writ of certiorari. In the Third Circuit, the clerk may dispose of any motion that can ordinarily be disposed of by a single judge, provided the motion is ministerial, addresses the preparation or printing of the appendix and briefs on appeal, or relates to calendar control. Any action taken by the clerk may be reviewed by a single judge or by a panel of the court.

For other motions, staff attorneys review the papers submitted and perform 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.

1. Panel types

Motions duties are principally carried out by rotating three-judge panels of randomly assigned judges. The nomenclature for motions panels varies—for example, the D.C. Circuit labels them “special panels,” while the Tenth Circuit refers to them as “special proceedings panels.” 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 (e.g., the Third and Fifth), motions panels are constituted for the entire year. In the Eleventh Circuit, composition of the motions panels is changed at the beginning of each fiscal year in October and after a change in the court's membership. In the First, Seventh, Ninth, and Federal Circuits, motions panels change composition 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.

Periodically, the chief judge of the Tenth Circuit assigns two judges to serve on a “clerk's panel” to decide procedural motions that require judicial action but do not require three judges. Members of the clerk's panel may request the assistance of a third judge for difficult or important issues, or to break a tie vote.

The Eleventh Circuit 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.

Monthly, the D.C. Circuit uses a “backlog prevention/reduction panel” (consisting of the chief judge and two other judges) to handle matters that are routine or simple enough to warrant disposition without a full memorandum from the staff attorney. Some of these matters are habeas corpus cases filed in the wrong jurisdiction, unwarranted denials of

motions for summary affirmance with summary disposition, and frivolous motions or appeals. Staff attorneys prepare proposed orders or judgments for these matters.

2. Panel operations

The courts of appeals 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, motions panel judges in the Ninth Circuit may confer by video-conference. In the First, Fifth, and Eleventh Circuits, nonemergency motions are considered seriatim. The staff transmits a single set of motions materials to the first judge, who reviews them and then passes the set on to the second judge with a proposed disposition. The second judge reviews the materials and then notes agreement or disagreement with the first judge and passes the materials on to the third judge, who reviews and then returns them with the written disposition to the Clerk's Office.

3. Motions decided by a single judge

Nearly 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 typically decided by single judges 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;
- motions for ordering a temporary stay;
- opposed motions that the clerk could rule on if unopposed; and
- post-decision motions for stay or recall of the mandate pending a writ of certiorari.

For motions that are not expressly categorized as single-judge matters, several courts authorize an individual judge to rule on them. For example, the Seventh Circuit 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 Fourth Circuit gives individual judges discretion to entertain emergency motions, but also provides that an individual judge may not dismiss or otherwise ultimately determine an appeal.

4. 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 an alternative disposition. In addition to requiring three-judge panels to act on substantive motions and motions to dismiss, the D.C. Circuit mandates that three-judge panels must decide opposed motions and mandamus petitions. The Seventh Circuit requires three-judge panels to deny a motion to expedite an appeal when the denial may result in the mooted of the appeal.

In most courts, standing three-judge motions panels also decide emergency motions, giving them priority over nonemergency procedural and substantive motions. In the Elev-

enth Circuit, however, a specially constituted emergency motions panel is drawn by rotation from an emergency routing log.

5. *Argument and case-assignment practices*

Circuit geography, tradition, and policy choices about panel construction have led to differences in the arrangement of argument schedules. A shortage of judges and multiple and prolonged judicial vacancies, which reduce the opportunity for active judges of the court to interact, also influence the assignment of cases.

Table 5 presents the basic models the courts of appeals follow in the operation of their argument panels. The number of sittings and number of cases are the courts' estimates or come from published materials. For simplicity of presentation, some details presented in the individual circuit profiles in Part II of this report (such as extra sittings for complex, capital, or en banc cases) have been omitted in the table.

Table 5: Models for Argument Panel Operations by Circuit

Circuit	Typical number of sittings for active judges per term or year	Number of cases argued/decided	Typical argument time per side
D.C.	Eight 5-day sittings	At least 3 per day	No set argument time; 15 min. is common; can move for additional time, but rarely granted
1st	Ten 5-day sittings	Up to 6 per day	Up to 15 min.
2d	Eight 5-day sittings + 2 pro se panels	30 per week	15–20 min.; more for complex multiparty cases
3d	Six 4-day sittings	35–38 calendared; approximately one-third argued	15–20 min.; 30 min.+ granted if warranted; a request for oral argument beyond 20 min. per side is determined by a majority of the panel
4th	Six 4–5-day sittings	4 per day	20 min.; 15 min. for social security disability, black lung, some labor cases, and criminal appeals on sentencing guidelines
5th	Seven 4-day sittings	5 per day	20 min. for Class III cases; 30 min. for Class IV cases
6th	Seven 4-day sittings; court's active judges are divided into two groups, so that there are oral arguments held 14 weeks throughout the year	6 per day	15 min.
7th	34 panels per year	6 per day	10–20 min.
8th	Ten 5-day sittings	Usually 5–6 per day	10–20 min.; 30 min. or more if warranted
9th	32 days of oral arguments	Usually 5–6 per day	10–20 min.

Table 5: Models for Argument Panel Operations by Circuit (cont.)

Circuit	Typical number of sittings for active judges per term or year	Number of cases argued/decided	Typical argument time per side
10th	Four 5-day sittings	Usually 5–6 per day	15 min.; more if warranted
11th	Fixed number of weeks for each active judge and the available sittings from the court’s senior judges, visiting circuit judges, and visiting district judges	Up to 6 per day	Up to 15 min.; 30 min. in complex cases
Fed.	30–40 panels per year for active judges; senior judges sit on a third of the panels; judges sit 10 months out of 12 months	Usually 6 per day	15 min.; 30 min. maximum allotment

To ensure that each panel has a range of matters and to equalize workloads, some courts attempt to distribute cases across panels, either based on staff assessments of case difficulty or according to case type. Beyond that, most case assignments are random, and case assignment is separate from panel selection to maintain the integrity of the process. For example, in capital appeals, the clerk in the Tenth Circuit creates a list of randomly selected active judges for assignment to cases. If no execution date has been set or the case does not otherwise require immediate judicial attention, the case is scheduled for oral argument after briefing.

6. Timing of disclosure of panel members’ identities

The courts of appeals also differ in how they construct their panels and when they announce the composition of the panel to litigants. Some courts announce it early, while others withhold panel members’ identities so that attorneys do not spend time and effort tailoring arguments in their briefs to the anticipated panel. In the First Circuit, panel members’ identities are disclosed 7 days before oral argument; in the Ninth and Tenth Circuits, attorneys are notified of the identities of panel members on the Monday prior to the week of oral argument. In the Second Circuit, panel members’ identities are disclosed at noon on Thursday of the week before the panel sits. The Sixth Circuit identifies the panel members 14 days before oral argument. In contrast, in the Seventh and Federal Circuits, the identities of panel members are not revealed until the morning of the argument. Most courts do not allow party-initiated continuances once the panel has been announced.

F. Use of Bankruptcy Appellate Panels

Bankruptcy Appellate Panels (BAPs) were originally established under the Bankruptcy Reform Act of 1978.¹³ That Act authorized the establishment of BAPs on a circuit-by-circuit basis, to serve as an alternative forum to the district courts for hearing bankruptcy

13. Pub. L. No. 95-598, 92 Stat. 2549 (1978).

appeals.¹⁴ Pursuant to 28 U.S.C. § 158 (b)(6), district judges must authorize appeals to the BAP from their district. Under the Bankruptcy Reform Act, appeals from dispositive orders of bankruptcy judges may be taken to the district court or to the circuit BAP (if one has been established and the district has chosen to participate), as well as to the court of appeals for the circuit.

The Ninth Circuit established the first Bankruptcy Appellate Panel in 1979,¹⁵ and the First Circuit followed in 1980. In 1982, the First Circuit's panel was dissolved¹⁶ after the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*¹⁷ In *Northern Pipeline*, the Court struck down the 1978 Bankruptcy Reform Act's broad vesting of judicial power in the bankruptcy courts, holding that the Act unconstitutionally conferred judicial power on non-Article III bankruptcy judges. Shortly thereafter, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, in which Congress noted the discretionary authority of each of the circuits to establish a bankruptcy appellate panel.¹⁸ In 1994, Congress enacted the Bankruptcy Reform Act of 1994,¹⁹ which mandated that the judicial council of each federal circuit establish a BAP unless (1) the circuit does not possess sufficient judicial resources to support a BAP, or (2) the circuit's establishment of a BAP would result in undue delay and increased cost to the parties.²⁰

At present, five circuits have a BAP: the First, Sixth,²¹ Eighth, Ninth, and Tenth.²² A BAP consists of bankruptcy judges appointed from the circuit's districts, and occasionally, bankruptcy judges from other circuits sitting by designation. BAP judges typically sit in three-judge panels, hearing appeals from the decisions of the bankruptcy court in their districts. BAP judges are precluded from hearing appeals arising from their own district.

14. One legal academic has argued against the need for BAPs, stating that they are neither useful nor necessary to the efficient operation of the bankruptcy system and that the "opt out" provision the Act contains is unconstitutional under *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Specifically, the BAP structure is incompatible with Article III requirements that appellate courts retain a certain degree of control over "adjunct" courts. See Thomas A. Wiseman, Jr., *The Case Against Bankruptcy Appellate Panels*, 4 Geo. Mason L. Rev. 1, 15 (1995).

15. The Judicial Council of the Ninth Circuit originally established its circuit BAP in 1979. Following the Supreme Court's decision in *Northern Pipeline*, 458 U.S. 50 (1982), and passage of the 1984 Bankruptcy Amendments and Federal Judgeship Act, it was reestablished in 1985.

16. In 1996, the Judicial Council of the First Circuit reestablished its BAP.

17. 458 U.S. 50 (1982).

18. Pub. L. No. 98-353, § 104(a), 98 Stat. 333, 336-42 (1984).

19. Pub. L. No. 103-394, 108 Stat. 4106 (1994).

20. *Id.* § 104(c), 108 Stat. at 4109.

21. The Sixth Circuit's Judicial Council authorized the creation of a BAP on October 1, 1996; however, not all districts in the circuit utilize a BAP. For example, in appeals arising out of the Western District of Michigan, parties have the option of having their appeals determined either by the Sixth Circuit BAP or by the district court. Parties filing in the Eastern District of Michigan do not have this option.

22. On February 6, 1996, the Judicial Council of the Tenth Circuit authorized the creation of the BAP for an initial three-year period commencing July 1, 1996, and ending June 30, 1999. On March 8, 1999, the Judicial Council of the Tenth Circuit voted to authorize the permanent establishment of the BAP in the Tenth Circuit. See Blaine F. Bates, Clerk of Court, Introduction to the Bankruptcy Appellate Panel (rev. June 1, 2011), <http://www.bap10.uscourts.gov/guide/historyBAP.pdf>.

According to the Administrative Office, in FY 2010, “BAP filings rose in four of those five circuits [having a BAP], and overall BAP filings increased 13 percent”²³ Specifically, “[f]ilings grew 8 percent (6 cases) in the First Circuit, 40 percent (29 cases) in the Eighth Circuit, 17 percent (71 cases) in the Ninth Circuit, and 1 percent (1 case) in the Tenth Circuit. Only the Sixth Circuit experienced a decline in filings, a drop of 9 percent (down 9 cases).”²⁴

The number of bankruptcy judges who serve on a BAP varies across the circuits; the range is from 5 to 11 judges. In the Ninth Circuit, 6 bankruptcy judges currently serve and are appointed for a seven-year term, which is renewable for one additional three-year term. By majority vote, these 6 BAP members select one member to serve as chief judge with authority to appoint the clerk, staff attorneys, and other necessary staff to carry out the work of the BAP. In addition, the Ninth Circuit also routinely utilizes pro tem judges in order to give appellate experience to other bankruptcy judges within the circuit. Pro tem judges sit for one-day merits calendar assignments and have equal votes with the regular BAP judges. Nine judges serve on the Tenth Circuit’s BAP and, upon the completion of a term, each is eligible for a renewable five-year term. Currently, all districts in the Tenth Circuit participate in the BAP, and personnel for the BAP’s Clerk’s Office consist of the clerk of the BAP, a staff attorney, and a deputy clerk. In the First Circuit, 11 judges currently serve on the BAP. In the Eighth Circuit, 6 judges serve on the BAP and are appointed for a term of seven years, but the judicial council may appoint bankruptcy judges to sit as pro tem members of a panel as the need arises. The clerk of the court of appeals also serves as the clerk for the BAP. Finally, in the Sixth Circuit, 5 judges serve on the BAP.

The Sixth Circuit’s BAP Rule 8080-2 authorizes preargument conferences to assist the parties in exploring the possibility of settlement or simplification of the issues. The preargument conference is conducted by one of the circuit mediation attorneys or by a panel judge designated by the chief judge. Judges who participate in a conference will not later sit on a panel that considers any aspect of the appeal.

Table 6 provides a snapshot of the types of appeals terminated in FY 2010 in the five circuits with BAPs. Nonbusiness appeals were the most common appeals terminated in the First, Sixth, and Ninth Circuits, whereas business appeals were the most common appeals terminated in the Eighth Circuit. Approximately the same number of business and nonbusiness appeals were terminated in the Tenth Circuit.

23. Admin. Office of U.S. Courts 2010 Annual Report, *supra* note 4, at 17.

24. *Id.*

Table 6: Bankruptcy Appellate Panels—Appeals Terminated During the 12-Month Period Ending September 30, 2010

	1st Cir.	6th Cir.	8th Cir.	9th Cir.	10th Cir.
Judgeships	11	5	6	6 ^a	9
Total appeals terminated	79	87	93	410	99
Total business	9	17	38	100	35
Total nonbusiness	41	38	27	189	34
Total adversarial	29	31	26	121	29
Total other	0	1	2	0	1
Appeals decided on the merits, per authorized judgeship	7.2	17.4	15.5	68.3	11

a. The Ninth Circuit Judicial Council has authorized seven bankruptcy judges to serve on the BAP; however, only six bankruptcy judges serve. The seventh position has been “left vacant to reflect the BAP’s reduced filing numbers and to allow opportunities for *pro tem* judge participation.” Appeals Before the Bankruptcy Appellate Panel of the Ninth Circuit, Dec. 2010, at 3.

1. Motions practice

In the five circuits with BAPs, the clerk of the BAP is authorized generally to act on certain procedural motions without submitting them to the BAP, including motions relating to the production or filing of the record; motions for extensions of time; motions for voluntary dismissal; and motions to withdraw or substitute counsel. In the First and Sixth Circuits, the clerk may also act on any other motion that the BAP may designate and that is subject to disposition by a single judge. The Ninth Circuit BAP clerk is authorized only to act on motions that are subject to disposition by a single judge, on the condition that the order entered on the motion does not dispose of the appeal or resolve a motion for stay pending appeal.

2. Oral argument practice

In general, BAPs have the discretion to decide appeals with or without oral argument. When necessary, oral argument may be conducted by videoconference or telephone. In the Ninth Circuit, oral argument may be held in any district within the circuit, regardless of an appeal’s district of origin. However, when economical and feasible, most appeals will be set for hearing in the district in which the appeal originated. Similarly, in the Tenth Circuit, the BAP generally schedules oral argument in the district in which the appeal arose, and the appeal will be placed on the first available calendar for that district. The First Circuit typically conducts oral arguments in two locations: Boston and San Juan, Puerto Rico. In some instances, if travel costs are a factor, the panel will travel to the district in which the appeal originated. In the Eighth Circuit, it is common practice for the panel to travel to the district in which the case arose to hear argument. The court strives to hear oral argument within 60 days of the filing of the appellee’s brief.

3. Disposition of appeals

Various case processing measures can provide useful information regarding the length of time it takes for a bankruptcy appeal to move through the system. Common case processing measures include the date from the filing of the notice of appeal to the filing of the last brief and the date from the hearing to the final disposition. Table 7 provides a snapshot of the median time from the filing of the notice of appeal to the date of the entry of the final disposition in the appeal by the BAP in the five circuits with BAPs. In general, it takes less than a year for most BAP appeals to be resolved by the circuits; median times range from 4.8 months in the Eighth Circuit to 9.2 months in the Sixth Circuit.

Table 7: Bankruptcy Appellate Panels—Median Time Intervals in Cases Terminated After Hearing or Submission During the 12-Month Period Ending September 30, 2010

Circuit	Total Number of Cases	Median Time from Filing Notice of Appeal to Final Disposition, in Months
1st	21	7.2
6th	26	9.2
8th	25	4.8
9th	107	8.2
10th	28	8.8

Source: Admin. Office of the U.S. Courts, Judicial Business of the United States Courts tbl.B-14 (unpublished table titled “U.S. Bankruptcy Appellate Panels Median Time Intervals in Cases Terminated After Hearing or Submission, by Circuit During the 12-Month Period Ended Sept. 30, 2010,” on file with the Center’s Information Services Office).

Table 8 shows that, in FY 2010, a significant number of appeals were terminated as a result of procedural rulings. Of the total appeals terminated, procedural terminations in the circuits range from a low of 44% (41 of 93 appeals) in the Eighth Circuit to a high of 66% (52 of 79 appeals) in the First Circuit. In the Sixth and Tenth Circuits, the majority of procedural terminations were done by staff, while in the Ninth Circuit the majority of such terminations were handled by judges.

Table 8: Bankruptcy Appellate Panels—Methods of Disposing of Appeals During the 12-Month Period Ending September 30, 2010

	1st Cir.	6th Cir.	8th Cir.	9th Cir.	10th Cir.
Total appeals terminated	79	87	93	410	99
By consolidation	0	7	24	5	1
Elections	6	7	3	85	18
Procedural	52	47	41	213	52
By judge	27	8	20	149	19
By staff	25	39	21	64	33
On the merits	21	26	25	107	28
After oral hearing	16	18	14	97	12
After submission on the briefs	5	8	11	10	16

Source: Admin. Office of U.S. Courts, 2010 Annual Report, at 134–37 tbl.B-11.

4. Opinion and publication practices

What is the publication rate of BAPs regarding cases terminated on the merits? Administrative Office data show that during the 12-month period ending September 30, 2010, the five circuits with BAPs entered a total of 207 opinions or orders. The Ninth Circuit accounted for approximately half of the total.²⁵ Of the 207 opinions or orders issued, 54% were unpublished. The Eighth Circuit published all of its opinions or orders, whereas the Ninth Circuit published 69% and the First Circuit published 24%.

Some circuits provide additional information on their bankruptcy appellate panels. In its yearly statistical report, the Eighth Circuit Court of Appeals provides data on the outcome of panel opinions and information on the nature of appeals to the Eighth Circuit.²⁶ Specifically, the Eighth Circuit report notes that of the 33 BAP opinions issued in 2010, 25 (75%) affirmed the bankruptcy court’s decision, while 7 (21%) reversed the decision.²⁷ In addition, the report states that “[a] total of twenty bankruptcy appeals were taken to the [Eighth Circuit] Court of Appeals in 2010. Of those appeals, seven were from District Court decisions and thirteen were from Bankruptcy Appellate Panel decisions.”²⁸

25. Admin. Office of the U.S. Courts, Judicial Business of the United States Courts tbl.B-19 (unpublished table titled “U.S. Bankruptcy Appellate Panels Type of Opinion or Order Filed in Cases Terminated on the Merits After Oral Hearing or Submission on Briefs During the 12-Month Period Ended Sep. 30, 2010,” on file with the Center’s Information Services Office).

26. U.S. Bankr. Appellate Panel for the Eighth Circuit, 2010 Stat. Rep., available at <http://www.ca8.uscourts.gov/newbap/bapFrame.html>.

27. *Id.* at 3.

28. *Id.* at 4.

G. Management of Immigration Cases

In 2002, the Department of Justice implemented specific “procedural reforms” concerning its Board of Immigration Appeals (BIA), which reviews decisions of immigration judges in exclusion, deportation, and remand cases. These procedures were designed to increase the efficiency of immigration appeals and to reduce the backlog of pending immigration cases.

The change in processing BIA cases had an immediate impact on the federal courts of appeals, and most notably on the Second and Ninth Circuits. In fact, it was reported that “in the summer of 2004 the Second and Ninth Circuits received about 70 percent of the petitions challenging BIA decisions.”²⁹

1. Second Circuit Court of Appeals

In 2003, the Second Circuit, recognizing the challenges posed by the increase in immigration appeals, authorized its “Backlog Reduction Committee” to develop a case management strategy to address the backlog of cases that was due to the increase in asylum cases.³⁰ After considerable debate and discussion, the committee proposed an expedited procedure for asylum cases. Specifically, the committee established a special nonargument calendar (NAC) for all cases involving a challenge to the BIA’s denial of an asylum claim.³¹ One unique aspect of the NAC is the use of sequential voting by a panel of three judges. To assist the panel in its review, each member receives a copy of the briefs, the record from the BIA, a memorandum prepared by a law clerk in the staff attorneys’ office, a draft summary order with a recommended disposition, and a voting sheet.³²

How the panel conducts its review as well as its voting procedure are explained more fully in the detailed profile for the Second Circuit in Part II of this report. In describing the impact of the NAC on the court’s workload, one judge indicated that the court’s use of the NAC has been successful in reducing the court’s backlog of petitions challenging the BIA’s denials of asylum claims while enabling the court to dispose of its other cases in a timely manner.³³

2. Ninth Circuit Court of Appeals

The Ninth Circuit provides a number of immigration practice resources for attorneys on its website, including the *Ninth Circuit Immigration Outline*³⁴ and a copy of the American Immigration Council’s *Practice Advisory on How to File a Petition for Review*.³⁵ The *Ninth Circuit Immigration Outline* provides a comprehensive up-to-date synthesis of Ninth Circuit immigration law and information about, for example, relief from removal

29. Jon O. Newman, *The Second Circuit’s Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 Brook. L. Rev. 429, 431 (2009).

30. *Id.* at 433.

31. *Id.* at 433–34.

32. *Id.* at 434.

33. *Id.* at 435.

34. http://www.ca9.uscourts.gov/guides/immigration_outline.php.

35. http://www.ca9.uscourts.gov/datastore/uploads/guides/petition/lac_pa_041706.pdf.

(asylum, cancellation of removal, adjustment of status), motions to reopen or reconsider immigration proceedings, and criminal issues in immigration.

In addition, the court has adopted specific case management measures to address the surge in asylum cases. Specifically, the court uses its mediation program to help resolve some types of immigration cases. Although petitioners are not required to file a mediation questionnaire, when it is filed, the court finds it useful in assessing the suitability of a case for mediation, especially when a petitioner is able to adjust status (e.g., change from one nonimmigrant status to another) or when a change in the law clearly requires remand.

H. 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 Judicial Conference's Long Range Plan recommended that the courts adopt internal procedures to maintain the consistency of circuit law. The Judicial Conference noted that "[o]pinions should be restricted to appellate decisions of precedential import," and it stated 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."³⁶

Over the years, amid growing concern about the proliferation of opinions, many courts adopted policies, internal rules, and publication plans to discourage unnecessary publication. In the next section, we describe the variation in the publication of opinions in the courts of appeals.

Judges have three basic options regarding how a decision of the court is provided to the public: (1) a signed published opinion; (2) a per curiam opinion; or (3) an unpublished nonprecedential opinion or order. National data show that during FY 2010, 30,914 opinions or orders were filed in cases terminated on the merits after oral hearings or submissions on the briefs (see Table 9). Of this total, 84% of the opinions or orders were unpublished. The percentage of unpublished opinions or orders ranges from 59.8% in the Seventh Circuit to 93% in the Fourth Circuit. Some of the variation in publication practices can be attributed to circuit culture, docket size, and whether an appeal was argued.

A number of the circuits' local rules explain their publication practice by noting 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. For example, the Eleventh Circuit's published material indicates that its preference is not to engage in the proliferation of published opinions because it tends to impede the development of a cohesive body of law. Similarly, in the Federal Circuit, the court's view is that its heavy workload precludes preparation of precedential opinions in all cases and that unnecessary full precedential opinions only impede the rendering of decisions and the preparation of precedential opinions in cases that merit that effort.

36. Judicial Conference of the U.S., Long Range Plan for the Federal Courts, *supra* note 2, Implementation Strategy 37d, at 69.

Table 9: Unpublished Opinions and Orders in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs by Circuit During the 12-Month Period Ending September 30, 2010

Circuit	Total Number of Opinions or Orders Filed in Cases Terminated on the Merits	Percentage of Unpublished Opinions or Orders in Cases Terminated on the Merits
Total	30,914	84.0
D.C.	520	62.3
1st	965	65.1
2d	3,304	88.3
3d	2,483	89.8
4th	2,894	93.0
5th	3,773	87.4
6th	2,350	83.6
7th	1,512	59.8
8th	2,293	71.8
9th	6,324	86.9
10th	1,353	77.5
11th	3,143	89.6

Source: Admin. Office of U.S. Courts, 2010 Annual Report, at 46 tbl.S-3.

Note: Total does not include data for the U.S. Court of Appeals for the Federal Circuit.

In the Fourth Circuit, the court publishes opinions only in cases that were fully briefed and orally argued. The opinions in these cases are seen as making a meaningful contribution to the circuit's body of law. Opinions in such cases are published if the author (or a majority of the judges) believes the opinion satisfies one or more of the circuit's standards for publication and all members of the court have acknowledged in writing their receipt of the proposed opinion.

In the Tenth Circuit, the court may dispose of an appeal by way of an unpublished order and judgment when the case does not involve new points of law that would make the decision a valuable precedent.

In the Ninth Circuit, all opinions are published, but not such dispositions as memoranda or orders, except by order of the court. Within 60 days of issuance of an unpublished disposition, however, publication may be requested by a letter addressed to the clerk, stating concisely the reasons supporting publication. If the request is granted, the unpublished disposition will be redesignated an opinion and published.

In the Third Circuit, an opinion, whether signed or per curiam, that appears to have value only to the trial court or the parties is designated as not precedential and is generally posted on the court's website.

Finally, in the Seventh Circuit, unpublished orders are issued in frivolous appeals and in appeals that involve only factual issues or concern the application of recognized rules of law. Opinions in cases decided on a divided vote are usually published.

In some courts, the issuance of a separate opinion (either dissenting or concurring) will trigger publication of an opinion (at least if the concurring or dissenting judge wants to publish it). The preparation of a separate opinion makes it more likely that an opinion will be published, but this is not a thoroughly reliable predictor. Table 10 provides an overview of some of the formal criteria that courts indicate govern their decisions about what to publish.

Table 10: Criteria for Opinion Publication by Circuit

Publication generally ordered if opinion:	D.C.	1st	2d ^a	3d	4th	5th	6th	7th ^b	8th	9th	10th ^c	11th	Fed.
is of general public interest ^d	•	•			•	•	•		•	•			•
has precedential or institutional value (general)				•			•				•	•	•
establishes, alters, modifies, or significantly clarifies a rule of law (including “first impression”)	•	•	•		•	•	•		•	•			•
calls attention to an existing rule of law that appears to have been generally overlooked	•					•				•			•
criticizes or questions existing law	•				•	•			•	•			•
resolves an apparent conflict within the circuit or creates a conflict with another circuit	•				•	•	•		•				•
applies an established rule of law to a factual situation significantly different from that in published opinions						•			•				•
constitutes a significant and nonduplicative contribution to legal literature by a historical review of law, or by describing legislative history					•	•			•				
is rendered in a case that has been reviewed previously and its merits have been addressed by an opinion of the U.S. Supreme Court, or if the Supreme Court reversed or remanded the case						•	•		•	•			•

Table 10: Criteria for Opinion Publication by Circuit (cont.)

Publication generally ordered if opinion:	D.C.	1st	2d ^a	3d	4th	5th	6th	7th ^b	8th	9th	10th ^c	11th	Fed.
is accompanied by a an opinion which, concurring or dissenting, reverses the decision below, or affirms the decision on different grounds, and the author may or may not have requested publication		•				•	•			•			
addresses a published opinion by a lower court or admin. agency (in 9th Cir.—unless panel determines publication is unnecessary for clarifying the panel’s disposition of the case)							•			•			
reverses a published agency or district court decision, or affirms a decision of a district court on grounds different from those set forth in the district court’s published opinion	•												
Publish if case decided en banc		•											
Publish only if orally argued					•								

Note: Absence of an entry denotes omission of criterion from published rules and procedures, not necessarily non-applicability of criterion.

- The Second Circuit 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 by summary order. 2d Cir. R. § 0.23.
- The Seventh Circuit lists no criteria, but the local rules provide this instruction: “it is the policy of the circuit to avoid issuing unnecessary opinions.” 7th Cir. R. 32.1.
- When the opinion of the district court, an administrative agency, or the Tax Court has been published, the Tenth Circuit ordinarily designates its disposition for publication. 10th Cir. R. 36.2.
- Formulations vary: “it involves a legal issue of continuing public interest” (4th Cir. R. 36(a)); “concerns or discusses a factual or legal issue of significant public interest” (5th Cir. R. 47.5.1); “involves a legal or factual issue of unique interest or substantial public importance” (9th Cir. R. 36-2(d)); “a legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved” (Fed. Cir. IOP 10).

I. En Banc Rehearings and Other Efforts to Maintain Consistency

En banc rehearing enables all judges of a circuit to play a role in setting circuit precedent. There are both advantages and disadvantages to having a court hear cases en banc. Advantages include, for example, the court speaking in a single voice to protect the integrity of circuit law and reinforcing institutional legitimacy by ensuring consistency and conformity in decision making.³⁷ Disadvantages include (1) delay in the ultimate resolution of the case; (2) increased resources expended by both the litigants and the judiciary; and (3) an increase in litigants seeking such review.³⁸ In addition, some legal commentators believe that such hearings could potentially lead to “intracourt acrimony, ideological polarization, and lost collegiality.”³⁹

1. Grounds for and frequency of en banc rehearings

En banc practices in the 13 courts of appeals are fairly similar. Federal Rule of Appellate Procedure 35 sets the basic criteria for determining when a hearing or rehearing en banc may be ordered:

[a] majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc.

An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

- (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or
- (2) the proceeding involves a question of exceptional importance.⁴⁰

However, in two circuits, the Fourth and the Federal, the courts’ local rules state that the court may also consider granting an en banc rehearing to resolve intercircuit conflicts. In the Eleventh Circuit, alleged errors in a panel’s determination of state law or in the facts of the case, and errors asserted in the panel’s misapplication of correct precedent to the case are matters for rehearing before the panel but not for en banc consideration. No matter what the standard, rehearing cases en banc does not occur very often (see Table 11).

Data from the U.S. Court of Appeals for the Federal Circuit show that for FY 2010, seven en banc petitions were granted, compared with six in FY 2009.⁴¹ These figures represent en banc rehearings granted on Combined and En Banc Rehearing Petitions. In addition, during FY 2010, there was one en banc hearing and rehearing granted sua sponte.⁴²

37. Fed. Bar Council, *En Banc Practices in the Second Circuit: Time for a Change?* 11 (2d Cir. Courts Comm. July 2011), available at http://www.federalbarcouncil.org/vg/custom/uploads/pdfs/En_Banc_Report.pdf.

38. *Id.* at 11–13.

39. *Id.* at 12.

40. Fed. R. App. P. 35(a).

41. The Federal Circuit Court of Appeals: Statistics: Panel and En Banc Petitions for Rehearing, available at http://www.patentlyo.com/files/panel_and_en_banc_petitions_for_rehearing_2001-20102.pdf.

42. *Id.*

Table 11: Number of En Banc Rehearings After Oral Hearings or Submission on Briefs by Circuit, FY 2006–2010

FY	D.C.	1st	2d ^a	3d	4th	5th	6th	7th	8th	9th	10th	11th
2006	2	3	—	1	8	2	5	1	6	22	7	8
2007	3	1	—	2	1	9	9	2	6	16	5	2
2008	1	—	—	3	1	1	5	2	8	14	1	5
2009	1	3	—	4	2	4	5	3	6	12	5	2
2010	2	1	—	3	—	6	2	7	3	15	2	3

Source: Table S-1 U.S. Courts of Appeals—Appeals Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2006–2010. Data for Table 11 are compiled from Table S-1 published across multiple volumes of Admin. Office of the U.S. Courts, Judicial Business of the United States Courts: Annual Report of the Director.

a. Even though data from the Administrative Office of the U.S. Courts reflect that no en banc hearings were granted in the Second Circuit from 2006 to 2010, a Westlaw search revealed that several cases have been heard en banc. *See, e.g.,* Lin v. United States Dep’t of Justice, 494 F.3d 296 (2d Cir. 2007) (en banc); United States v. Cavera, 550 F.3d 180 (2d Cir. 2008) (en banc); Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc). For a thorough discussion on the number of en banc decisions in the Second Circuit, see Fed. Bar Council, En Banc Practices in the Second Circuit: Time for a Change? (2d Cir. Courts Comm. July 2011), at 15 (“... in the 11-year period from 2000 through 2010, the court heard only eight cases en banc—a decline from an average of about 1.2 cases per year from 1979 through 1993 to a rate of about 0.7 cases per year from 2000 through 2010.”)

Currently, only the Ninth Circuit uses a limited en banc, although two other courts are authorized to do so.⁴³ In the Ninth Circuit, the limited en banc court consists of the chief judge and 10 additional judges drawn by lot from the active judges of the court. In the absence of the chief judge, an eleventh judge is drawn by lot, and the most senior active judge on the panel presides. Because only 11 of the court’s judges participate in the en banc proceeding, a majority of the court’s active judges may vote to have the case reheard by the full court after the en banc court acts. In addition, the Ninth Circuit is the only circuit that has an en banc coordinator,⁴⁴ who is an active or senior judge appointed by the chief judge to supervise the en banc process. The coordinator is responsible for recording the en banc votes and circulating the final tally to the court. Additional responsibilities include circulating periodic reports on the status of en banc cases and, when appropriate, suspending en banc proceedings.

43. The 1978 Omnibus Judgeship Act authorized courts with more than 15 active judges to perform their en banc functions with fewer than all the court’s active judges. Section 6 of the Act provided, *inter alia*, “[a]ny court of appeals having more than 15 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, § 6, 92 Stat. 1629, 1633. The Ninth Circuit adopted the limited en banc procedure in 1979. The other two circuits that are currently eligible are the Fifth and Sixth Circuits.

44. *See generally* Stephen L. Wasby, “A Watchdog for the Good of the Order”: The Ninth Circuit’s En Banc Coordinator, 12 J. App. Prac. & Process 91 (2011) (describing the origins and development of the en banc coordinator position and the process leading to granting rehearing en banc in the Ninth Circuit).

In some instances, the Second Circuit has used an informal process, a “mini-en banc,” when issuing a panel decision that may conflict with prior panel opinions.⁴⁵ Specifically, “[t]hese mini en banc decisions state that the panel has circulated the opinion to all active judges prior to filing, and that no judge objected to the decision.”⁴⁶ One scholar noted that the use of this procedure is perhaps one explanation for the significantly lower en banc rate in the Second Circuit.⁴⁷

2. Effect of grant

The courts describe a variety of immediate effects of a grant of rehearing. In a few circuits (the First, Third, and Fourth), when a petition for rehearing is granted, the original panel opinion and the judgment are vacated. In the Seventh and Eleventh Circuits, the panel opinion is vacated and the mandate is stayed.

3. Procedures employed to minimize intracircuit and intercircuit conflicts

Without exception, 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, to minimize conflicts without convening en banc.

The Third Circuit’s position is that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding of a precedential opinion of a previous panel. A decision by the court en banc is required to do so.

In the D.C. Circuit, 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 is called an *Irons*⁴⁸ footnote and must be approved by the full court before it becomes the law of the circuit.⁴⁹

In the First Circuit, staff attorneys screening briefs for oral argument or summary affirmance try to identify cases that present similar issues so that these cases may be assigned to the same panel or so that other panels may be alerted that the same issue is being considered simultaneously by multiple panels.

During the 10-day prefiling circulation of opinions for publication in the Tenth Circuit, nonpanel judges may raise questions or suggest changes to the authoring judge. In addition, 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.

Similarly, in the Ninth Circuit, in addition to an 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. A prepublication

45. Fed. Bar Council, *supra* note 37, at 2.

46. *Id.*

47. *Id.* at 15.

48. *Irons v. Diamond*, 670 F.2d 265 (D.C. Cir. 1981).

49. U.S. Court of Appeals for the District of Columbia Circuit, Policy Statement on En Banc Endorsement of Panel Decisions, Jan. 17, 1996, [http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Irons%20Footnote/\\$FILE/IRONS.PDF](http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Irons%20Footnote/$FILE/IRONS.PDF).

report is circulated which summarizes opinions that will be filed in two days and describes how issues resolved in those opinions may affect pending cases.

In the Seventh Circuit, 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 argued separately on the same day before the same panel. If a case presents the same issue as a case pending before the court or before the Supreme Court, the later case is held pending the decision in the controlling case. After the controlling case is decided, the court asks the parties to file supplemental statements in light of the decision.

In the Second Circuit, judges prepare a list of “significant issues” to alert other judges or panels to issues that may soon be decided.

Finally, in the Federal Circuit, 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.

J. Special Procedures for Pro Se Cases

Appeals filed by unrepresented litigants continue to make up a large part of appellate court filings (more than 48% in 2010). The majority of pro se appeals fall into one of two categories: criminal matters and prisoner petitions. Table 12 lists the sources of these appeals for 2009 and 2010.

Table 12: U.S. Courts of Appeals—Sources of Pro Se Appeals During the 12-Month Periods Ending September 30, 2009 and 2010

Source	2009		2010		Pro Se Appeals Percentage Change 2009–2010
	Total	Pro Se	Total	Pro Se	
Total	57,740	27,805	55,992	27,209	–2.1
U.S. District Courts					
Criminal	13,710	2,375	12,797	2,119	–10.8
Civil	30,967	19,333	30,940	19,264	–0.4
Prisoner Petitions	16,249	14,513	15,789	14,067	–3.1
U.S. Civil	2,943	1,249	2,835	1,147	–8.2
Private Civil	11,775	3,571	12,316	4,050	13.4
Bankruptcy Court	793	314	678	206	–34.4
Administrative Agency	8,570	2,406	7,813	2,173	–9.7
Original Proceedings	3,700	3,377	3,764	3,447	2.1

Source: Admin. Office of U.S. Courts 2010 Annual Report, at 47 tbl.S-4.

Note: Data for the U.S. Court of Appeals for the Federal Circuit are not included.

As one would expect, appeals by pro se litigants pose special case 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. In general, courts use their staff attorneys extensively in this process and occasionally appoint counsel for indigent pro se litigants. In addition, some courts will accept informal briefs or handwritten briefs from pro se litigants, typically prisoners.

In the First, Third, and D.C. Circuits, the Clerks' Offices, not the Staff Attorneys' Offices, handle pro se mail. However, in the Third Circuit, staff attorneys and administrative assistants handle pro se mail in habeas cases. In the D.C. Circuit, procedural questions raised by pro se litigants are referred generally to special counsel to the clerk or to other staff in the Clerk's Office. Attorneys in the Clerk's Office will schedule in-person meetings with pro se litigants on request.

In the First Circuit, pro se litigants who want counsel 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 a criminal defendant 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. In the Third Circuit, the clerk, on recommendation of a staff attorney, may appoint pro bono counsel in civil cases without an order from a judge.

Staff attorneys in the D.C. Circuit may recommend to a special panel that an attorney or *amicus curiae* be appointed in a civil or agency case. If the panel agrees, the Clerk's Office selects the attorney or *amicus curiae*, subject to the panel's approval. In the Tenth Circuit, most pro se cases are decided by screening panels. In many of these cases, 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.

In the Fourth and Ninth Circuits, an attorney will be appointed for formal briefing and oral argument if the court determines that a pro se appeal warrants argument—for example, if 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. When it appears that a pro se case should be argued, the supervising attorney will arrange for oral argument by a volunteer attorney. The supervising attorney also coordinates communication with pro se law clerks in the district courts and maintains a substantive outline for use at the district court level.

The Ninth Circuit has also developed and implemented the Pro Se "Three Strikes" Database,⁵⁰ which was designed to make it easier to identify pro se litigants who file cases found to be without merit. To discourage frivolous filings, the court requires those with three or more "strikes" to pay filing fees rather than proceeding *in forma pauperis*. The database has been online since March 2007. In addition, the Ninth Circuit offers regular educational and training opportunities for court staff and judges regarding, among

50. 2008 Ninth Circuit Ann. Rep. 30, available at <http://www.ce9.uscourts.gov/publications/AnnualReport2008.pdf>.

other subjects, alternative case management practices for pro se litigants and how to streamline the initial review process.

K. Mediation and Conference Programs

Table 13 summarizes the various features of the appellate courts' mediation and conference programs in 2011. For the most current information, the reader should consult each circuit's local rules and internal operating procedures.

Table 13: Mediation and Conference Programs in the Federal Courts of Appeals

Circuit	Program name, year it began	Case types eligible for selection for a conference	Cases selected for conferences	Mandatory or voluntary	Who participates in conferences	Who conducts conferences	Program's involvement with briefing and other procedural matters
D.C.	Appellate Mediation Program, implemented 1987.	Fully counseled civil cases, including petitions for review of agency action and original actions (though pro se cases are rarely granted mediation).	Cases reviewed individually, taking into account several factors, including nature of the underlying dispute, relationship of the issues on appeal to the underlying dispute, susceptibility of these issues to mediation, possibility of effectuating a resolution, and number of parties. Parties may also request mediation by submitting a form to the Clerk's Office.	Mandatory	Attorneys with settlement authority. Clients strongly encouraged, but not required, to attend. For cases involving U.S. government or D.C. government, senior attorneys on either side of the case may attend mediation sessions so long as someone with settlement authority can be reached by telephone during conference sessions. Requirement may be waived in certain circumstances involving high-ranking officials.	Trained volunteer attorney–mediators, who are experienced litigators, senior members of the bar, and law school professors. Director of dispute resolution employed by the court.	Joint motions for extension of the briefing schedule must be filed with the Clerk's Office. Parties must represent in the motion that the mediator (not identified by name) concurs in the request.
1st	Civil Appeals Management Program (CAMP), implemented 1992 (1993 for Puerto Rico).	Fully counseled civil cases and review of administrative orders, except original proceedings (such as petitions for mandamus), prisoner petitions, habeas corpus petitions, summary enforcement actions of the NLRB, or any pro se cases.	Every CAMP-eligible case, unless in settlement counsel's opinion, there is no reasonable likelihood of settlement. In addition, any matter referred at any time by a circuit judge or hearing panel (by motion or sua sponte).	Mandatory	Attorneys with full settlement authority. Clients are generally required to attend.	Two settlement attorneys, one located in Boston, Mass., and the other in San Juan, P.R.; or a judge designated by the chief judge.	Settlement counsel also aid disposition of appeal by attempting to resolve open procedural matters and identifying meritless appeals.
2d	Civil Appeals Management Plan (CAMP), implemented 1974.	Fully counseled civil cases, including appeals from Administrative Agency Orders and Tax Court decisions and non-asylum immigration cases (but not petitions for writs of mandamus or prohibition, habeas corpus cases, and proceedings brought under 28 U.S.C. § 2255).	Nearly all CAMP-eligible cases, including all civil appeals, petitions for review, and applications for enforcement.	Mandatory	Attorneys with appropriate settlement authority, usually without clients. During the conference, the client must be available by telephone.	Three staff attorneys and one senior staff attorney employed by the court in its Office of Staff Counsel.	Staff attorneys have authority to dispose of certain procedural motions, including consolidation of appeals, expediting appeals, and enlargements of the briefing schedule.

Table 13: Mediation and Conference Programs in the Federal Courts of Appeals (cont.)

Circuit	Program name, year it began	Case types eligible for selection for a conference	Cases selected for conferences	Mandatory or voluntary	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 and petitions for review or for enforcement of agency action (but not original proceedings, such as mandamus; appeals or petitions in social security, immigration or deportation, or black lung cases; prisoner petitions; and habeas corpus petitions). Court recently introduced a program to appoint counsel for pro se litigants for mediation only.	Chief circuit mediator exercises judgment and discretion, based on nature of the case, issues involved, and prior experience. In appropriate cases, program director may ask counsel to represent pro se litigants for mediation only.	Mandatory	Attorneys with settlement authority.	Chief circuit mediator, a senior judge of the court of appeals, a senior judge of a district court, or a conference attorney.	Clerk's Office generally does not issue a briefing order until after a case leaves the program. If scheduling of additional mediation sessions will affect the briefing schedule in a case, the clerk postpones issuance of the briefing order on the mediator's recommendation.
4th	Office of the Circuit Mediator, implemented 1994.	Fully counseled civil cases (but not habeas corpus petitions and some government agency cases).	Cases selected by the program's chief circuit mediator from those eligible for the program, with consideration given to settlement potential, cases referred by hearing panels, and most cases in which counsel requests a conference.	Mandatory	Lead counsel with settlement authority. Clients are permitted, but generally not required, to attend.	Three circuit mediators are employed by the court. Most mediation conferences take place by telephone, but in-person mediation sessions may be held and are screened carefully due to a limited budget.	Circuit mediator may recommend extensions to the briefing schedule if all parties consent. Circuit mediator may also send to the clerk recommendations for other consent orders that control the course of proceedings in the case or that may dispose of the case.
5th	Appellate Conference Program, implemented 1996.	Fully counseled civil cases (but not prisoner, pro se, habeas corpus, social security, or immigration cases, or cases with unresolved jurisdictional problems).	Cases selected by the conference attorneys after initial jurisdictional review process, cases referred by the court, and most cases in which counsel requests a conference.	Mandatory	Lead counsel; conference attorney may require attendance by the parties.	Three attorney-mediators employed by the court. Most initial conferences are by telephone.	Assignment to the conference program does not affect deadlines already set by the court. But if settlement discussions are making progress, extensions of briefing schedules may be arranged.

Table 13: Mediation and Conference Programs in the Federal Courts of Appeals (cont.)

Circuit	Program name, year it began	Case types eligible for selection for a conference	Cases selected for conferences	Mandatory or voluntary	Who participates in conferences	Who conducts conferences	Program's involvement with briefing and other procedural matters
6th	Office of the Circuit Mediators, implemented on a trial basis in 1981 and permanent basis in 1983.	Fully counseled civil cases and bankruptcy appellate panel (BAP) cases (but not prisoner, tax cases, and most federal agency cases).	Cases selected randomly from a pool of new fully counseled civil appeals; cases referred by hearing panels; and most cases in which a party requests a conference.	Mandatory	Lead counsel with settlement authority. Generally, clients are not required to attend, although participation is welcome. If clients do not attend, it may be advisable to have them available by telephone.	One chief circuit mediator and 3 circuit mediators, all in Cincinnati. A circuit judge may also conduct the conference. Most initial mediation conferences are done by telephone unless counsel work within 50 miles of the court.	A circuit judge or clerk of court at the behest of the mediation attorney may enter an order or orders controlling the course of the proceedings or implementing any settlement agreement.
7th	Settlement Conference Program, implemented 1994.	Fully counseled civil cases (but not certain agency cases, including immigration and social security appeals, prisoner civil rights cases, habeas corpus petitions, mandamus appeals, sentencing cases, and pro se cases).	Court notices most eligible appeals for Rule 33 conferences.	Mandatory	Attorneys with appropriate settlement authority. Clients generally are not required to attend, but clients with full settlement authority must be available by telephone for duration of the conference.	Three conference attorneys employed by the court's Settlement Conference Office.	Briefing is usually postponed until after the initial conference. If further modification of the briefing schedule would be conducive to settlement, an order to that effect may later be entered.
8th	Preargument Settlement Conference Program, implemented 1981.	Fully counseled civil cases (but not petitions for post-conviction relief; social security cases; cases dismissed for lack of jurisdiction; interlocutory appeals certified under 28 U.S.C. § 1292(b); cases appealed under 28 U.S.C. § 1292(a)(1); and federal income tax cases).	Cases selected by the program director from those eligible for the program, with consideration given to settlement potential.	Voluntary; however, court strongly encourages participation.	Court encourages counsel and clients to attend settlement conferences.	Settlement conferences are conducted by the director of the program or by a senior district judge on special assignment from the chief judge. Contact with counsel is by telephone and in personal conferences held in several cities throughout the circuit.	Clerk's Office, not the mediator, handles all motions for extension of briefing schedules and other case-management matters.

Table 13: Mediation and Conference Programs in the Federal Courts of Appeals (cont.)

Circuit	Program name, year it began	Case types eligible for selection for a conference	Cases selected for conferences	Mandatory or voluntary	Who participates in conferences	Who conducts conferences	Program's involvement with briefing and other procedural matters
9th	Circuit Mediation Program, implemented 1984.	Fully counseled civil cases (but not appeals from an action filed under 28 U.S.C. §§ 2241, 2254, 2255, or petitions for a writ under 28 U.S.C. § 1651).	Cases selected after circuit court mediators review Mediation Questionnaire for all eligible cases, with consideration given to settlement potential. Cases also referred from panels of judges after oral argument and from appellate commissioner, who refers matters related to attorneys' fees. Counsel may also request mediation.	Mandatory	Attorneys, sometimes with clients at the mediator's direction. Clients are generally discouraged from participating in initial assessment.	Chief circuit mediator and 8 circuit court mediators employed by the court. Eight are in San Francisco and one is in Seattle.	Briefing schedule established by the Clerk's Office at the time the appeal is docketed remains in effect unless adjusted by a court mediator to facilitate settlement, or by the Clerk's Office pursuant to 9th Cir. R. 31-2.2. Circuit mediators are authorized to rule on certain procedural matters, including vacating or resetting the appeal schedule, if all counsel are in agreement.
10th	Circuit Mediation Office, implemented 1991.	Fully counseled civil cases except pro se, prisoners' rights, social security, and habeas corpus appeals; also, mediation is not routinely scheduled in cases involving social security claims or immigration matters, although the office will mediate them occasionally.	Cases randomly selected by circuit mediators from cases eligible for the program; cases referred by hearing panels; and cases in which a party requests a conference.	Mandatory	Lead counsel with settlement authority. Circuit mediator may permit or require client to attend.	Three circuit mediators and one conference attorney employed by the court.	Appellate process is not automatically stayed during the mediation process. However, the mediator may abate the preparation of the transcript or extend or abate the briefing schedule to accommodate the mediation process.
11th	Kinnard Mediation Center, implemented 1992.	Fully counseled civil cases (but not appeals in which any party is incarcerated, immigration or pro se cases, and appeals from habeas corpus actions).	Eligible cases referred by a hearing panel or circuit judge, either before or after oral argument.	Mandatory, but case may be removed from the program on request of a party and consent of the circuit mediator.	Counsel with full settlement authority, client, and a representative of any person or entity directly affected financially by the outcome of the litigation. Sometimes insurers and government entities. Client should be available during mediation.	Court employs five full-time mediators located in Atlanta and Miami. Parties may also hire their own mediator, at their own cost, with court approval.	Appellate proceedings are not stayed. Due date for briefing may be extended by the Kinnard Mediation Center if there is substantial probability that the appeal can settle via mediation, extension will save time and money, and other certain conditions are met.

Table 13: Mediation and Conference Programs in the Federal Courts of Appeals (cont.)

Circuit	Program name, year it began	Case types eligible for selection for a conference	Cases selected for conferences	Mandatory or voluntary	Who participates in conferences	Who conducts conferences	Program's involvement with briefing and other procedural matters
Fed.	Appellate Mediation Program, implemented in 2005 by en banc order; program guidelines revised in May 2008.	Fully counseled civil cases.	For all cases covered by Fed. Cir. R. 33, circuit mediation officers contact principal counsel to determine if the case is a good candidate for mediation and to seek opinion of counsel regarding participation in the program. Counsel may jointly request that the case be included in the mediation program.	Mandatory for all cases selected for participation in program that were docketed after Sept. 18, 2006.	Lead counsel attend all sessions. At initial session, a party representative with actual settlement authority must also attend. 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 in the case.	Chief circuit mediator or the circuit mediation officer. In some cases, an outside mediator from the court's roster may be used.	Cases in mediation remain subject to normal scheduling for briefs and oral argument by the clerk of court, but counsel may file a consent motion for an extension of time. Motions for additional extensions will be referred to circuit mediators, who are authorized to grant motions for extensions up to a date that is generally no more than 150 days after the case is referred to a mediator.

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Part II: Profiles of Each Court of Appeals

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United States Courts 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 11 judgeships. In the 12-month period ending September 30, 2010, it had 4 sitting senior judges and 24.0 vacant judgeship months.

A. Judges and Panels

1. *Orientation and assignments for new judges*

The court has no formal orientation for new judges.

2. *Visiting judges*

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

3. *Panels*

In addition to regular merits panels, each judge serves on a special panel that handles motions, cases recommended for disposition without oral argument, and emergency matters that are presented by the legal division.

4. *Screening judges*

Although initial screening is done by the court's legal division, as described in *infra* 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 infra* section V.

B. Central Staff

1. *Legal division*

The legal division is part of the Clerk's Office. The court's central legal staff consists of the director, an assistant to the director, staff attorneys, and support staff. The office also occasionally employs law student interns. Staff attorneys are hired either on a permanent basis or for two-year terms on a staggered basis. Their primary duties fall into three broad categories: (1) screening and classifying cases and pleadings filed in the court; (2) making recommendations to panels and preparing proposed dispositions of dispositive motions, contested procedural motions, and emergency matters; and (3) making recommendations and preparing proposed dispositions in cases decided without oral argument, pursuant to Circuit Rule 34(j). In addition to supervising the work of the staff attorneys, the director and assistant to the director assist merits panels in managing motions practice, briefing, and oral argument in major cases designated as "complex" under the court's 1986 Case Management Plan, and in smaller cases deemed appropriate for man-

agement. The legal division also screens cases for inclusion in the court's Appellate Mediation Program.

2. Clerk's Office

The Clerk's Office is composed of an administrative division, a case administration division, and a legal division. The office maintains the docket of the court and the official record of proceedings before the court, and it receives and maintains all filings in the court, keeping them available for public inspection. In addition, the Clerk's Office prepares and distributes the judges' sitting schedules and the court's oral argument calendar.

3. Appellate mediation program staff

The court employs a chief circuit mediator and a circuit mediator. The director of the legal division of the Clerk's Office oversees a group of volunteer attorney-mediators who are trained and selected by the court. See *infra* section II.C.

C. Technological Resources

The court's website (<http://www.cadc.uscourts.gov>) provides additional court information to the public. The site allows on-line viewing and printing of court forms; the Circuit Rules Handbook and Frequently Asked Questions (FAQs); the oral argument calendar; court opinions, orders, and judgments that are not sealed; and other information concerning the court. Case information is also available on the PACER website to individuals who have a PACER account. The PACER website is accessible via a link from the court's website.

The court also has a Lotus Notes-based automated voting system called Web Vote. 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

1. Information provided by attorneys

When a new appeal or petition for review is docketed, the appellant or petitioner is provided with a docketing statement form, which must be filed within 30 days. Each appellant or petitioner also must file a preliminary, nonbinding statement of issues on appeal and a copy of the district court or agency opinion or order. These documents are referred to collectively as "initial submissions."

2. Information provided to attorneys

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

B. Screening

1. Screening for jurisdiction

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

2. Screening for argument vs. nonargument disposition

a. Role of staff

Staff attorneys screen all cases for a preliminary determination of whether an argument or nonargument track is appropriate. All pro se cases in which the pro se litigant is not an attorney are screened for disposition without argument and retained by the staff attorneys. If a staff attorney is convinced a pro se appeal should be argued, the staff attorney may recommend to the special panel that an attorney or amicus curiae 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 both the appellant's brief and 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. A significant 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 after 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.

b. Role of litigants

When the court concludes that oral argument is not needed, it notifies the parties that argument will not be held and may proceed to dispose of the case without oral argument. Parties may, within 10 days, file a motion for reconsideration of this decision, but such motions are disfavored.

3. 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. Cases classified as "borderline complex" that are assigned to the regular merits panel are assigned a computer code that prevents two such cases from being calendared on the same day, unless they are related.

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. Cases are selected for mediation by attorneys in the legal division of the Clerk's Office working in concert with the chief circuit mediator 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 the court gives them special consideration in selecting cases to be mediated under the program. Screening of civil cases usually occurs after dispositive motions have been decided and, in any event, no sooner than 45 days after a case has been docketed in the court of appeals.

Some factors that determine whether a case will be eligible are (1) the nature of the underlying dispute, (2) the relationship of the issues on appeal to the underlying dispute, (3) the availability of incentives to reach settlement or limit the issues on appeal, (4) the susceptibility of these issues to mediation, (5) the possibility of effectuating a resolution, (6) the number of parties, and (7) the number of related pending cases.

Uncounseled cases, while not categorically excluded, are rarely referred to mediation. The court's mediation staff generally contacts counsel for the parties to discuss a case's suitability for mediation prior to determining whether the matter will be mediated. However, once a case is selected for mediation, participation in the program is mandatory. The role of the mediators is to help parties reach a settlement 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 in order to expedite the appellate process. The mediators are experienced attorney-volunteers, who are selected and trained by the court.

III. Electronic Case Filing, Briefing, and Motions Practice

A. Electronic Case Filing

The D.C. Circuit requires all documents submitted in cases to be filed electronically pursuant to Circuit Rule 25(a) and the court's Administrative Order Regarding Electronic Case Filing, unless otherwise indicated by circuit rule or court order. There are some exceptions to the electronic filing requirement, including pro se appeals; motions to file documents under seal; exhibits, attachments, or appendix items that exceed 500 pages or 1,500 kilobytes; and materials that are not in a format that readily permits electronic filing, such as odd-sized documents or documents that are illegible when scanned into an electronic format.

Attorneys who appear before the court must register for the court's CM/ECF system and must enter an appearance in each case in which they want to participate as an ECF filer. A pro se party in a civil case may be permitted to register as an ECF filer solely for purposes of that case. To obtain permission to file electronically, a pro se litigant must file a motion describing his or her access to the Internet and confirm his or her capacity to file and receive documents electronically on a regular basis. If permission is granted, the pro se party may be required to complete CM/ECF training provided by the clerk. All ECF filers have to agree to protect the security of their passwords and are required to notify the PACER Service Center and the clerk immediately if they learn that a password has been compromised. ECF filers may be sanctioned for failure to comply with this requirement.

B. Briefing

In civil cases, the Clerk's Office establishes a briefing schedule after the case has been screened and classified by the legal division, and after any pending motions in the case have been resolved. In cases designated as "regular merits" cases, counsel may receive a single order fixing the date for oral argument and setting briefing dates. For these cases, a final brief is generally due at least 50 days before the case is to be heard.

C. Motions Practice

Motions in cases that have not been calendared for argument, and cases initially screened for disposition without argument, are handled by a special panel. These panels sit for up to three months during the court's term and for shorter periods over the summer. The staff attorneys prepare memoranda for the special panels and draft proposed orders or judgments. The special panel receives these materials, along with any necessary underlying pleadings. The staff attorneys subsequently meet with the panel to present the motions at conferences that are scheduled every two to three weeks.

1. Procedural motions

The clerk may dispose of certain procedural motions pursuant to circuit rules, or may submit such motions to a panel of the court. Any interested party adversely affected by an order of the clerk disposing of a motion may move for reconsideration within 10 days after entry of the order. Motions for reconsideration of clerk's orders are submitted to a panel of the court. Staff attorneys present to the special panel procedural motions that are opposed or otherwise require panel action.

2. Substantive motions

The legal division prepares recommendations for the resolution of dispositive motions, 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; all motions under the Prison Litigation Reform Act; and petitions for permission to appeal pursuant to Federal Rule of Appellate Procedure 5.

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.

3. Emergency motions

For emergency motions, the staff attorneys prepare 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 screened for decision without argument, the briefs are routed to the legal division for further assessment. If a supervisor determines that the case is not suitable for disposition without argument, it will be placed on the oral argument calendar. Otherwise, the case will be assigned to a staff attorney, who will prepare a memorandum and a proposed judgment for the special panel recommending that the case be decided without argument.

Once the staff attorney has prepared the case for decision without argument, a conference is held at which the staff attorney presents the case. The judges either adopt the attorney's recommendation or send the case to the oral argument calendar. If the special panel accepts the recommendation that the case be decided without argument, the parties will be notified by order of that decision. Absent a successful motion to reconsider, the panel's judgment resolving the merits of the appeal will be issued. The result is usually announced in an unpublished per curiam judgment, which may be accompanied by a brief memorandum explaining the panel's decision.

In cases screened for decision with oral argument, if the judges on the merits panel determine that a case set for argument can be decided without argument, the case is removed from the argument calendar and the court notifies the parties. A party may move for reconsideration of this decision, but such motions are rarely granted. Again, the result is typically announced in an unpublished per curiam judgment and memorandum.

Some cases and other matters are presented to a "backlog prevention/reduction panel." This panel consists of the chief judge and two members of the sitting special panel, who serve in rotation. Each month, one staff attorney presents to this panel matters that are routine or simple enough to warrant disposition without a full memorandum from the staff attorney. 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 motions or appeals. The staff attorney prepares proposed orders or judgments for these matters.

V. Argument Panel Operations

A. Panel Composition, Sitting Schedules, and Panel Rotation

1. 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 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 cases, each judge is assigned one to three complex cases for argument and disposition over the course of the term. These cases involve large numbers of parties and issues and extensive briefing.

2. Daily argument schedule

Generally, at least three cases are scheduled for each day of a panel's sitting period. The mix of cases (criminal appeals, private civil appeals, administrative agency cases, etc.) in a given sitting period reflects roughly the proportions of the court's overall caseload.

3. Argument time

The panel's screening judge sets argument times. There is no set argument time, but 15 minutes per side is a common allotment. Counsel may move for additional time, but the court rarely grants such motions.

4. 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 e-mail, Westlaw and Lexis, and files stored anywhere on the court's network.

B. Assignment of Cases to Panels

1. Standby pool

Parties may expedite their own cases by agreeing to have their cases placed in 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.

2. 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 it 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 30 days of the filing of the last brief.

3. 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 clerk notifies the panel with the earlier case and gives it the option of taking the newer case.

4. 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 Preparing Cases for the Argument Calendar

Staff attorneys prepare recommendations for the merits panel when substantive motions or opposed procedural motions are filed after the case is calendared but before the briefs have been transmitted to the panel members.

D. Judicial Preparation for Argument: Materials and Timing

The Clerk's Office ordinarily distributes briefs, appendices, and other relevant materials to the judges approximately four to five weeks before oral argument. 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, limitations 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. Senior judges of the court do not serve as screening judges.

E. Disclosure of Panel Members' Identities

The clerk posts the calendar for a sitting period about two months in advance, but the panel composition is subject to change. Argument panel members' identities are generally disclosed to counsel in the order setting the case for argument. Thus, for civil appeals, counsel may know the panel very early in the process. In criminal appeals, the panel is usually not disclosed until after the parties have filed briefs. The legal division ordinarily does not screen such cases for argument until after the appellee'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: (1) a published signed opinion, (2) a published per curiam opinion, (3) an unpublished judgment or order with memorandum, and (4) 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 denial of a petition for review, with a brief explanation, such as citation of a governing precedent. 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. An opinion, memorandum, or other statement explaining the basis for the court's action in issuing an order or judgment will be published if it meets one or more of the following criteria:

- With regard to a substantial issue it resolves, it is a case of first impression or the first case to present the issue in the court.
- It alters, modifies, or significantly clarifies a rule of law previously announced by the court.
- It calls attention to an existing rule of law that appears to have been generally overlooked.
- It criticizes or questions existing law.
- It resolves an apparent conflict in decisions within the circuit or creates a conflict with another circuit.
- It reverses a published agency or district court decision, or affirms a decision of the district court on grounds different from those set forth in the district court's published opinion.
- It warrants publication in light of other factors that give it general public interest.

B. Criteria for Judgment Without Opinion

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 reversal 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

The authoring judge circulates a draft opinion or judgment to the other members of the panel, who may suggest changes to the proposed text, or draft and circulate a concurring or dissenting opinion. Final drafts of all opinions of the court—whether or not designated for publication—are circulated to all judges of the court before issuance.

D. Citation of Unpublished Opinions

Unpublished dispositions issued before January 1, 2002, may not be cited as precedent but may be cited for their preclusive effects. Unpublished dispositions issued after January 1, 2002, may be cited as precedent.

E. Availability of Unpublished 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, with the exception of orders filed under seal and some scheduling orders generated by the court's docketing system. All orders and judgments, including clerk's orders, issued on or after June 1, 2001, are available over the Internet via PACER.

F. Miscellaneous Opinion and Publication Issues

1. 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 30 days after judgment or, if a timely motion for rehearing is made, within 30 days after action thereon, and must explain why the opinion meets the court's own criteria for publication.

2. Monitoring of opinion status

Each month, 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 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 rehearing en banc must contain a separate section that either concisely states the issue and why it is of exceptional importance or identifies the 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 rehearing before the full court's review. Nonetheless, the judg-

ment of the panel would be vacated and, upon termination of the en banc proceeding, a new judgment issued.

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 heard initially en banc or reheard en banc. A vote is then taken to determine whether a majority of the active judges agree.

D. Process for Rehearing En Banc

1. 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.

2. Voting

When a petition for rehearing en banc is filed, the clerk transmits a vote sheet and the petition electronically to all members of the original panel (including senior judges) and to all other active judges of the court. A vote may be requested by an active judge of the court, or by any member 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, along with any response to the petition ordered by the court, to all active judges of the court. Only active judges of the court may vote, and a majority must approve a rehearing en banc. For purposes of calculating a majority of the court, “majority” means a majority of all active judges who are not recused. When a rehearing en banc is approved, the clerk enters an order to that effect.

3. 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 rehearing en banc and vacating the judgment (but not ordinarily 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.

4. Hearing

The court may or may not request additional briefing when an 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 wants to participate.

E. Sanctions for Unmeritorious Petitions

Costs may be assessed as a penalty for the filing of 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, another way the court seeks to limit intracircuit inconsistency is by clearing up apparent conflicts in the opinions of three-judge panels. 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,⁵¹ must be approved by the full court before it becomes the law of the circuit but does not require separate en banc hearing or additional briefing.

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal Appeals

The court specially expedites sentencing appeals if the defendant is incarcerated and a sentence of short duration has been imposed. The court requires the appellant to file a memorandum of law and fact, limited to 20 pages, challenging the sentence. The appellee is allowed a 20-page response, and the appellant may file a 10-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.

1. Certificates of appealability

Requests for certificates of appealability (COAs) 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, an attorney or amicus curiae will be appointed to brief and argue the appeal.

2. Special procedures for capital habeas corpus cases

No such cases have been litigated 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 their legal work in connection with nonargument decision making (described above), legal 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.

51. *Irons v. Diamond*, 670 F.2d 265 (D.C. Cir. 1981).

C. Appointment of Counsel

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

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

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 a Consent to Collection form, to be completed by the prisoner, both of which are to be submitted to the court.

Prisoners who are released while their appeal is pending must still pay the fees incurred while they were imprisoned. *See In re Smith*, 114 F.3d 1247, 1251–52 (D.C. Cir. 1997). And prisoners filing petitions for mandamus in civil cases must comply with the filing fee requirements of the PLRA. *See In re Grant*, 635 F.3d 1227 (D.C. Cir. 2011).

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. Five federal district courts operate within the circuit. The First Circuit Court of Appeals is headquartered in Boston. The circuit does not hold formal terms, but is always open for docketing appeals and petitions; making motions; filing records, briefs, and appendices; filing opinions; and entering orders and judgments.

The court has 6 authorized judgeships. In the 12-month period ending September 30, 2010, it had 2 sitting senior judges and 5.5 vacant judgeship months.

A. Judges and Panels

1. Orientation and assignments for new judges

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

2. Visiting judges

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

3. Panels

In addition to serving on argument panels, judges serve on motions or duty panels, and as motions or duty judges.

4. Motions panels

Approximately one year in advance, the Circuit Executive's Office assigns a motions panel composed of three judges for each month. Service on a motions panel rotates among the judges. This panel handles all procedural and substantive motions, including emergencies that arise during that month and matters that have not been delegated to the Clerk's Office or to single judges. These panels do not physically sit together, but decide matters serially.

5. Duty judge

A duty judge is assigned nondispositive, procedural motions that can be decided by a single judge but cannot be disposed of by the Clerk's Office or staff attorneys' office. The duty judge, who can be a senior judge but not a visiting judge, is the lead judge of the motions panel.

B. Central Staff

1. Staff attorneys' office

The staff attorneys' office provides the circuit court with legal and research assistance. The attorneys review the briefs submitted in cases that the clerk has assigned to a particular session. In addition, the Clerk's Office sends substantive motions to the staff attorneys' office, which prepares explanatory memoranda and draft orders. In addition to

these duties, staff attorneys sometimes assist in drafting local rules and work with other court units on policy matters.

Staff attorneys do not formally specialize in specific types of cases, but may develop informal temporary specialties in new or discrete areas. Cases with difficult circumstances and emergencies are generally assigned to the most experienced attorneys.

Currently, the staff attorneys' office is staffed with 1 senior staff attorney, 1 supervisory staff attorney, 14 full-time line staff attorneys, 5 part-time staff attorneys, and 2 support persons.

2. Clerk's Office

Currently, the Clerk's Office has 26 employees, including 3 part-time employees. The office is organized into four main groups: (1) a case management team; (2) a CM/ECF coordinator and data quality team; (3) a legal team; and (4) an intake/records team. Additional deputy clerks perform administrative, calendaring, statistical, and district court liaison duties.

3. Civil Appeals Management Program (CAMP)

The court employs two settlement attorneys, who are located in the Office of Settlement Counsel. *See infra* section II.C.

II. Intake, Screening, and Settlement Programs

A. Intake

1. Information provided by attorneys

a. All cases

In cases appealed from the district court, counsel must file the notice of appeal in the district court and pay the district court clerk the combined docketing and filing fees. In administrative agency cases and petitions for mandamus, the docketing fee is paid to the appeals court clerk at the time the petition is filed with the court. Failure to pay the fee or seek in forma pauperis status within 14 days after the case is docketed in the court of appeals may lead to dismissal of the appeal.

Counsel filing the appeal must also complete and file a docketing statement using the form provided by the Clerk's Office within 14 days after the case is docketed in the court of appeals. The docketing statement must list all parties to the appeal, the last known counsel, and last known addresses and e-mail addresses for counsel and unrepresented parties. The statement and any attachments must be served on the opposing party at the time they are filed with the clerk. If the opposing party concludes that the docketing statement includes inaccurate, incomplete, or misleading statements, that party must inform the Clerk's Office in writing of any errors and any proposed additions or corrections within 14 days of service.

Attorneys for both the appellant and the appellee must file appearance forms within 14 days after the case is docketed in the court. Only additional or new attorneys for the parties may enter an appearance outside this initial period. Once the appellee brief has been filed, no attorney may file a notice of appearance without leave of court.

Transcripts must be ordered promptly and completely. The transcript order must specify the date and type of hearing. Counsel have 14 days after the appeal is docketed to file the transcript order form in the court of appeals. The court urges parties to order any

necessary transcript immediately after the filing of the notice of appeal. If the appellant fails to timely order a transcript in writing from the court reporter, the appeal may be dismissed for want of diligent prosecution. A corporate disclosure statement may be required under Federal Rule of Appellate Procedure 26.1. If required, the statement must be filed at the same time as any other document is filed in the court of appeals and at the beginning of a party's main brief.

b. Civil appeals

Many cases are eligible for the Civil Appeals Management Program (CAMP). *See infra* section II.C.

c. Criminal appeals

Trial counsel in criminal cases remain counsel on appeal unless given leave to withdraw by the court. When a defendant has been represented in district court by counsel appointed under the Criminal Justice Act, the clerk typically sends the defendant a "Form for Selection of Counsel on Appeal," which allows the defendant to request that new counsel be appointed on appeal. In these situations, the court will ordinarily appoint new counsel and allow trial counsel to withdraw. In other situations, a motion to withdraw must be accompanied by an affidavit from the defendant indicating that he or she wants to apply for replacement counsel under the Criminal Justice Act; has retained new counsel; elects to appear pro se; or chooses to withdraw the appeal. The docketing statement and transcript order form described above are required in criminal cases.

2. Information provided to attorneys

After the clerk in the court of appeals receives the notice of appeal, the clerk notifies CAMP (the Civil Appeals Management Program) if the appeal is eligible for the program. CAMP, in turn, contacts the parties. Once the record on appeal is complete, including the filing of all necessary transcripts, the Clerk's Office sends to the appellant's counsel a notice of the filing dates for the brief and appendix. After the brief for the appellant is filed, the Clerk's Office similarly gives notice to the appellee's counsel.

In addition, the clerk sends attorneys information about the court's local rules and identifies significant procedural issues that commonly arise on appeal.

B. Screening

1. Preliminary screening

A preliminary screening for procedural defects takes place after the docketing of an appeal in the First Circuit. Such screening allows for sua sponte action by the court, including dismissal of the appeal.

2. 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 memorandum and draft order and circulates it to the motions panel for review.

3. Screening for argument vs. nonargument disposition

The following types of cases are typically submitted on the briefs and referred to staff attorneys to prepare for nonargument disposition: pro se cases, bail appeals, recalcitrant witness matters, social security appeals, *Anders* brief cases, and cases in which all parties waive argument.

Staff attorneys review the briefs in other cases the clerk has assigned for a particular session. By local rule, parties may add to their briefs a statement explaining why oral argument should or need not be granted. A panel of three judges consults with staff attorneys to determine whether oral argument is warranted in a particular case. If it is not, the clerk advises counsel of the court's decision.

Other cases, when fully briefed, are reviewed by the senior staff attorney, who recommends to the court whether to put them on the argument calendar or to have a staff attorney prepare them for decision without argument. If a 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, submitted cases are those 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.

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.

4. 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 senior staff attorney alerts one panel to the fact that another panel is considering a similar issue simultaneously.

C. Civil Appeals Management Program (CAMP)

The First Circuit's Civil Appeals Management Program (CAMP), which is managed and staffed by settlement counsel, attempts to settle appellate cases before briefing without court action. The mediation process in the First Circuit begins with the docketing of an appeal in the Clerk's Office. The clerk notifies settlement counsel of all civil appeals considered eligible for CAMP.

The First Circuit requires mediation of all civil appeals except habeas corpus, prisoner petitions, pro se cases, National Labor Relations Board (NLRB) enforcement petitions, and original proceedings (e.g., mandamus). Under Local Rule 33, settlement counsel has the discretion to require parties in a particular case to attend a preargument conference. Such a conference is almost always required unless information provided by the parties to settlement counsel indicates that there is no reasonable likelihood of settlement. In-person conferences are preferred to conferences conducted by telephone, and attorneys attending conferences are required to have full settlement authority. A conference typically lasts one to three hours, and settlement counsel may require one or more follow-up telephone or in-person conferences. At the end of the process, a report is filed with the Clerk's Office indicating only whether the case has been settled. For cases that

are not settled or withdrawn, the conferences are also intended to facilitate disposition by simplifying issues and resolving procedural matters.

III. Electronic Case Filing, Briefing, and Motions Practice

A. Electronic Case Filing

Electronic filing of briefs, pleadings, motions, and other documents is mandatory for all attorneys practicing before the court unless they are granted an exemption. Counsel should register to use the court's electronic filing system at the PACER website, <http://www.pacer.psc.uscourts.gov>. Electronic filing is voluntary for all nonincarcerated pro se parties without counsel.

Documents may be filed electronically at any time. The filer should not, however, expect that the filing will be addressed outside regular business hours (Mondays through Fridays from 8:30 a.m. to 5:00 p.m.) unless the filer contacts the Clerk's Office in advance to make special arrangements. In situations that the clerk determines are of an emergency nature or involve other compelling circumstances, the clerk is authorized to accept papers for filing that are transmitted to the Clerk's Office by facsimile, subject to any procedures for follow-up filing of electronic or hard copies.

B. Briefing

Once the record on appeal is complete, including the receipt of all required transcripts, the Clerk's Office will set a briefing schedule. The court's website, <http://www.ca1.uscourts.gov>, provides guidelines and a checklist to help counsel prepare and submit briefs. If a brief does not conform to the requirements of the rules, the Clerk's Office will issue a noncompliance order and set a deadline for filing a compliant brief.

If a brief or petition is not filed electronically, one copy of it must be filed on a computer-readable disk. Counsel should consult Local Rule 32.0 for the specific requirements for filing the computer-readable disk with the Clerk's Office. The disk requirement does not apply to parties appearing pro se or to other parties who submit a timely motion certifying that undue hardship or other unusual circumstances prevent compliance with the rule.

C. Motions Practice

1. Composition and operation of motions panels

Motions requiring the action of a single judge are transmitted to a single judge, and matters requiring three-judge action are transmitted to a three-judge panel. The duties of the single-motions judge and the motions panel are rotated among the judges of the court. Unless the court orders otherwise, motions are decided without oral argument by counsel.

2. Procedural motions

Depending on the nature of a procedural motion, the motion may be handled by the clerk, the staff attorneys, or a motions panel. The clerk is authorized to dispose of certain routine, procedural motions in accordance with the court's standing instructions. Any party adversely affected by the action of the clerk on a motion may promptly move for reconsideration. Unless the clerk grants reconsideration, the motion for reconsideration will be submitted to a single judge or panel. A clerk's order is identifiable by its form:

The order states on its face that it is entered pursuant to 1st Cir. R. 27.0(d). 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 (IFP) motion 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, setting briefing schedules in a bail or recalcitrant witness appeal, allowing a sur-reply brief of 15 pages or less, and granting assented-to motions to reinstate appeals.

3. Substantive motions

The Clerk's Office sends substantive motions to the staff attorneys' office. For most 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, and 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. The memorandum and draft order are transmitted electronically to the panel for the panel's consideration.

4. Emergency motions

The local rules advise counsel to contact the Clerk's Office at the earliest opportunity in situations that may require emergency action by the court outside of normal business hours. The Clerk's Office will consult with the duty judge and staff attorneys' office to determine whether special arrangements will be made for after hours filings and responses, issuance of orders after hours, and similar matters. In addition, even if an attorney anticipates that the emergency circumstances can be addressed within ordinary business hours, he or she should contact the Clerk's Office in advance, and any motion seeking expedited relief should clearly give the reasons why expedition is necessary and indicate the date by which a ruling is requested.

IV. Nonargument Decision-Making Practices

Briefed pro se cases are typically submitted on the briefs and routed to the staff attorneys' office for memorandum and draft disposition. For fully briefed, counseled cases retained in the staff attorneys' office, a staff attorney prepares a memorandum and draft opinion. The staff attorney memorandum and draft opinion or disposition are circulated to the panel for its approval or revision.

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.

V. Argument Panel Operations

A. Panel Composition, Sitting Schedules, and Panel Rotation

Each judge sits on 10 oral argument panels a year. The court will hear up to 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.

The court usually sits for one week starting on the first Monday of the month during the two periods from January through June and October through December. In addition, in either July or August, the court sits for one week. In September the court starts on the Wednesday after Labor Day and sits for the three days in that week and the five days in the following week. In November and March the court sits two weeks—one week in Boston and one week in Puerto Rico.

When a new judge is appointed to a district in the circuit, the 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. Visiting judges from outside the circuit sit with the court when needed.

The circuit executive assigns judges to panels.

B. Assignment of Cases to Panels

There is a long-standing practice in the circuit to assign cases to panels on a random basis. In some situations, however, a case may be assigned to a particular panel or to a panel on which a particular judge sits. Such situations, set forth in 1st Circuit Internal Operating Procedure VII.D, include the following:

- the case is a sequel to, or offshoot of, a case previously decided by the court (e.g., following a remand);
- the case was presented to the duty panel in the regular course of duties (*see e.g., Bui v. DiPaolo*, 170 F.3d 232, 238 (1st Cir. 1999));
- the case has been assigned to a panel, but scheduling changes (e.g., postponement of oral argument) or changes in the procedural handling of the case (e.g., a case intended for summary disposition is thereafter set for oral argument) require rescheduling; and
- the case has been assigned to a panel, but the subsequent recusal of a judge (or other unavailability of a judge, e.g., because of illness) makes it appropriate to transfer the case to a different panel or to find a replacement judge.

No other nonrandom assignments of cases are made except for special cause and with the concurrence of the duty judge.

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 notifies counsel of the specific date of the hearing and requests the name of the person who will give the oral argument so that any calendar conflicts can be identified and resolved. One week before the monthly session begins, the clerk issues an order listing the cases for that session, the names of the panel members, and the times for oral argument. Cases scheduled earlier in the court day may take less time for oral argument than was anticipated; therefore, it is the responsibility of counsel to be present at the beginning of the court day or make arrangements to ascertain whether there is any change in the order of the cases.

Expedited scheduling is provided automatically in those cases in which it is required by statute (e.g., recalcitrant witness cases). Parties may also request expedited processing in other cases, but are encouraged to file the motion shortly after the case is docketed in the court of appeals.

C. Staff Role in Preparing Cases for the 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 Members' Identities

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

VI. Opinion Preparation and Publication

A. Types of Dispositions and Criteria for Publication

A panel may dispose of a case by judgment, unpublished opinion, or published opinion. A published or unpublished opinion is used when the decision calls for more than summary explanation.

The court generally thinks it desirable that its opinions be published and thus available to parties for citation. Exceptions to this policy include situations in which 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. The court notes that most opinions dealing with claims for benefits under the Social Security Act, 42 U.S.C. § 205(g), fall within the exception.

As members of a panel prepare for argument they consider the appropriate manner of disposition and attempt to agree in conference as to how to dispose of a particular case. This initial decision may be altered in 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 of the opinion is required. When a case includes a dissenting opinion or more than a single opinion, the opinion or opinions are published unless the entire panel decides against publication. Any party or interested person may apply to the court for publication of an unpublished opinion for good cause shown.

B. Criteria for Judgment Without Opinion

The court rarely enters judgments without a published or unpublished opinion in orally argued cases. Judgments without opinion are common in submitted cases.

C. 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.

D. Citation of Unpublished Opinions

An unpublished judicial opinion, order, or judgment, or other written disposition of the court may be cited, regardless of the date it was issued. The court considers the disposi-

tion's persuasive value but does not consider it as binding precedent. A party citing an unpublished disposition must note in its brief or other filing that it is unpublished.

The citation of dispositions of other courts is governed by Federal Rule of Appellate Procedure 32.1 and the local rules of the issuing court. However, unpublished or nonprecedential dispositions of other courts may always be cited to establish a fact about the case or to show the binding or preclusive effect of an opinion that is independent of its quality as precedent.

E. Availability of Unpublished Opinions

Nonprecedential opinions are available on the court's website, LexisNexis, Westlaw, and on other commercial sites and databases.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for Grant of En Banc Rehearing

The court requires that a petition for rehearing en banc contain a separate section that either 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. Process for Rehearing En Banc

The First Circuit emphasizes that the purpose of petitions for rehearing is to bring to the attention of the panel claimed errors in the opinion and that petitions should not be used to reargue an issue previously presented by counsel. Usually when an en banc rehearing is granted, the previous opinion and judgment will be vacated.

C. Treatment of Petitions for Rehearing En Banc

A petition for rehearing en banc is submitted by the clerk to the panel that heard the case and to the other active First Circuit judges. The decision to hear or rehear a case en banc is determined by a majority of affirmative votes of First Circuit judges who are in regular active service. In addition, rehearing en banc occurs only if it is agreed to by a majority of circuit judges in regular active service who are not disqualified. Any senior judge of the First Circuit is eligible to participate in en banc proceedings, at that judge's discretion, under the circumstances specified in 28 U.S.C. § 46(c).

D. 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 can be assigned to the same panel or so that other panels can 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. However, cases that originate from the same district court number are typically consolidated for briefing and argument.

B. Habeas Corpus Cases and Certificates of Appealability

Ordinarily, neither the court nor a judge will act on a request for a certificate of appealability if the district judge who refused the writ is available and has not yet ruled. If the district court denies a certificate of appealability, the petitioner may then file a motion for a certificate of appealability before the First Circuit. The motion should be timely and include a memorandum that provides specific and substantial reasons, and not mere generalizations, why a certificate should be granted. If a petitioner fails to file a sufficient memorandum by the time set by the clerk, the certificate may be denied without further consideration and the appeal is subsequently terminated. There is no local rule that specifies the number of judges required to deny a certificate of appealability. Under the local rules, if a district court does not grant a certificate of appealability on all issues, the petitioner's appeal includes only the issue or issues for which the district court granted the certificate.

If the petitioner wants appellate review of the issues for which the district court denied a certificate, the petitioner must apply to the court of appeals promptly, within the time limit set by the clerk, for an expanded certificate of appealability. The request for an expanded certificate of appealability must be accompanied by a copy of the district court order and a memorandum giving specific and substantial reasons why an expanded certificate should be granted. If the petitioner fails to apply for an expanded certificate, the appeal will proceed only with respect to issues on which the district court granted the certificate.

IX. Special Procedures for Pro Se Cases

The Clerk's Office handles all correspondence and telephone calls with pro se litigants and gives the litigants direction if requested.

Pro se litigants who want counsel to be appointed on appeal and 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 a criminal defendant 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 (PLRA)

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. However, when a case is determined to be a PLRA case, a form letter and forms are provided to the appellant. When those forms are compliantly filed, an order typically issues directing the district court and the prisoner account technician to deduct monies from the prisoner's account until the \$455 filing fee is paid.

B. The PLRA's "Three Strikes" Provision and In Forma Pauperis Status

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

XI. Bankruptcy Appellate Panel (BAP)

A. General Information

Appeals from decisions of the bankruptcy courts within the First Circuit are sent to the United States Bankruptcy Appellate Panel for the First Circuit (BAP) unless a party timely files a separate statement of election to have a U.S. district court hear the appeal. The Clerk's Office for the BAP is located in Boston, Mass.

The BAP includes bankruptcy judges selected from the five districts within the First Circuit and, occasionally, bankruptcy judges from other circuits who sit by designation. Any given BAP consists of three judges, none of whom are from the district in which the appeal originated.

Appeals to the BAP are governed by Part VIII of the Federal Rules of Bankruptcy Procedure and the First Circuit BAP Local Rules. If these rules are silent as to a matter of practice in a particular situation, the BAP may apply the First Circuit Local Rules and the Federal Rules of Appellate Procedure.

B. Intake

Bankruptcy courts transmit to the BAP notices of appeal, typically within 24 hours of filing; the BAP does not require a completed record on appeal to be received in order to process an appeal.

The appellant is required, within 14 days of filing a notice of appeal, to file with the bankruptcy court a designation of the record on appeal and a statement of issues to be presented on appeal. Similarly, an appellee may designate additional items to be included in the record within 14 days of service of the appellant's designation.

When the BAP receives the notice of appeal from the bankruptcy court, the BAP opens the case and prepares an opening letter that contains the BAP case number, general information about the BAP, and deadlines that are generally applicable to the case. The BAP serves the opening letter on all parties to the appeal.

C. Briefing and Motions Practice

Attorneys are required to file all papers electronically unless they have requested and received an exemption from the BAP, or have previously obtained an exemption from the bankruptcy court. Pro se filers may not file papers electronically.

In its efforts to process appeals quickly, the BAP, after the docketing of the record on appeal, enters a briefing order requiring the appellant's opening brief and appendix to be filed within 14 days of the date of the order. In addition, the appellee must file its brief within 14 days of service of the appellant's brief and appendix. The appellant, if it so chooses, may file a reply brief within 14 days of service of the appellee's brief.

The clerk of the BAP is authorized to act on certain procedural motions without submitting them to the BAP. Such motions include the following: (1) motions relating to the production or filing of the record, transcripts, briefs, or appendices; (2) motions for voluntary dismissal of the appeal; (3) motions to dismiss for want of prosecution; (4) motions for extensions of time; and (5) motions for leave to consolidate appeals. The

clerk may also act on any other motion that the BAP may designate and that is subject to disposition by a single judge.

For further instructions on briefing and motions practice before the BAP, appellate parties should consult the First Circuit BAP Local Rules and the *Practice Guide for Appeals to the United States Bankruptcy Appellate Panel for the First Circuit*, both of which are available on the BAP's website: <http://www.bap1.uscourts.gov>.

D. Argument Panel Operations

Oral argument is permitted in all cases unless the parties request otherwise or the BAP determines that oral argument is unnecessary after reviewing the briefs and appendices. A party may submit a statement of no more than one-half page within the opening or answering brief as to why oral argument should or should not be heard in the case. The BAP sets the oral argument schedule six weeks prior to the oral argument date. When a case is placed on the argument calendar, the BAP will issue an Oral Argument Scheduling Order and an Oral Argument Acknowledgement Form, which must be completed and returned promptly to the Clerk's Office.

The BAP generally conducts oral arguments in Boston for appeals originating from Maine, Massachusetts, New Hampshire, and Rhode Island bankruptcy courts and in San Juan, Puerto Rico, for appeals originating from Puerto Rico. However, the BAP recognizes that travel costs can be a major factor in a bankruptcy appeal, and therefore, the panel will travel to the district where the appeal originated. The BAP may also allow parties to appear by videoconference or by telephone.

E. Opinions

The clerk of the BAP is responsible for entering the panel's judgment and opinion on the docket and sending notice to all parties and to the clerk of the bankruptcy court from which the case was appealed.

Appeals from decisions rendered by the BAP are taken to the U.S. Court of Appeals for the First Circuit.

United States Court of Appeals for the Second Circuit

I. General Information

The Second Circuit encompasses Connecticut, New York, and Vermont. Six federal district courts operate within the circuit. The Second Circuit Court of Appeals is headquartered in New York City.

The court has 13 authorized judgeships. In the 12-month period ending September 30, 2010, it had 12 sitting senior judges and 42.3 vacant judgeship months.

A. Judges and Panels

1. *Orientation for new judges*

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

2. *Panels*

The court holds a continuous annual term, which commences in August or September, as the court may designate, and ends the day before the first day of the next term. The court generally sits every weekday except holidays and the last week of December. Double panels (two three-judge panels) hear argument 10 weeks each year. The court holds sessions in New York City and at other locations when necessary.

The court does not use separate motions panels except in the seven weeks in which there are no panel hearings calendared. During those weeks, motions panels handle submitted motions, including pro se motions, for the particular week.

3. *Duty judge*

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

B. Central Staff

1. *Staff attorneys' office*

The staff attorneys' office employs a senior staff attorney and six supervisory staff attorneys. Staff attorneys draft bench memoranda for all pro se appeals and for motions in counseled cases. Supervisory staff attorneys may also decide procedural motions (e.g., motions for extension of time or oversized briefs) in pro se cases.

2. *Office of Staff Counsel (Civil Appeals Management Plan staff)*

The court employs three conference attorneys who conduct all Civil Appeals Management Plan (CAMP) settlement conferences. *See infra* section II.C.

II. Intake, Screening, and Settlement Programs

A. Intake

1. Information provided by attorneys

a. Civil appeals

A counseled appellant taking a civil appeal from the district court or the U.S. Tax Court must file with the clerk a Civil Appeal Pre-Argument Statement (Form C), which reports basic information about the appeal and about the judgment appealed from. The civil appeal must be filed within 14 days after the filing of the notice of appeal or petition for review or the entry of an order granting permission to appeal under Federal Rule of Appellate Procedure 5. Form C is available on the court's website, <http://www.ca2.uscourts.gov>.

To order transcripts, an appellant is required to complete the Civil Appeal Transcript Information-Form D, which is also available on the court's website. The appellant must forward a copy of Form D to the court reporter and file the original with the circuit clerk no later than 14 days after filing the notice of appeal. If the appellant does not want to order a transcript, the appellant must check the appropriate box on Form D and file the form with the court no later than 14 days after the filing of the notice of appeal.

b. Criminal appeals

When a convicted defendant wants to appeal, trial counsel, whether retained or appointed, is responsible for representing the defendant unless counsel is relieved by the court of appeals. The district court has no authority to relieve counsel from representation on appeal. Unless and until counsel is relieved by the court of appeals, counsel is held responsible for the appeal even if the notice of appeal is filed pro se.

To order a transcript, the appellant is required to complete the Criminal Appeal Transcript Information-Form B, which may be obtained from the courtroom deputy, the district court's appeals clerk, or the court's website. The appellant is also required to forward a copy of Form B to the court reporter. If the appellant does not want to order a transcript, the appellant must check the appropriate box on Form B and file the form with the court no later than 14 days after the filing of the notice of appeal.

c. Agency appeals

A counseled appellant in an agency case (e.g., Social Security, NLRB) is required to file an Agency Appeal Pre-Argument Statement (Form C-A), along with the addenda required by the form.

Petitions for review and applications for enforcement of agency orders are filed in the customary manner prescribed in Federal Rule of Civil Procedure 15. The court also has a form for agency appeals, which gathers information about (1) whether the proceeding is an application for enforcement of a petition for review; (2) facts relating to jurisdiction and venue; (3) the proceedings below and the order to be reviewed or enforced; (4) the issues proposed to be raised; and (5) the relief sought. The form also asks about any related pending cases.

2. Information provided to attorneys

Counsel can access the court's local rules, internal operating procedures, and instructions for filing various appeals on the court's website.

B. Screening

1. *Screening for jurisdiction*

a. *Pro se cases*

In a pro se case, after preliminary issues about the filing fee and, if applicable, certificate of appealability have been settled, and before the appellant submits a scheduling notification, one of the court's supervisory staff attorneys reviews the file to determine if there is any jurisdictional defect resulting from the untimely filing of the notice of appeal, or if there is a final order that is being appealed. If a jurisdictional problem is found, the file is retained in the staff attorneys' office and assigned to a staff attorney to prepare a bench memorandum generally recommending sua sponte dismissal.

b. *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 *infra* section II.C.

2. *Screening for argument vs. nonargument disposition*

Pro se appeals that survive initial review are placed on an argument panel calendar (unless a litigant is incarcerated). Parties request argument by filing a Local Rule 34.1 statement. However, parties may waive argument, subject to court approval. If one side wants argument and the other does not, the waiving party need not appear, unless the court directs otherwise.

3. *Screening for case weighting or issue tracking*

To ensure equitable workload distribution, the staff attorneys' office evaluates each appeal and assigns it a rank according to the number and complexity of the issues raised. An issue is tracked if it affects many other cases.

C. Civil Appeals Management Plan (CAMP)

The Civil Appeals Management Plan (CAMP) is the court's program for exploring settlement in all civil appeals except cases in which at least one party appears pro se, petitions for a writ of mandamus or prohibition, habeas corpus cases, and proceedings brought to collaterally challenge a sentence imposed in a federal court under 28 U.S.C. § 2255.

After the appeal is docketed, the clerk refers the case to the CAMP office for scheduling of a settlement conference. The conference takes place in the CAMP office or by telephone. Counsel must consult with the client in advance of the conference and obtain as much authority as possible to settle the case. Counsel's appearance at the conference is required, and counsel must be prepared to discuss the legal, factual, and procedural issues in depth. An attorney or client who fails to participate in the conference process in good faith may be sanctioned by the court.

During the pendency of the CAMP proceedings, the parties remain obligated to meet court deadlines, including the filing of briefs and appendices. If the parties enter into a stipulation to withdraw the appeal without prejudice to reinstatement, the stipulation must state the terms of reinstatement, including the date by which reinstatement must occur. Dismissal under the stipulation is effective when the stipulation is "so ordered" by the

court. If the case is not reinstated by the date specified in the stipulation, the mandate in the case will issue, and jurisdiction of the case will revert to the district court.

Information shared during the CAMP proceeding is confidential and is not included in court files or disclosed to the circuit judges, with the exception of information disclosed by an order entered as a result of a CAMP proceeding. At the conclusion of the CAMP proceeding, counsel for each party may complete an anonymous Post-Conference Survey form and submit it to the court's director of legal affairs. The form is available on the court's website.

III. Electronic Case Filing, Briefing, and Motions Practice

A. Electronic Case Filing

Attorneys must file every document, other than an initiating document, electronically in PDF in accordance with the Case Management/Electronic Case Filing (CM/ECF) instructions posted on the court's website. An attorney must file an initiating document in PDF by e-mailing it to newcases@ca2.uscourts.gov. The clerk may exempt from the electronic filing requirement attorneys who, upon motion, show extreme hardship or exceptional circumstances. Sealed documents and documents that exceed 10 megabytes in size are exempt from the electronic filing requirement.

A pro se party who wants to file electronically must seek permission from the court by filing the court's CM/ECF Pro Se Filing User Request Form, which is available on the court's website.

B. Briefing

1. Appellant's brief filing

Within 14 days of the date the appellant receives the completed transcript or the date the appellant is required to file the certificate on Form D indicating that no transcript will be ordered, the appellant is required to notify the court in writing of the date by which the appellant's brief will be filed. Unless the case involves a voluminous transcript, the appellant must select a filing date that is within 91 days of receipt of the completed transcript. The appellant's letter is so ordered unless the court determines that the selected filing date is unacceptable. An appellant's failure to comply with a so ordered scheduling notification or any other order regarding the scheduling of briefs may result in dismissal of the appeal without further notice.

In the statement of the case, an appellant's brief must name the judge or agency official who rendered the decision appealed from and cite the decision or supporting opinion, if reported. In addition to filing a brief and appendix electronically, a party is required to file six copies of each brief with the clerk in all cases.

2. Appellee's brief filing

Within 14 days of receipt of the appellant's brief, or the last appellant's brief in a multi-defendant appeal, the appellee is required to notify the court in writing of the date by which the appellee's brief will be filed. Unless the case involves a voluminous transcript, the appellee must select a filing date that is within 91 days of receipt of the last appellant's brief. The appellee's letter will be so ordered unless the court determines that the selected filing date is unacceptable.

3. Cross-appellant's brief filing

If a cross appeal has been filed, within 14 days of receipt of the last cross-appellant's brief, the appellant-cross-appellee must notify the court in writing of the date by which the appellant-cross-appellee's response brief will be due. The appellant-cross-appellee must select a filing date that is within 60 days of receipt of the last cross-appellant's brief.

Within 14 days after the filing of the final appellee brief, each party must file an Oral Argument Statement. Failure to timely file the Oral Argument Statement signifies that the party has waived oral argument.

4. Scheduling

Absent extraordinary circumstances, an appellant's failure to submit a scheduling letter will result in a briefing deadline of 40 days from the date the completed transcript is received. An appellee's or appellant-cross-appellee's failure to submit a scheduling letter will result in a briefing deadline of 30 days from the date the last appellant's or cross-appellant's brief is filed. If a reply brief is filed, it must be served and filed within 14 days after service of the last appellee's brief (or cross-appellee's brief if a cross appeal has been filed) but not less than 7 days before argument unless the court allows a later filing.

A party's filing of a potentially dispositive motion, a motion for in forma pauperis status, or a Federal Rule of Appellate Procedure 42 stipulation for dismissal without prejudice at any time prior to one of the deadlines set forth above tolls the time period for the filing of a document due until the court decides the motion or the case is reinstated.

C. Motions Practice

The court requires a motion to be accompanied by the court's Motion Information Statement (T-1080). In a case in which all parties are represented by counsel, a motion is required to state (1) that the movant (party) has notified opposing counsel of the motion, or why the movant was unable to do so; (2) opposing counsel's position on the relief requested; and (3) whether opposing counsel intends to file a response to the motion.

A movant seeking substantive relief from a lower court opinion or agency decision must attach a copy of the opinion or decision and any written decision as a separately identified exhibit. For cases in which a party does not file documents electronically with the court, a movant must file only an original of the motion. If the motion is more than 50 pages, the movant must also submit three paper copies of the motion to the court. Proof of service on all other parties to the action must accompany the motion papers, unless the motion is filed electronically in accordance with Local Rule 25.1.

1. Composition and operation of motions panels

The court does not use separate motions panels except in the seven weeks in which there are no panel hearings calendared. During those weeks, motions panels handle submitted motions for the particular week.

2. Procedural motions

The clerk is authorized to decide routine, unopposed procedural motions. Other procedural motions are referred to the applications judge. Upon counsel's request for reconsideration, a clerk's order may be resubmitted to a judge for determination. Once a case is assigned a date for oral argument, all motions filed in that case, including any procedural

motions, will be referred to the panel that will hear the appeal. To maintain the anonymity of the panel, a motion decided by the panel is signed by the clerk or the clerk's designee.

3. Substantive motions

Substantive motions in noncalendared cases are placed on a motions calendar for argument or submission each Tuesday. Substantive motions in calendared cases are handled by the panel scheduled to hear the appeal.

For substantive motions, staff attorneys prepare bench memoranda and a proposed order. The bench memoranda and draft orders are submitted to a Tuesday argument panel, accompanied by copies of the motion, response, and any relevant items from the record.

4. 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 panel reviews the merits of the entire appeal.

The staff attorney prepares a bench memorandum evaluating the appeal for frivolousness and recommends that the appeal either be dismissed as frivolous or be allowed to proceed (with a recommendation as to the disposition of the motion). These motions, with the bench memoranda and draft orders, are submitted for disposition to the panel scheduled to hear argument on each Wednesday that the panel sits and to a "pro se panel" on weeks when the merits panel is not sitting. The number of pro se motions submitted each week generally ranges from 15 to 30.

5. Emergency motions

A motion seeking emergency or expedited relief must (1) be preceded by as much advance notice of intent to file as possible to the clerk and to opposing counsel; (2) be labeled "Emergency Motion"; (3) state the nature of the emergency and the harm that the movant will suffer if the motion is not granted; and (4) state the date by which the movant believes the court must act.

6. Emergency motions scheduled by the presiding judge

The presiding judge of the sitting panel schedules emergency motions seeking a stay, injunctive relief, bail, or mandamus, and other motions presenting emergency circumstances. The motion is initially received and docketed by the case manager, who sends it to the administrative attorneys. The administrative attorneys contact counsel to determine whether the parties will maintain the status quo until the motion can be calendared by nonemergency procedures; if not, the motion is sent immediately to the presiding judge.

The judge may set the motion for hearing by (a) that week's panel, (b) the following week's panel, (c) a subsequent panel, or (d) the first panel sitting after a bench memorandum is prepared. If immediate action is required, the judge may act as an emergency applications judge and provide an interim ruling (e.g., a temporary stay) pending full panel consideration.

The judge may also determine that a bench memorandum is needed. If so, the motion and hearing date are promptly transmitted to the staff attorneys. If immediate considera-

tion is required, the judge will normally set a hearing date that allows two days to prepare the bench memorandum; if not (e.g., when a temporary stay was entered), the hearing date is set to allow at least one week for preparing the bench memorandum.

IV. Nonargument Decision-Making Practices

Cases are submitted on the briefs when the parties have waived argument or when a pro se party is incarcerated. Cases in which argument has been waived are determined by the panel hearing argument on the submission date.

Pro se prisoner cases are handled first by the staff attorneys' office. The staff attorneys 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.

The court maintains a Non-Argument Calendar (NAC) for the following classes of cases:

(1) Immigration. An appeal or petition for review, and any related motion, in which a party seeks review of the denial of the following:

- a) claim for asylum under the Immigration and Nationality Act (INA);
- b) claim for withholding of removal under the INA;
- c) claim for withholding or deferral of removal under the Convention Against Torture; or
- d) motion to reopen or reconsider an order involving one of the claims listed above.

(2) Any other class of cases that the court identifies as appropriate for the NAC.⁵²

The clerk identifies a proceeding for placement on the NAC and, as soon as practicable, informs the parties.

V. Argument Panel Operations

A. Panel Composition, Sitting Schedules, and Panel Rotation

An appeal is heard by a three-judge panel of the court. From mid-August through June, the panel generally sits every weekday except holidays and the last week of December. Double panels (two three-judge panels) hear argument 10 weeks each year.

The chief judge selects the panels for the year before the start of the term. Panel selection takes into account the judges' necessary time to prepare for a sitting and draft decisions following a sitting. A goal in the selection process is to afford each judge an opportunity to sit with different colleagues.

Currently the court hears argument in New York City. Occasionally the court will hear argument at another location within the circuit. During certain weeks the court has double panels, and the second panel hears argument simultaneously in another designated courtroom or following the first panel's argument hearing. Notice of changes in the date, time, or location of a court session is posted on the court's website.

On average, 30 appeals are calendared per week. Each active judge sits on a panel approximately 40 days per year as well as on two pro se motions panels during the weeks in which a panel does not sit. One active judge is available to determine procedural

52. Local Rule 34.2(a)(1)–(2).

motions and emergency application appeals during those weeks. If necessary, a panel may be assembled to hear all emergency proceedings.

The judge presiding on a panel sets the time that each side will be allotted for argument, after considering the appellant's brief and party requests. Typically, each side is assigned 10 to 15 minutes in counseled cases and 5 minutes in pro se cases. Additional time may be assigned in complex or multiparty cases.

B. 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, taking into account case type, combined weights of cases, age of cases, judicial disqualification, and attorney availability. On occasion the court may decide to take a case on submission, without oral argument. When the court so decides, the clerk will notify the parties.

C. Judicial Preparation for Argument: Materials and Timing

Each panel judge receives—at the judge's duty station and, if requested, at the judge's New York City chambers—the briefs and other necessary materials six to eight weeks before argument. Each judge prepares individually for the argument. If the presiding judge anticipates that a case will be determined by summary order, that judge's law clerk generally is instructed to prepare a summary order rather than a bench memorandum.

D. Disclosure of Panel Members' Identities

The names of the panel judges are made public at noon on Thursday of the week before the panel sits.

VI. Opinion Preparation and Publication

A. Types of Dispositions and Criteria for Publication

The court decides calendared appeals primarily by signed opinion or summary order. When a decision in a case is unanimous and each panel judge believes that no jurisprudential purpose would be served by a signed opinion, the panel may rule by summary order, which does not have precedential effect.

Nonunanimous decisions are published, as are opinions in the few cases the court rehears en banc.

B. Criteria for Judgment Without Opinion

The court issues a judgment without opinion in the rare instance in which the panel wholly adopts the district court's reasoning and affirms the district court opinion.

C. Prefiling Circulation of Opinions

The court does not circulate opinions to nonpanel judges before filing them.

D. Citation of Unpublished Summary Orders

Citation to summary orders filed after January 1, 2007, is permitted. When citing a summary order in a document filed with the court, a party must cite either the Federal

Appendix or an electronic database (with the notation “summary order”). A party citing a summary order must serve a copy of it on any party not represented by counsel.

E. Availability of Summary Orders

The court’s unpublished summary orders are available in the Clerk’s Office, at no charge on the court’s website, and for a fee on LexisNexis and Westlaw.

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 importance or a conflict with Supreme Court or Second Circuit precedent.

B. Treatment of Petitions for Rehearing En Banc

The court requires that if a party is simultaneously filing a petition for panel rehearing and a petition for rehearing en banc, the petitions must be combined in a single document. A petition for rehearing en banc, or a combined petition for panel rehearing and for rehearing en banc, must include a copy of the opinion or summary order to which the petition relates, and must not include any other documents.

If the court substantively amends its opinion or summary order, a petition (or an amended petition) for rehearing en banc may be filed within the time specified by Federal Rule of Appellate Procedure 35(c) and counted from the date of filing of the amended opinion or order. A petition for rehearing en banc filed before amendment of the court’s ruling may, but need not, be amended.

C. Process for Rehearing En Banc

Only an active judge of the court or a senior judge who sat on the three-judge panel is eligible to request a poll of the active judges to determine whether a case should be heard or reheard en banc. Only an active judge may vote to determine whether a case should be heard or reheard en banc.

Only an active judge or a senior judge who sat on the three-judge panel is eligible to participate in the en banc hearing or rehearing. A judge’s status as an active or senior judge is determined on the date of the hearing or rehearing en banc, that is, on the date oral argument is heard or the case is submitted. Only an active judge or a senior judge who either sat on the three-judge panel or took senior status after a case was heard or reheard en banc may participate in the en banc decision. A judge who joins the court after a case was heard or reheard en banc is not eligible to participate in the en banc decision.

D. Sanctions for Unmeritorious Petitions

The court may, after affording notice and an opportunity to be heard, impose sanctions against a party that files a frivolous petition for rehearing en banc.

E. Other Ways the Court Works to Avoid Conflict and Inconsistency

Judges prepare a list of “significant issues” to alert other judges or 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 motions staff attorneys. The motions staff 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 and counseled habeas corpus and 28 U.S.C. § 2254 and 28 U.S.C. § 2255 cases are referred to staff attorneys who prepare memoranda and draft orders for the panel that will determine the case disposition.

1. Certificates of appealability

In a case governed by 28 U.S.C. § 2253 and Federal Rule of Appellate Procedure 22(b), the court will not act on a request for a certificate of appealability (COA) unless the district court has denied a COA. If the district court denies a COA, the applicant must, within 28 days after that denial or the filing of the notice of appeal, whichever is later, request a COA in the Second Circuit Court of Appeals. The request must include a copy of the district judge's order denying the COA and a statement that (1) identifies each issue that the applicant intends to raise on appeal and the relevant facts and (2) makes a substantial showing of a denial of a constitutional right as to each issue. A request to the circuit court for a COA is decided without oral argument. The court ordinarily limits its consideration of the request to the issues identified in the request. The appeal may not proceed unless a COA has been issued.

A pro se appellant may make a motion for appointment of counsel. The staff attorneys' office will prepare a bench memorandum and proposed order, which are submitted to a three-judge panel.

Although there is no local court rule that specifies the number of judges required to deny a certificate of appealability, a three-judge panel determines an application for a COA.

2. Special procedures for capital habeas corpus cases

The clerk monitors any case within the circuit with a scheduled execution date, and is authorized to communicate with all parties and relevant state and federal courts.

The death penalty case pool consists of all active judges of the court and those senior judges who have filed with the clerk a statement of willingness to serve on death penalty case panels.

On receipt of a notice of appeal or a request for a certificate of appealability, or other application to the court for relief in a death penalty case, the clerk docket the case and assigns it to a death penalty case panel.

The clerk assigns judges in death penalty cases by random drawing from the death penalty case pool. If a judge is unable to serve, that judge's name returns to the pool after a replacement is drawn. If a random drawing results in the selection of three senior judges, the clerk sets aside the third senior judge's name and continues drawing until an active judge's name is selected, after which the clerk returns the third senior judge's name, and the names of any senior judges drawn thereafter, to the pool.

A judge who serves on a death penalty case panel is not eligible to serve again until the pool is exhausted.

A panel assigned to a particular death penalty case handles all matters pertaining to that case, including the direct appeals of codefendants if they involve common issues.

The clerk initially refers a request for a certificate of appealability to a single judge of the panel assigned to a death penalty case, who has authority to issue the certificate. If the single judge denies the certificate, the clerk refers the application to the full panel for disposition by majority vote.

IX. Appellate Procedural Issues Arising Under the Prison Litigation Reform Act (PLRA)

A motion for leave to appeal in forma pauperis, for appointment of counsel, or for a transcript at public expense must include (1) the affidavit prescribed by Federal Rule of Appellate Procedure 24(a)(1), and (2) a statement that identifies the relevant facts and shows the merit as to each issue the appellant intends to present on appeal. Failure to comply with any of these requirements may result in denial of the motion and dismissal of the appeal.

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

1. The court requires every prisoner seeking to appeal a judgment in a civil action without prepayment of fees to file with the 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 the 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 has the obligation to send to the court the certified copy of the prisoner's trust fund account statement for the prior six months, and to send to the court or the district court the initial partial filing fee payment and the subsequent monthly payments until the entire \$105 (\$100 in agency cases) fee has been paid. Once the prisoner has authorized the agency to send the certified copy of his or her prison account statement and make the disbursements from his or her prison account, the failure of the agency to send the statement or to remit any required payment will not adversely affect the prisoner's appeal.
4. If a prisoner files an appeal without prepayment of appellate fees and does not furnish the court with the required authorization, the court will dismiss the appeal in 30 days unless within that time the prisoner files with the court the required authorization.

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.

X. Immigration Unit

The immigration unit of the staff attorneys’ office currently has two supervising staff attorneys who report directly to the senior staff attorney. Staff attorneys in the immigration unit prepare bench memoranda on all fully briefed petitions for review from decisions of the Board of Immigration Appeals (BIA) on (1) asylum; (2) withholding of removal and Convention Against Torture claims; (3) denials of and motions to reopen or reconsider, rescind, and remand; and (4) any other motions involving impromptu issues. The bench memoranda are then sent to be placed on the court’s nonargument calendar.

The court uses an expedited procedure for asylum cases, which usually focuses on a single issue. Each week, a group of asylum cases are presented to the nonargument panel of three judges. Each judge, at the judge’s resident chambers, receives the briefs, the record from the BIA, a memorandum prepared by a staff attorney, and a draft summary order with a recommended disposition, also prepared by the staff attorney. In addition, a voting sheet accompanies these materials and

identifies each of the three panel members as either Judge No. 1, Judge No. 2, or Judge No. 3. Each of the judges on the panel is Judge No. 1 for one third of the week’s cases, is Judge No. 2 for another third of the cases, and is Judge No. 3 for the final third. The judges vote in sequence on the voting sheet. Each Judge No. 1 votes first on the three or four cases for which that judge is Judge No. 1, and sends the voting sheet to Judge No. 2, who votes and sends it on to Judge No. 3. The voting options are: refer the petition to the RAC [regular argument calendar], deny, grant, remand, or other. The voting sheet provides blanks to be checked to indicate whether the proposed order from the SAO [staff attorneys’ office] is acceptable (either as submitted or as edited by the judges) or whether Judge No. 1 (or occasionally Judge No. 2 or No. 3) has proposed a substitute order. In the absence of exceptional circumstances, each judge is required to vote and send the voting sheet on in one week. Thus, the voting is normally concluded within three weeks of submission.

If any judge on the panel votes to send the case to the RAC, the remaining judges who have not yet voted do not cast a vote; the case has been removed from the NAC [nonargument calendar].⁵³

One circuit judge, in writing about the NAC procedure for immigration cases, indicated that the procedure has been instrumental in accomplishing the court’s goal of

53. See Jon O. Newman, *The Second Circuit’s Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 Brook. L. Rev. 429, 434 (2009).

reducing its backlog of pending BIA petitions while enabling the court to maintain its normal pace in effectively managing its docket.⁵⁴

54. *Id.* at 435.

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United States Court of Appeals for the Third Circuit

I. General Information

The Third Circuit encompasses Delaware, New Jersey, Pennsylvania, and the Virgin Islands. Five federal district courts and the court of the Virgin Islands operate within this circuit. The main courthouse for the Third Circuit Court of Appeals is located in Philadelphia. Panels also hear appeals twice per year in Pittsburgh, Newark, and the Virgin Islands.

The court has 14 authorized judgeships. In the 12-month period ending September 30, 2010, the court had 9 sitting senior judges and 10.9 vacant judgeship months.

A. Judges and Panels

1. Orientation and assignments for new judges

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

2. Visiting judges

When a visiting judge is designated to sit with the court, the court sends an orientation package (including local appellate rules and internal operating procedures) to the judge and his or her staff.

3. Panels

Fully briefed cases are sent to merits panels. Judges on merits panels determine whether the case will be argued or decided on the briefs.

A panel is available to receive motions at all times. The chief judge, with the consent of the court, designates standing motions panels (SMPs) to receive from the clerk and staff attorneys' office motions in cases that have not been sent to merits panels.

Another set of five standing panels deals with fully briefed pro se cases. Fully briefed counseled immigration cases are sent to one of seven screening panels. The screening panel either decides the case and issues an opinion or refers the case to a regular sitting panel. In addition, for each death penalty case, a special panel is constructed, and active judges are randomly assigned to the panel.

B. Central Staff

1. Legal Division

The staff attorneys' office has been consolidated with the Clerk's Office and is called the Legal Division. The court has 21 full-time and 1 part-time line staff attorneys. Eleven of these positions are permanent. Most staff attorneys work full time, although part-time positions are allowed. About a third of the staff attorney positions are permanent; the rest have varying terms of from one to five years. In addition, there are four supervisors and the chief deputy of the Legal Division, who are career attorneys. When the caseload allows, a term staff attorney may perform a two-month tour of duty as an elbow clerk in a judge's chambers. The Clerk's Office has five attorneys on its staff to respond to difficult

questions from litigants, rule on procedural motions, manage emergency motions and death penalty cases, and handle attorney discipline and judicial misconduct cases.

Staff attorneys based in Philadelphia work under the supervision of the clerk and chief deputy of the Legal Division. They provide legal research and assistance to the court as directed.

2. Appellate mediation program

Appeals in civil cases and petitions for review of agency action or for enforcement of administrative action are referred to the Appellate Mediation Program to facilitate settlement or assist in the expeditious handling of the appeal or petition. A chief circuit mediator, in cooperation with the clerk, manages the Appellate Mediation Program. Mediations are conducted by a senior judge of the court of appeals, a senior judge of a district court, the chief circuit mediator, a conference attorney, or another person designated pursuant to Rule 48. Parties may confidentially request mediation by telephone or by letter directed to the chief circuit mediator. In all cases, however, the chief circuit mediator will determine which cases are appropriate for mediation and will assign those cases to a mediator.

II. Intake, Screening, and Settlement Programs

A. Intake

1. Information provided by attorneys

a. Civil and agency appeals

In civil cases (including petitions for review of agency action), counsel complete a Civil Appeal Information Form to supply procedural information, 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 form entitled "Concise Summary of the Case," which should include a statement of facts and issues to be presented on appeal. Appellee's counsel who do not agree with the appellant's recitation of the facts and issues may file a response.

b. Criminal appeals

Parties in criminal cases must complete a Criminal Appeal Information Form, which 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.

2. Information provided to attorneys

Attorneys may consult the Third Circuit's website to find the internal operating procedures, local rules, and copies of many forms, including the Appeal Information Forms.

B. Screening

1. Screening for jurisdiction

The Clerk's Office case opening team screens counseled cases upon receipt, looking for potential jurisdictional problems. If the members of the team 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 asked 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, the necessity for a certificate of appealability, or other grounds for possible summary action.

2. Screening for argument vs. nonargument disposition

The merits panel determines whether there will be oral argument and the amount of time allocated. There is oral argument if it is requested by at least one judge. Each judge communicates his or her views to the other panel members. No later than 11 calendar days before the first day of the panel sitting, the presiding judge furnishes the clerk with the panel's determination of time to be allocated for argument (in accordance with the maximum request of any single judge), up to 20 minutes per side. Usually, 15 minutes per side is allotted. A request for oral argument beyond 20 minutes per side is decided by a majority of the panel.

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.

However, oral argument is usually granted if (1) the appeal presents a substantial and novel legal issue; (2) the resolution of an issue presented by the appeal will be of institutional or precedential value; (3) a judge has questions to ask counsel to clarify an important legal, factual, or procedural point; (4) a decision, legislation, or an event subsequent to the filing of the last brief may significantly bear on the case; or (5) an important public interest may be affected.

3. 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. The program is run by the chief circuit mediator. The chief circuit mediator determines which cases are appropriate for mediation and assigns them to a mediator. As a general rule, cases are mediated by the chief circuit mediator, the assistant director, or a senior judge of the court of appeals or a district court within the circuit. A party may also confidentially request that a case be assigned to mediation.

Once mediation is scheduled under the program, participation is mandatory. The senior lawyer for each party and the person with actual authority to negotiate a settlement are required to attend mediation. At any time during the pendency of an appeal or petition, any judge or panel of the court may refer the appeal or petition to the chief circuit mediator for mediation or any other purpose consistent with the local rules, so cases may sometimes be mediated after motions and oral argument have been heard. The court recently introduced a program to appoint counsel for pro se litigants for purposes of

mediation only. If mediation is unsuccessful, the representation may continue if pro bono counsel and the party agree to it, or the party may continue to proceed pro se.

III. Electronic Case Filing, Briefing, and Motions Practice

A. Electronic Case Filing

Attorneys have been required to file all documents electronically since December 15, 2008. To file electronically, attorneys must register with the PACER Service Center as a Filing User. The PACER Service Center then notifies the Clerk's Office, which will verify that the attorney is admitted to the bar of the court and will then approve the registration.

B. Briefing

Each party must file 10 paper copies (i.e., an original and nine copies) of each brief with the clerk and, unless counsel has consented to electronic service, serve 1 paper copy on counsel for each party separately represented. If volume one of the appendix is attached to the electronic brief, one paper copy of volume one must be served on opposing counsel. In addition to the paper brief, counsel must file with the court the same brief in electronic form.

Filing must be done in accordance with the local rules on electronic filing and must be in PDF format. The date of filing the brief is the date the electronic version of the brief is received by the clerk, provided that 10 paper copies are mailed on the same day as electronic transmission. The electronic copy of the brief is considered to be the official copy. Counsel must also certify that the text in the paper copy and the text in the electronic copies of the brief are identical and that a virus-detecting software has examined the electronic document. Pro se litigants are exempt from electronic filing requirements. The Clerk's Office scans pro se-filed documents into the court's electronic docketing system.

A first request for an extension of time of less than 14 days may be made by telephone and must set forth good cause. Counsel should endeavor to notify opposing counsel in advance that such a request will be made. Further specifics on motions for extensions of time to file a brief can be found in Third Circuit Local Rule 31.4.

C. Motions Practice

1. Generally

The chief judge designates standing motions panels. These panels receive motions from the clerk's and staff attorneys' offices in cases that have not yet been sent to merits panels. Insofar as possible, the staff sends equal numbers of motions and emergency motions to each standing motions panel. The standing motions panel determines whether there will be oral argument on a motion in the same manner as for an appeal.

The staff attorneys' office sends each panel 6 to 10 motions per week; the Clerk's Office sends motions in counseled cases as they are received. The staff attorneys' office handles substantive pro se motions, counseled and pro se habeas cases, and nonemergency requests for stays in immigration cases. Judges on the panel receive the materials simultaneously. Each standing motions panel sets its own procedures for conference and disposition. The presiding judge of each standing motions panel enters the order, gener-

ally on the motion form supplied by the clerk, or asks another judge to do so. The order notes a dissenting vote on the request of the dissenting judge.

2. Procedural motions

The court has delegated authority to the clerk to rule on procedural motions. Attorneys and paralegals in the Clerk's Office make such rulings. For some classes of motions, attorneys have authority to grant motions but not to deny them.

Staff attorneys also have some delegated authority over procedural motions, including authority to grant extensions of time for motions they handle. The clerk 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, it 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.

3. 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 require a certificate of appealability or in pro se cases with a possible jurisdictional defect, staff attorneys prepare memoranda with proposed order language. An order or opinion taking summary action, dismissing under section 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 or for untimeliness, 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.

4. Emergency motions

Generally, all motions 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 by hand or by electronic transmission, 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 assigned to regular argument panels, pro se merits panels, or immigration screening panels. Regular argument panels handle cases decided with argument and counseled cases decided without argument. Judges on these panels receive the cases at least four weeks before the argument date and decide at least 10 days in advance of the argument week which cases referred for that week will be argued. There is an implicit understanding in the local rules that each judge will read the briefs and review the appendices a minimum of 11 calendar days before the first day of panel sitting.

V. Argument Panel Operations

A. Panel Composition, Sitting Schedules, and Panel Rotation

Unless there is a judicial emergency, each panel includes either two active judges of the court or one active judge and one senior judge of the court. Composition of a panel is determined at the time cases are assigned to a panel. If an active judge assumes senior status after cases have been assigned to a panel, the panel need not be reconstituted. Senior judges may elect to be included in the pool for death penalty cases.

Each judge participates in six argument calendars per year, each lasting for four days. Approximately 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, 15 to 20 minutes per side is allotted, but a panel judge may suggest a longer time, and 30 minutes or more per side may be granted. A request for oral argument beyond 20 minutes per side is determined by a majority of the panel.

A party may request oral argument by videoconference by calling the Clerk's Office. Counsel must notify all opposing sides that a request for videoconference has been made. Generally, a request for oral argument by videoconference should be made when the party is notified of the calendaring of the case. In any case, a request for oral argument by videoconference must be made as soon as possible after counsel knows that a videoconference is needed. Granting of the request is at the court's discretion.

When necessary, a judge may participate in oral argument or other panel matters via audioconference or videoconference.

B. Assignment of Cases to Panels

The clerk randomly assigns all fully briefed counseled cases, except death penalty cases, to three-judge panels, which may include a visiting judge. For death penalty cases, a computer randomly selects panels of three circuit judges.

C. Staff Role in Preparing Cases for the Argument Calendar

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

D. Disclosure of Panel Members' Identities

The clerk discloses the identities of the argument panel members no later than 10 days before the panel begins hearing cases.

VI. Opinion Preparation and Publication

A. Types of Disposition and Criteria for Publication

There are two forms of opinions: precedential and not precedential. A majority of the panel determines whether an opinion is designated as precedential or not precedential, unless a majority of the active judges of the court decides otherwise. The face of an opinion states whether it is precedential or not precedential.

An opinion, whether signed or per curiam, is designated as precedential when it has precedential or institutional value. Precedential opinions are posted on the court's Internet website.

An opinion, whether signed or per curiam, that appears to have value only to the trial court or the parties is designated as not precedential and is also posted on the court's Internet website. A not precedential opinion may be issued without regard to whether the panel's decision is unanimous and without regard to whether the panel affirms, reverses, or grants other relief.

A judgment order is filed when the panel unanimously decides to affirm the judgment or order of the district court or decision of the Tax Court, enforce or deny review of a decision or order of an administrative agency, or dismiss the appeal or petition for review for lack of jurisdiction or otherwise, and determines that a written opinion will have no precedential or institutional value.

At conference the panel decides whether the case requires an opinion or a judgment order. If the latter, the judge assigned to prepare the order furnishes other members of the panel with copies of the proposed order. The panel members indicate their approval in writing either on a copy that is provided by the order writer or by electronic mail or other means.

B. Summary Action

The court, sua sponte or upon motion by a party, may take summary action affirming, reversing, vacating, modifying, setting aside, or remanding the judgment, decree, or order appealed from; granting or denying a petition for review; or granting or refusing enforcement of the order of an administrative agency if it clearly appears that no substantial question is presented or a change in circumstances warrants such action. Before taking summary action, the court will afford the parties an opportunity to submit argument in support of or in opposition to such disposition if briefs on the merits have not already been filed. Summary action may be taken only by unanimous vote of the panel. If a motions panel determines that summary action is not appropriate at that time, it may, in lieu of denial, refer the matter to the merits panel without decision and without prejudice.

C. Prefiling Circulation of Opinions

Draft opinions are circulated to the other two members of the panel for an eight-day period before they are filed, with a request for approval or suggestions panel members may desire to make with respect to the draft opinion. Whether a draft opinion is circulated to nonpanel active judges is dependent on whether it is precedential or unanimous, or if a panel member requests that it be circulated to all judges. For more information on this process, see Internal Operating Procedure 5.5.4.

D. Citation of Unpublished Opinions

The court by tradition does not cite to its not precedential (unpublished) opinions as authority. Such opinions are not regarded as precedents that bind the court because they are not circulated to the full court before they are filed.

E. Availability of Unpublished Opinions

Unpublished (not precedential) opinions are available on the court's website.

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. Rehearing en banc is not favored and will not be ordered unless consideration by the full court is necessary to secure or maintain uniformity of its decisions or the proceeding involves a question of exceptional importance.

B. Treatment of Petitions for Rehearing En Banc

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

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 14 days. Courtesy copies of the response are sent to any senior judge or visiting judge who was on the original panel.

C. Process for Rehearing En Banc

When a petition for rehearing is filed, a copy of the petition is transmitted by the clerk to each member of the panel that heard and decided the case and to the other active judges of the court with a request that they respond to the authoring judge if they desire rehearing or an answer. When the author is not a member of the court, the clerk requests that responses be directed to the ranking judge of the majority. Any member of the panel majority may direct the clerk to request an answer.

Only active judges of the court may vote for rehearing en banc. Therefore, rehearing en banc will be ordered only upon the affirmative votes of a majority of the judges of the court in regular active service who are not disqualified.

1. Voting

If, during the eight-day circulation of draft opinions pursuant to the court's internal operating procedures, a majority of active judges who are not disqualified votes that the case be considered en banc, the chief judge enters an order for rehearing en banc. Extensions of time to vote are granted in various situations; further explanation can be found in Internal Operating Procedure 9.5. A judge who fails to vote within the time established for a petition for rehearing en banc is presumed not to desire rehearing 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. In addition, a senior judge who sat on the original panel may elect to participate in the en banc court.

2. Effect of grant

If rehearing en banc is granted, the chief judge enters an order granting rehearing as to one or more of the issues, vacates the panel's opinion in full or in part and the judgment entered thereon, and assigns the case to the calendar for rehearing en banc.

3. Hearings

There is oral argument in an en banc case if it is requested by at least one judge of the en banc court. Argument is typically 30 minutes per side, and each side is given at least 5 minutes of 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 criminal cases and order copying of the transcript to minimize costs of 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 such appeals "shall be by motion filed either concurrently with or promptly after filing a notice of appeal."

B. Habeas Corpus Cases and Certificates of Appealability

1. *Certificates of appealability*

When a certificate of appealability is required, a formal application must be filed with the court of appeals, but the court may deem other documents to be an application for a certificate of appealability if they are filed by a habeas corpus petitioner and evidence an intent to obtain appellate review.

If the district court grants a certificate of appealability as to only some issues, the court of appeals will not consider the uncertified issues.

An appellant who desires certification of additional issues must file a separate motion for additional certification within 21 days of the docketing of the appeal in the court of appeals. Appellees may file a memorandum in opposition within 14 days of service of the application. The appellant's reply, if any, must be filed within 10 days of the service of the response. If the motions panel denies the motion to certify additional issues, the parties should brief only the issues certified unless the merits panel directs briefing of any additional issues. Notwithstanding the above, the merits panel may expand the certificate of appealability as required by the circumstances of a particular case.

2. *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. 111.1B–111.9.) The Clerk's Office chief deputy and legal coordinator (a staff attorney in 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 stay application is filed in the circuit court before a district court decision has been entered, the clerk forwards the stay motion to a special panel. Whether or not a stay application has been filed, if no ruling has been made 10 calendar days before the time scheduled for execution of the judgment, the case is tentatively assigned to a panel. Judges on the panel will be advised of the

status of the case, the name of the district judge who is presiding over the lower court proceedings, and the scheduled time of execution of the judgment.

United States Code, Title 28 § 2253, Federal Rule of Appellate Procedure 22, and Third Circuit rules require the district court to state the specific issues that are included in the certificate. In emergency 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. If the district court grants a certificate on fewer than all issues, the appellant may apply to the court of appeals for certification of additional issues.

IX. Special Procedures for Pro Se Cases

A. Role of Central Staff in Pro Se Cases

Most pro se mail and phone calls are handled by the Clerk's Office staff. Staff attorneys and administrative assistants handle pro se mail in habeas cases and other pro se cases assigned to an attorney. Administrative assistants handle telephone calls from attorneys and pro se litigants in non-death penalty habeas cases. Attorneys in the Clerk's Office will see pro se litigants in person if the litigants arrange appointments. For security reasons and to enable the attorneys to have 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 Clerk's Office or staff attorneys' office. Both offices have 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 infra* section X.

C. Appointment of Counsel

When a certificate of appealability is granted on behalf of an indigent appellant pursuant to 28 U.S.C. § 2254 or § 2255, the clerk appoints counsel for the appellant unless the court instructs otherwise.

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. The clerk, on recommendation of a staff attorney, may appoint pro bono counsel in civil cases without an order from a judge.

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

A. The PLRA's Filing Fee Provisions and In Forma Pauperis Status

When prisoners seek to proceed in forma pauperis on appeal 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 statements (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 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 in which 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" may not 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 electronic docketing system. 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 the electronic docketing system as having three strikes, the staff attorneys' office checks all the prisoner's 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 instructed to mark the prisoner's name in the electronic docketing system.

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 that occurred prior to 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. In *Abdul-Akbar v. McKelvie*, 239 F.3d 307 (3d Cir. 2001) (en banc), the court overruled *Gibbs* and held 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 the complaint is filed or the appeal is lodged.

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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. Nine districts operate within the circuit. The Fourth Circuit Court of Appeals is headquartered and normally hears oral arguments in Richmond, Virginia. The court also hears oral arguments at various law schools within the circuit on a periodic basis.

The court has 15 authorized judgeships. In the 12-month period ending September 30, 2010, the court had 1 sitting senior judge and 40.4 vacant judgeship months.

A. Judges and Panels

1. Orientation and assignments for new judges

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

2. Visiting judges

The court of appeals has a visiting judge memorandum posted on the J-Net to orient judges to the court's processes and practices.

3. Argument panels

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

4. Motion and submission panels

Motion and submission panels are randomly assigned by a computer program 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 assigned panel; submission to a single judge is used only for procedural matters.

5. Death penalty panels

Death penalty panels are randomly assigned by a separate computer program as matters arise.

B. Central Staff

1. Office of Staff Counsel

The Office of Staff Counsel is staffed by 40 people: 32 attorneys and 8 support persons. The 32 attorneys include 1 senior staff attorney, 3 supervising staff attorneys, and 28 full-time staff attorneys.

2. Clerk's Office

The Clerk's Office, staffed by 65 people, provides case management and automation support for the court. Twenty-two case managers provide most case support, and others in the office assume responsibility for appointment of counsel, calendaring, and records management.

Counsel to the clerk and the case managers have been delegated authority to rule on procedural motions. *See infra* section III.C. In addition, the Clerk's Office provides support as needed for attorney discipline and judicial complaint matters, and assists in the review of Criminal Justice Act (CJA) vouchers.

3. Office of the Circuit Mediator

The court employs three circuit mediators and a chief mediator. *See infra* section II.C.

II. Intake, Screening, and Settlement Programs

A. Intake

1. Information provided by attorneys

a. Civil and agency appeals

Counsel for appellants must file a docketing statement within 14 days of filing the notice of appeal. The purpose of the docketing statement is to assist counsel in giving prompt attention to the substance of an appeal, to help reduce the ordering of unnecessary transcripts, to provide the clerk with the information needed for effective case management, and to provide necessary information for any mediation conference. A copy of the docketing statement must be served on the opposing party or parties. The docketing statement must have attached to it any relevant transcript order. Although a party will not be precluded from raising additional issues, counsel should make every effort to include in the docketing statement all of the issues that will be presented to the court. If counsel fail to file the docketing statement within the time set forth above, the court will initiate the process for dismissing a case under Local Rule 45. Any party who finds the appellant's docketing statement incomplete, inaccurate, or misleading must file additions or corrections within 10 days of service of the docketing statement. This same docketing statement must also be filed for appeals from agencies.

b. Criminal appeals

The court uses similar docketing statements for both criminal appeals and civil and agency appeals.

2. 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. On the circuit's website, counsel appointed under the Criminal Justice Act (CJA) are provided with information regarding payment and record-keeping provisions under the CJA.

B. Screening

1. Screening for jurisdiction

The Clerk's Office conducts a basic jurisdictional review at the time the case is docketed and notes the presence of any jurisdictional issues. Any jurisdictional issue that has not been resolved before briefing is reviewed during preargument screening of the case.

2. Screening for argument vs. nonargument disposition

a. Role of staff

All pro se appeals and all habeas corpus and 28 U.S.C. § 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 on the submission panel desires to hear argument, the case is placed on the calendar.

b. Role of judges

To maintain docket control and to expedite the final disposition of pending cases, the chief judge may designate a panel to review any pending cases at any time before oral argument.

If all of the judges on the panel to which a pending appeal has been referred conclude that oral argument is not to be allowed, they may make any appropriate disposition without oral argument.

c. Role of litigants

When briefing is complete and before argument is set, any party may move to submit the case on briefs. A party may include a statement at the end of its brief concerning the need for oral argument.

3. 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. Appellate Mediation Program

The Office of the Circuit Mediator provides settlement assistance to reduce the caseload of the judges of the circuit, save taxpayers money, and save the time and money of litigants and their counsel. All civil and agency cases with counsel are assigned to the mediation program when the docketing statement is filed. The assigned circuit mediator schedules an initial telephone conference to discuss settlement. Lead counsel for each party is required to participate, but clients are not required to participate in most initial conferences. Mediation conferences will generally be conducted by telephone but may be conducted in person at the discretion of the circuit mediator. Each conference is conducted by a circuit mediator. Circuit mediators are located in Palmyra, Virginia; Cary, North Carolina; Duncan, South Carolina; and Durham, North Carolina.

Although the time allowed for filing of briefs is not automatically tolled by participation in a mediation conference, if the parties want to pursue, or are engaged in, settlement discussions, counsel for any party may move to extend the briefing schedule. The mediator, through the clerk of court, may enter orders that control the course of the proceedings, and, upon agreement of the parties, dispose of the case.

Information disclosed in the mediation proceeding is to be kept confidential and is not to be disclosed to the judges deciding the appeal or to any other person outside the

mediation program participants without the approval of the Standing Panel on Attorney Discipline. Confidentiality is required of all participants in the mediation proceedings. All statements, documents, and discussions in such proceedings are to be kept confidential.

III. Electronic Case Filing, Briefing, and Motions Practice

A. Electronic Case Filing

The court has established procedures requiring electronic filing of documents, with certain exceptions, and authorizing electronic service of documents using the court's transmission equipment.

B. Briefing

The clerk sends the parties a formal briefing schedule upon receipt of the record or determination by the clerk that the record is complete—whichever occurs first. 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.

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 the court's permission.

C. Motions Practice

1. Composition and operation of motions panels

In general, the court will act through panels or en banc in all but routine procedural matters. Ordinarily, counsel must present all motions to the clerk for presentation to the court. Application to a single judge should be made only in exceptional circumstances in which action by a panel would be impractical because of time requirements. In such circumstances, counsel must attempt to notify the Clerk's Office that application is being made directly to a single judge. When a single judge decides to act, the matter will be referred to a panel as early in the process as is practical. As soon as a matter has been assigned to a panel, any action in the matter will be decided by the panel.

The court does not use a standing motions panel. All motions that are decided by judges (i.e., those 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. Substantive motions are considered and decided on the papers, generally after workup by the office of staff counsel; oral argument is rarely ordered.

2. Procedural motions

In cases in which 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. Although any party may file a response to a motion, a party need not respond unless the court requests that it do so. If the court acts on 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, motions that are ordinarily acted on without notice or hearing, and motions for which notice and hearing have been waived. Any party adversely affected by an order entered by the clerk may request reconsideration of the clerk's action by the court. For further information on the clerk's authority to grant motions, see Local Rule 27(b).

3. 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 on other procedural grounds may be filed at any time. The court may also sua sponte summarily dispose of any appeal at any time.

4. 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 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.

IV. Nonargument Decision-Making Practices

To expedite the final disposition of pending cases, the chief judge may designate a panel or panels to review any pending case at any time before argument for disposition. In reviewing pending cases before argument, the panel will utilize the minimum standards set forth in Federal Rule of Appellate Procedure 34(a)(2). If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument is not to be allowed, they may make any appropriate disposition without oral argument, including affirmance or reversal. Because any case may be decided without oral argument, all major arguments should be fully developed in the briefs. Parties may include in their briefs at the conclusion of the argument a statement setting forth the reasons why, in their opinion, oral argument should be heard.

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 that case list with a list of three-judge panels generated by a computer program to achieve random assignment of judges to panels.

A. Panel Composition, Sitting Schedules, and Rotation

The court initially hears and decides cases in panels consisting of three judges, with the chief judge or most senior judge presiding. For its regular court terms, the court sits in Richmond, Virginia, to hear cases during six to eight separate argument weeks scheduled between September and June. Summer panels are scheduled if needed. Each panel regularly hears oral argument in four cases each day during the court week.

Each side is normally given 20 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 15 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 done to ensure that particular judges do not receive—or appear to receive—a disproportionate share of particular types of cases.

C. Staff Role in Preparing Cases for the 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

Briefs for cases assigned to a hearing panel are distributed by the clerk to the judges on the hearing panel at the time the hearing panel assignments are made. The judges hearing oral argument will have read the briefs before the hearing and therefore will be familiar with the case.

E. Disclosure of Panel Members' Identities

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

VI. Opinion Preparation and Publication

A. Types of Dispositions and Criteria for Publication

The court disposes of calendared cases by three main methods: published opinions, unpublished opinions, and summary opinions. Published opinions are those that meet certain, generally precedent-setting, criteria. Unpublished opinions do not meet these criteria; the opinion provides the court's reasoning for its decision. If, after oral argument,

all of the judges agree that an opinion in the case would provide no precedential value, they may issue a summary opinion that provides the basic reasons for the decision but no elaboration on the facts of the case or the court's reasoning.

The court's policy is to publish an opinion only if it meets one or more of the following standards:

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

In addition, the court publishes 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 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 judges' acknowledgments only if the opinion has been in circulation for 10 calendar days and the authoring judge has received confirmation that the non-acknowledging judges received the opinion.

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

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 10 calendar days before they are filed. When a proposed opinion in an argued case is prepared and submitted to other panel members, copies are provided to the nonsitting judges, including the senior judges, and their comments are solicited. The opinion is then finalized. The Clerk's Office never receives advance notice of when a decision will be rendered.

D. Citation of Unpublished Opinions

Citation of unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in the circuit court and in the district courts within the circuit is disfavored, except for the purpose of establishing *res judicata*, *estoppel*, or the law of the case. If a party believes, nevertheless, that an unpublished disposition of the court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of Federal Rule of Appellate Procedure 32.1(b) are met.

E. Availability of Unpublished Opinions

Copies of published and unpublished opinions are available from the Clerk's Office for \$2.00 per opinion. Published and unpublished opinions issued since January 1, 1996, are available free of charge on the court's website, <http://www.ca4.uscourts.gov>.

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.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for Grant of En Banc 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.

In a motion for panel rehearing, counsel must state that in their judgment, one of the following situations exists: (1) a material factual or legal issue was overlooked; (2) a change in the law occurred after the decision or was overlooked; (3) the opinion is in conflict with a decision from the U.S. Supreme Court, the Fourth Circuit, or another court of appeals, and the panel overlooked this; or (4) the proceeding involves issues of exceptional importance.

B. Treatment of Petitions for Rehearing En Banc

A petition for rehearing en banc must be made at the same time, and in the same document, as a petition for rehearing. The request for en banc consideration must be stated plainly in the title of the petition. Petitions for rehearing en banc will be distributed to all active and senior judges of the court, and to any visiting judge who may have heard and decided the appeal.

A majority of the circuit judges who are in regular active service and who are not disqualified may grant a hearing or rehearing en banc. A poll on whether to rehear a case en banc may be requested, with or without a petition, by an active judge of the court or by a senior or visiting judge who sat on the panel that decided the case originally. Unless a judge requests that a poll be taken on the petition, none will be taken. If no poll is requested, the panel's order on a petition for rehearing will bear the notation that no member of the court requested a poll. If a poll is requested and hearing or rehearing en banc is denied, the order will reflect the vote of each participating judge. A judge who joins the court after a petition has been submitted to the court, and before an order has been entered, will be eligible to vote on the decision to hear or rehear a case en banc.

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

For purposes of a vote granting a rehearing en banc, a majority of the circuit judges who are in regular active service and who are not disqualified may grant a hearing or rehear-

ing en banc. 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, except for timely petitions for rehearing en banc, for costs and attorney fees, or for matters ancillary to filing a petition for writ of certiorari.

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal Appeals

The court expedites criminal cases by requiring the appellant's brief within 35 days, the appellee's brief within 21 days thereafter, and the appellant's reply within 10 days. The court also affords criminal cases priority on the calendar.

B. Habeas Corpus Cases and Certificates of Appealability

1. Certificates of appealability

For all pro se appeals and all noncapital habeas and section 2255 appeals in which the district court has not granted a certificate of appealability, the notice of appeal is treated as a request for a certificate. The case is set on an informal briefing track to assist the court in resolving the request. After reviewing the briefs, the court may either deny the certificate and dismiss the appeal or grant a certificate and enter a final briefing order.

For capital habeas and section 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, counsel will be appointed and directed to file further briefs.

An application for a certificate of appealability will be referred to a panel of three judges. If the panel denies a certificate, the appeal will be dismissed. If the panel grants a certificate, the clerk will enter a briefing order specifying the issues the court will review.

If the district court has denied a certificate of appealability on some issues, the appellant may submit a request for a certificate on additional issues, along with a statement of the reasons why the expanded certificate should be issued. The clerk will refer the request to a three-judge panel and after the panel has granted or denied the request, will enter a briefing order. If there is no express request made to expand the certificate, the clerk will enter a briefing order, and no additional issues will be heard unless the appellant files, simultaneously with the brief on the merits, a statement with information

on the case and a list of issues the appellant wants to add to the certificate. Upon receipt of this statement, the clerk will suspend briefing and refer relevant materials to a three-judge panel to determine whether to expand the certificate. After the panel makes a decision, the clerk will enter a final briefing order.

2. Special procedures for capital habeas corpus cases

Once a notice of appeal has been filed in a case involving a sentence of death and an execution date has been set, a panel of three judges will be promptly identified for consideration of all matters related to the case. An expedited briefing schedule will be established when necessary to allow the court the opportunity to review all issues presented.

Pursuant to Judicial Council Order 113, which conforms to the requirements of 28 U.S.C. § 2266, the court is required 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 (PLRA)

A. The PLRA's Filing Fee Provisions and In Forma Pauperis Status

The PLRA's filing fee provisions are governed by Local Rule 24 for prisoner appeals and by Local Rule 21(c) for mandamus petitions. Under Rule 24, a prisoner appealing a judgment in a civil action must pay the full \$455 fee required for commencement of the appeal. Under Local Rule 21(c)(1), 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 \$450 docket fee. 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.

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, was malicious, or failed to state a claim on which relief could be granted may not proceed on appeal without prepayment of fees unless the prisoner is in 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, Louisiana. Oral argument is generally heard in New Orleans, but is occasionally scheduled at other locations within the circuit.

The court has 17 authorized judgeships. In the 12-month period ending September 30, 2010, the court had 5 sitting senior judges and 12 vacant judgeship months.

A. Judges and Panels

1. *Orientation and assignments for new judges*

All new judges receive a brief orientation from all court units. In FY 2002, the court instituted an orientation trial program, in which a newly appointed judge spends about a day and a half in detailed discussions with the chief judge and two other experienced active judges to discuss court policies, procedures, and chambers operations. As a general rule, new judges receive the same caseload as experienced judges; however, new judges do not act on death penalty cases until 6 to 12 months after their appointment.

2. *Visiting judges*

The court has 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 conferences and the designation of authoring judges, and court facilities.

3. *Panels*

In addition to sitting on regular oral argument panels, each judge participates on an electronic "conference calendar" panel once a year (*see infra* section IV.B). The judges also serve on a "jurisdiction calendar panel" and on a three-judge "screening panel" that is constituted for a full year. Senior judges may serve on the argument, screening, and jurisdictional review panels, and may volunteer to sit on the conference calendar.

B. Central Staff

1. *Staff attorneys' office*

In the 12-month period ending September 30, 2010, the court employed 44 staff attorneys and a support staff of 9 in New Orleans. They are supervised by a senior staff attorney and seven supervisory staff attorneys. Staff attorneys are hired for a two-year term or career appointment. Each new staff attorney's performance is reviewed periodically during his or her first year. After the first year, the court decides whether the attorney will be offered additional years. The attorneys continue to be reviewed annually to maintain employment.

2. Appellate conference program

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

3. Attorney advisor; pro se prisoner litigation; death penalty litigation

The court employs an attorney as counsel to the Clerk's Office, who participates in the jurisdictional conference, advises staff on legal and procedural issues that arise in case processing, and provides advice to the clerk on legal matters facing the office.

The Clerk's Office is responsible for processing specialized types of cases. It employs two assistant case managers, who handle all litigation (except direct criminal appeals) involving prisoners who are not represented by counsel; one generalist/capital case manager, who assists in processing prisoner cases and handles all aspects of death penalty litigation; and one clerical/legal assistant, who assists in preparing orders for presentation at a monthly jurisdictional conference, drafts responses to inquiries from pro se litigants, and conducts limited legal research.

II. Intake, Screening, and Settlement Programs

A. Intake

1. Information provided by attorneys

a. Civil and criminal appeals

No docketing or preargument statement is required.

b. 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 Department of Labor's Benefits Review Board.

2. Information provided to attorneys

A docketing notice is sent to attorneys, 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

1. Screening for jurisdiction

An attorney in the Clerk's Office performs an initial jurisdictional review at the time of case opening. Thereafter, a senior staff attorney reviews fully briefed cases; in the course of this review, the attorney looks for jurisdictional problems. The court has a jurisdictional conference that meets each month to dispose of cases with jurisdictional defects.

2. Screening for argument vs. nonargument disposition

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

3. Classifications

The court classifies cases as follows:

- Class I cases are those so lacking in merit as to be deemed frivolous and subject to affirmance or dismissal.
- Class II cases constitute the court's summary calendar. This class 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. 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 these appeals are decided without oral argument.
- Classes III and IV represent the court's oral argument calendars. The majority of cases classified for oral argument are placed in Class III, in which each side receives 20 minutes to argue. Class IV provides oral arguments of 30 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 it is absolutely necessary.

4. Screening procedure

When the briefs and record are filed, the senior staff attorney reviews them to determine if the case, on its face, appears to be one that needs oral argument. If it does, 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 as Class III or Class IV, as the screening judge directs. If the screening judge disagrees and concludes that 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 senior 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 placed on the summary calendar (Class II cases), the staff attorney memorandum will fully state the facts with citations to the record, 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 proposed per curiam opinion is attached to the memorandum. A supervisor reviews the memorandum and the authorities and citations to the record.

If the staff attorney concludes that the appeal should be placed on the oral argument calendar (Class III or IV), and a supervisor agrees, the staff attorney prepares a memorandum explaining the recommendation that argument should be heard.

Cases routed first to staff attorneys include direct criminal cases, non-direct criminal cases, and prisoner cases challenging the conditions of confinement, habeas corpus cases, private civil federal cases *only* if any party is pro se, and immigration cases.

5. Screening for case weighting or issue tracking

The court does not assign weights (measurements of case workload) 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, which is administered by a senior conference attorney who is assisted by two other conference attorneys. These 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. In cases selected by the conference attorneys, a party's written request not to participate in initial settlement discussions, or continue with such discussions, is always respected, and proceedings thereafter, if any are held, will relate only to other matters concerning the efficient management and disposition of the appeal.

III. Electronic Case Filing, Briefing, and Motions Practice

A. Electronic Case Filing

Electronic case filing is mandatory in the Fifth Circuit. Electronic filers are required to complete at least two interactive electronic learning modules and provide certification that they have done so by using the e-mail button at the end of the modules either before or after they register for an electronic filing account.

In civil cases only, nonincarcerated pro se litigants may request the clerk's permission to register as a filing user. Filing users must submit all briefs, motions, and petitions for rehearing in PDF text format and in paper format as prescribed by the clerk. All paper files must be identical to the electronic files.

B. Briefing

1. General

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

2. Briefs on digital media

Only seven paper copies of briefs need to be filed. If a party is represented by an attorney who is exempt from electronic filing, and the attorney generates his or her brief by computer, the party also must submit an electronic version of the brief to the court. The filing party must serve a paper copy and an electronic version of the brief on unrepresented parties, counsel for separately represented parties, and each party separately represented. However, the parties may agree in writing to waive service of paper copies of the brief and to be served with an electronic copy only. Electronic service may be in a form agreed to in writing by the parties, or by the same means used for submissions to the court. The electronic copy of the brief must be filed on a CD, computer disk, or such other electronic medium as the clerk may authorize.

The electronic version of briefs must be prepared in a single Portable Document Format (PDF) file (briefs scanned into PDF are not acceptable) and must contain nothing other than the brief and have as the first page a brief cover page. If submitted on a CD, disk, or other authorized physical media, the electronic version must have a label containing the case name, docket number, and brief identification (e.g., appellant's, appellee's).

C. Motions Practice

1. 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. 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.

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 identities of the panel members are made public, the clerk enters an order responding to the motion on behalf of the panel.

2. 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 both opposed and unopposed procedural motions identified in Circuit Local Rule 27.1.

Pursuant to Federal Rule of Appellate Procedure 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 Circuit Local Rule 27.2.

3. Substantive motions

Motions requiring consideration by the panel judges are reviewed to ensure that there is no recusal problem and then assigned in rotation to an active judge on a routing log. In single-judge matters, which are subject to review by the court, the initiating judge acts on the motion and returns it to the clerk with an appropriate order. (A post-decision motion for a stay or recall of mandate is referred to the authoring judge of the panel, and not placed on the routing log.) For those motions requiring panel action, a single file of papers is prepared and the initiating judge transmits the file to the next judge, along with a recommendation. The second judge, in turn, sends the file, along with a recommendation, to the third judge, who returns the file and an appropriate order to the clerk.

4. Emergency motions

Emergency motions are motions that require a ruling within 14 days of filing. Every emergency motion must (1) be preceded by a telephone call to the Clerk's Office advising that the motion is being filed; (2) be labeled "Emergency Motion"; (3) state the nature of the emergency and the irreparable harm that will result if the motion is not granted; (4) certify that all facts supporting emergency consideration are true; (5) provide the date

by which action is necessary; (6) have attached all documents relevant to the decision; (7) be served on opposing counsel at the same time and in the same manner as the motion is filed with the court; and (8) be filed in the Clerk's Office by 2:00 p.m. If any of these requirements are not met, the motion will be filed as a nonemergency matter and decided by the court pursuant to normal procedures. For a stay of deportation to receive emergency consideration, counsel must satisfy all the above prerequisites and show that the petitioner is in custody with a scheduled removal date.

IV. Nonargument Decision-Making Practices

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

A. Summary Calendar

The summary calendar is operated in a serial, or round-robin, fashion. The staff attorney routinely prepares an in-depth research memorandum and proposed disposition, which is forwarded to the judge designated as the initiating judge. 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 agreement with the authoring judge, forwards the materials and the draft to the third judge. When all judges have agreed no oral argument is warranted, the decision is filed; if any judge believes argument is necessary, the case is placed on the next available oral argument calendar.

B. Conference Calendar

Every other month, the court holds an electronic conference to consider cases designated for conference by the staff attorneys' office. Conference calendar cases consist of direct criminal appeals in which defense counsel has filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), and foreclosed cases (i.e., cases in which the issue raised on appeal has been squarely addressed by the court or in which one of the parties has moved for summary treatment in lieu of filing a brief based on the ground that the issue raised is foreclosed). A staff attorney prepares a memorandum and short per curiam opinion for each case. The conference panel conducts its review electronically over a 10-day period. All three judges must agree to either affirm the judgment of the district court or dismiss the appeal; otherwise, the case is removed from the conference calendar and sent to the initiating judge's screening panel for further screening. The case may then be resolved by that screening panel or placed on the oral argument calendar if necessary.

V. Argument Panel Operations

A. Panel Composition, Sitting Schedules, and Panel Rotation

The court term runs from July to June. Usually, from three to five panels sit the first week of each month in New Orleans or another courthouse or law school within the circuit.

The clerk prepares a proposed court schedule for a full court term and obtains the approval of the scheduling proctor and the chief judge. The schedule does not include specific cases but only sets the weeks of court, based on 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 sit the number of sessions they designate during a court term (up to seven if the court's caseload permits each active judge to sit seven sessions).

The scheduling proctor and the clerk create panels of judges for the anticipated sessions. A computer program is used to achieve random assignment of judges to panels and avoid judges sitting together more than once each court term.

Parties are usually allotted 20 minutes each for argument. In Class IV cases, 30 minutes may be allotted.

B. Assignment of Cases to Panels

The clerk prepares the calendars approximately 60 days in advance, and seeks 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. The clerk calendars the cases 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, and then on a "first-in, first-out" basis.

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 prepared.

The clerk sends the proposed calendars along with the certificates of interested parties to each panel member and requests notice of any recusal or other conflict within a week. The clerk then makes the necessary adjustments and circulates the final calendars to each panel member.

C. Staff Role in Preparing Cases for the Argument Calendar

Judges have their law clerks prepare memoranda on cases scheduled for oral argument.

D. Judicial Preparation for Argument: Materials and Timing

The clerk sends the briefs to the panel members when the calendar is ready for issuance.

E. Disclosure of Panel Members' Identities

The clerk may not disclose the names of the panel members until one week in advance of the session. The calendars of cases, including the panel members, are then posted on the court's website for public information.

VI. Opinion Preparation and Publication

A. Types of Dispositions and Criteria for Publication

1. General policy

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.

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

1. 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;
2. applies an established rule of law to facts significantly different from those in previous published opinions;
3. explains, criticizes, or reviews the history of existing decisional or enacted law;
4. creates or resolves a conflict of authority either within the circuit or between the circuit and another circuit;
5. concerns or discusses a factual or legal issue of significant public interest; or
6. 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.

2. Panel publication criteria

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.

B. 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) 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; (4) in the case of a summary judgment, no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears.

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. Citation of Unpublished 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. 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 Unpublished Opinions

The unpublished decisions of the court are available on the court's website for free and are also available for a fee on LexisNexis and Westlaw.

F. Miscellaneous Opinion and Publication Issues

The court's published opinions 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 be of exceptional importance regarding the issues involved.

B. Treatment of Petitions for Rehearing En Banc

The petition for rehearing and the petition 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 sent to the chief judge, with copies sent 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 it is 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 of his or her ballot 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 authoring 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, and the case is returned to the live docket as a pending appeal.

E. Sanctions for Unmeritorious Petitions

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

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal Appeals

Briefing and oral argument are expedited in criminal appeals. Requests for extensions are not favored.

B. Habeas Corpus Cases and Certificates of Appealability

1. *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 than seven days (including 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 Criminal Justice Act (CJA) plan indicates that direct appeal appointments are provided, but does not address counsel for certificate applications.

Except in death penalty cases, 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, 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 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.

2. *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 that was informally tracked by the court at some point because an execution date was imminent) or a prior appeal involving that party. If it does, 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 routing log, and contacts panel members to determine their availability. The panel

members receive a memorandum advising them that 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 as any other habeas corpus appeal would. 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 System 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. Appellate Procedural Issues Arising Under the Prison Litigation Reform Act (PLRA)

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, April 26, 1996.

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 staff attorneys' office tracks 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 section 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 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. Nine federal district courts operate within the circuit. The Sixth Circuit Court of Appeals hears oral arguments in Cincinnati, Ohio.

The court has 16 authorized judgeships. In the 12-month period ending September 30, 2010, it had 9 sitting senior judges and 12.0 vacant judgeship months.

A. Judges and Panels

1. *Orientation for new judges*

An orientation manual is distributed to new judges and secretaries.

2. *Visiting judges*

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

3. *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 active judges for the exclusive purpose of making assignments to death penalty cases. The roster includes the chief judge and those senior judges who elect to hear such cases. An active judge who is assigned to a panel in a death penalty case continues as a member of the panel even after that judge assumes senior status.

B. Central staff

1. *Office of the Staff Attorneys*

The Office of the Staff Attorneys provides legal support services to the court. While the office reviews the docket for all cases that might be recommended for disposition without oral argument, its primary mission is to assist the court in processing all pro se appeals that do not require oral argument.

The staff also prepare memoranda and proposed orders with respect to motions to proceed in forma pauperis, certificates of appealability, transcripts, appointments of counsel, and motions seeking permission to file second and successive habeas corpus petitions, motions to vacate, and motions for reconsideration. The office includes a specialized death penalty unit, which was formed in 2002. The unit assists the court in processing applications for certificates of appealability in capital appeals and submitting bench briefs in fully briefed capital cases.

Some of the staff acquire expertise in particular areas (e.g., social security, bankruptcy, sentencing guidelines, immigration) and are assigned cases according to their expertise.

The office includes 1 senior staff attorney, 2 supervisory staff attorneys, 24 line staff attorneys, 6 support staff, and an administrative manager. The line staff include both career attorneys and term attorneys, who serve for two years and have one option for term

renewal at the conclusion of their initial term. Four additional lawyers are allocated to the motions attorney section of the clerk's office.

2. Office of the Clerk

The Office of the Clerk is also responsible for providing administrative assistance to the Bankruptcy Appellate Panel (BAP) of the Sixth Circuit.

3. Office of the Circuit Mediators

The court employs four lawyers with extensive negotiation and/or mediation training in the Office of the Circuit Mediators. *See infra* section II.C.

II. Intake, Screening, and Settlement Programs

A. Intake

1. General

Immediately upon receiving notification from the district court clerk of the filing of a notice of appeal, the Clerk's Office docket the appeal and assigns it a general docket number. An appellant's failure to pay the docket fee will not prevent the appeal from being docketed but may provide grounds for dismissal by the clerk.

Where multiple attorneys file a notice of appearance indicating that they represent the same party, they will be directed by the Clerk's Office to designate one of their number as "lead" counsel.

Counsel must use the form available on the court's website to order any transcript required to resolve the issues on appeal. Counsel should order only those parts of the transcript that relate to the issues to be raised on appeal. If a transcript is unnecessary for the appeal, the appellant must inform the court by using the form for certifying that a transcript is unnecessary. The form must be submitted electronically, and the appellant is responsible for serving copies on the appellees, district court, and other parties indicated on the form.

2. Civil appeals

In civil appeals from the district court and appeals from the U.S. Tax Court, appellants represented by counsel must file within 14 days a docket sheet that sets forth information regarding the nature of the appeal. The court provides a form for this purpose.

3. Agency appeals

Within 14 days after filing a petition for review of an agency order (e.g., social security, National Labor Relations Board) or an application for enforcement, a petitioner or appellant 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

1. Screening for jurisdiction

The Office of the Staff Attorneys' jurisdictional unit is responsible for performing an initial screening of appeals to detect jurisdictional problems. For pro se appeals, immediately after the notice of appeal is filed, the unit determines whether appellate jurisdiction is proper. The unit also screens all appeals involving prisoners' post-conviction chal-

lenges to their convictions or sentence regardless of whether the prisoner has counsel. If jurisdictional problems are discovered during the initial screening process, the office reviews the entry of a show cause order and will, in some circumstances, write a memorandum for the court that recommends dismissal of the appeal before briefing begins.

2. Screening for argument vs. nonargument disposition

The Office of the Staff Attorneys reviews the court's docket to identify cases that might be decided without oral argument. These include (1) frivolous appeals; (2) cases involving a dispositive issue or set of issues that have recently been authoritatively decided; and (3) cases in which the facts and legal arguments in the briefs are adequately presented and the decisional process would not significantly be aided by oral argument. For these types of cases, short legal research memoranda written by staff attorneys and all briefs filed by the parties are referred on a continuous basis to standing nonargument panels, which sit for a calendar quarter. Oral argument can also be waived upon written stipulation by the parties, but only with the specific consent of the court.

For those cases that are assigned to the oral argument calendar, the court provides counsel with approximately eight or nine weeks' advance notice of the assignment. If counsel seeks a postponement, it must be made with notice to all counsel indicating whether the moving party has the consent of the opposing party.

C. Office of the Circuit Mediators

The Office of the Circuit Mediators is responsible for initiating and facilitating confidential settlement discussions in civil appeals that meet program eligibility requirements. The office also mediates Bankruptcy Appellate Panel (BAP) cases. Overall, the office mediates approximately 750 appeals per year, about 40 percent of which are resolved without judicial involvement.

Mediation conferences are scheduled routinely in most civil appeals. Cases are selected for mediation in three ways. First, a case can be selected randomly by the mediation office from the pool of new fully counseled civil appeals. Certain types of cases are excluded from the selection process, including prisoner and tax cases and most federal agency cases (e.g., National Labor Relations Board (NLRB) and social security cases). In addition, settlement conferences are generally not scheduled while substantive motions, show cause orders, or jurisdictional problems are pending. Second, parties may themselves confidentially request mediation in any fully counseled civil case. These requests are kept confidential by the mediation office and are almost always granted by the court. Third, cases are sometimes referred to the office by hearing panels either immediately before or after oral argument.

The office typically schedules conferences by written notice before briefing and three to four weeks in advance of the conference date. Cases in which all counsel work within 50 miles of Cincinnati are usually mediated in person. In other cases, the initial conferences are conducted by telephone with the mediation office, which initiates the calls. The local rules require that all parties to the appeal participate in scheduled conferences, at least through their counsel. No actions adverse to the interests of any party will be taken without the consent of all the parties.

III. Electronic Case Filing, Briefing, and Motions Practice

A. Electronic Case Filing

The Sixth Circuit requires all documents submitted in cases to be filed electronically unless otherwise indicated by the circuit or by court order. Parties should consult Sixth Circuit Rule 25(b) for all of the exceptions to electronic filing. Some of the exceptions are petitions for a writ of mandamus or writ of prohibition under the federal rules; documents filed under seal; and documents relating to complaints of attorney misconduct. In addition, no pro se party may file electronically. In such cases, the clerk scans the documents in the Electronic Case Filing (ECF) system, and the electronic version constitutes the appeal record of the court.

The electronic filing requirement does not alter the filing deadline specified under the rules. Counsel should consult Sixth Circuit Rule 25(h) for the procedures to follow in case the electronic filing requirement cannot be met.

An attorney is required to register with PACER (Public Access to Court Electronic Records) and must be a member in good standing of the bar in order to use the circuit's ECF system. After attorney registration, the clerk assigns the attorney a log-in name and user password. The attorney is responsible for informing the clerk of any changes to the attorney's e-mail address. Under the local rules, if an attorney fails to notify the clerk of a new e-mail address, service on the obsolete e-mail address will constitute valid service on the attorney's PACER account.

B. Briefing

A brief filed with the court is required to direct the court to the specific parts of the record to which the brief refers. References to particular parts of the record should be to the "Page ID" number which is assigned consecutively by the district court's electronic filing system to every page of the record. In addition, references to the record should briefly identify the document to which reference is made (e.g., Seconded Amended Complaint, Motion for Summary Judgment). Briefs that exceed the lengths provided under the local rules are rarely permitted.

In some cases, the court requires the parties to file briefs on an expedited basis and then subsequently schedules an oral hearing or submission of briefs as quickly as possible. These types of cases include appeals with recalcitrant witnesses under 28 U.S.C. § 1826 and grand jury contempt appeals. In addition, issuance of a routine briefing schedule and expedited argument or submission on briefs is required in the following cases: appeals from orders granting or denying preliminary or temporary injunctions; interlocutory appeals; direct criminal appeals; and appeals in cases filed pursuant to 28 U.S.C. §§ 2241, 2254, and 2255.

A party that desires oral argument must include a statement in the brief that is no longer than one page and provides the reasons why oral argument should be heard. If a party does not include such a statement in the brief, the court may deem that the party has waived oral argument.

C. Motions Practice

All motions, including emergency motions, must be filed with the Office of the Clerk in Cincinnati. When a party is required to file a motion electronically, the clerk will not

accept a paper copy for filing. A party given leave to file a paper motion must file only one signed original and serve one copy on each opposing party.

1. Composition and operation of motions panels

Substantive motions filed with the court that have not yet been assigned to a panel are assigned to the nonargument panels. See *supra* section II.B. Motions are divided as equitably as possible among the panels. 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 relevant documents 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 motions panel. The senior active judge on the panel initiates the action taken by the panel on the motion. Motions to amend, correct, or settle a judgment are referred to the panel that decided the case.

Motion memoranda and proposed orders that are prepared by the Office of the Staff Attorneys are also submitted to the motions panels and include motions to proceed in forma pauperis, applications for certificates of appealability, motions requesting a free transcript, and motions for the appointment of counsel.

2. Procedural motions

The clerk is permitted by local rule to 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. These matters include

1. motions and applications for orders that are procedural or relate to the production or filing of the appendix or briefs on appeal;
2. orders for voluntary dismissal of appeals or petitions, or for consent judgment in National Labor Relations Board cases;
3. orders for dismissal for want of prosecution of appeals or petition;
4. orders appointing counsel under the Criminal Justice Act (CJA) and in certain other cases;
5. bills of costs filed pursuant to Federal Rule of Appellate Procedure 39(d);
6. 14-day extensions of time in which to file a petition for rehearing or rehearing en banc;
7. orders granting remands and limited remands to allow the district court to grant a particular relief requested by a party and to which no other party has objected, or where the parties have moved jointly, or where the motion includes a notice under Federal Rule of Appellate Procedure 12.1(a); and
8. orders dismissing as duplicative a second appeal filed by or on behalf of a party, when there has been docketed in the court a jurisdictionally sound first appeal from the same judgment or final order sought to be reviewed.

Any party adversely affected by an order entered by the clerk may move for reconsideration by a judge or panel of the court within 14 days of service of notice of the order's entry.

3. Substantive motions

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.

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 10 days from the date of service of the motion. No motion to affirm the judgment appealed from may be filed.

4. Emergency motions

In situations in which an attorney anticipates the need to file an emergency motion, the attorney is expected to notify the clerk in advance that such a 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, like those on other motions, are extremely unusual. If the court feels it is necessary to hold a hearing, the clerk will inform counsel of the date and time.

IV. Nonargument Decision-Making Practices

In cases scheduled for nonargument disposition under the court's Sixth Circuit Rule 34, a staff attorney prepares a research memorandum and a proposed dispositive order. The Office of the Staff Attorneys sends these materials, with the briefs, to panel judges at least 30 days in advance of the date that the panel is scheduled to convene. During the conference at the end of an argument day, the panel discusses both the argued cases and the cases prepared by the staff attorneys for decision without argument. If all three judges agree with the staff attorneys' recommendation, the decision is filed, along with any revisions required by the judges. If any judge would prefer oral argument on the case, the panel may refer the case to the clerk for scheduling on the oral argument calendar.

In addition to deciding nonargument cases, the panels review staff recommendations regarding motions seeking permission to file second or successive habeas corpus petitions, motions to vacate, and motions for reconsideration of orders denying certificates of appealability. These motions materials are also sent to the panels at least 30 days before the panel is scheduled to sit.

V. Argument Panel Operations

A. Panel Composition, Sitting Schedules, and Panel Rotation

The court divides itself annually into divisions for hearing purposes. Every six months individual judges are reassigned to a division for the purpose of providing every judge with the opportunity to sit with as many colleagues as possible during the year. The circuit executive, at the direction of the chief judge, is responsible for making up the schedule of panels.

B. Assignment of Cases to Panels

Calendars of cases that will be argued orally before the court are prepared by the clerk. Calendars for oral argument sessions are drafted by the clerk prior to the time the clerk is advised of the composition of the panel to be assigned for a given session. The clerk

balances the calendars for oral argument by dividing the cases as evenly as possible among the panels according to case type. The purpose of this assignment process is to have each panel consider a reasonably equal number of different types of litigation.

The court sits for oral argument 14 weeks during the course of the year. The active judges are divided into two sitting divisions, and each active judge hears arguments seven weeks during the year. Senior circuit judges and visiting judges are scheduled to sit as their schedules allow. As a result, panels generally sit together for two days at a time; active judges will sit on two such panels per week, with a total of eight panels convening during each sitting week. Each two-day panel will have 15 cases assigned to it, which it receives 15 weeks in advance of the sitting week. The panel reviews its cases and decides which are to be argued, which will be considered on the briefs without oral argument, and which, if any, will be referred to the staff attorneys. Attorneys whose cases are to be argued are so notified by the Clerk's Office 8 to 9 weeks prior to the date of argument. Panels are free to schedule argument during their sitting days as they deem appropriate.

If an earlier appeal resulted in the return of a case to the district court for additional proceedings, the original panel will determine whether the second appeal should be submitted to it for decision or assigned to a panel at random.

In situations in which it is necessary to bring in a new third judge to complete a panel, the clerk draws a name from among the active judges not already on the panel. The judge whose name is drawn will be the third judge of the panel regardless of whether he or she was previously scheduled to sit during the same weeks as the other members of the panel.

Cases in which the disposition of an appeal includes an order retaining jurisdiction after remand to the district court or agency are also assigned to the panel that ordered the retention of the jurisdiction, unless otherwise assigned to a different panel by the chief judge.

C. Judicial Preparation for Argument: Materials and Timing

The clerk sends panel members copies of the briefs for the cases set on the calendar approximately six to eight weeks in advance of any hearing.

D. Disclosure of Panel Members' Identities

Fourteen days before oral argument is scheduled, a person may obtain the names of the judges on the panel that will hear the case by contacting the Clerk's Office or accessing the court's website.

VI. Opinion Preparation and Publication

A. Types of Dispositions and Criteria for Publication

An opinion or order is designated for publication only if requested by any member of the panel. 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.

Published panel opinions are binding on subsequent panels. Court en banc consideration is required to overrule a published opinion of the court.

B. Criteria for Judgment Without Opinion

In those 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 of the case may be in open court following oral argument. A written judgment is signed and entered by the clerk in accordance with the decision of the panel from the bench. Counsel may obtain from the clerk a copy of the transcript of the decision as it was announced from the bench.

C. Prefiling Circulation of Opinions

At the end of each day's oral arguments, the panel typically holds a conference concerning that day's cases. The panel discusses a tentative decision, and the presiding judge of the panel assigns opinion-writing responsibilities to the judges on the panel. Once a draft opinion has been prepared, the judge who wrote the opinion circulates the draft to the other judges on the panel for the purpose of obtaining their concurrence, dissent, or special concurrence. Additionally, all nonpanel judges receive copies of any proposed panel opinions to be designated for full-text publication in the Federal Reporter, Third Series.

D. Availability of Unpublished Opinions

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

E. Miscellaneous Opinion and Publication Issues

The Clerk's Office releases all decisions, but is not given advance notice of when a decision will be rendered. The clerk sends copies of opinions to all counsel and makes the opinions available to the public on the date of filing.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for Grant of En Banc Rehearing

The purpose of a petition for rehearing en banc is to call to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent. Other alleged errors are matters for panel rehearing but not for rehearing en banc. Matters that do not qualify for rehearing en banc include errors in the determination of state law, or in the facts of the case (including sufficient evidence), or errors in the application of correct precedent to the facts of the case.

B. Treatment of Petitions for Rehearing En Banc

A petition for rehearing containing a petition for rehearing en banc must state the request plainly on the cover and in the title of the document and include a copy of the opinion or final order sought to be reviewed. Sixth Circuit Rule 27(b) governs filing and service of such petitions, and the court will not typically consider a petition for rehearing en banc if it does not conform to this rule.

A response from the petitioner is not necessary unless the court requests one, but if a poll is requested by the petitioner or a member of the en banc court, the clerk will ask for a response if one has not already been requested.

If an order of the court disposes of a case on the merits or on jurisdictional grounds, petitions seeking rehearing en banc will be circulated to the whole court. If, however, an order of the court does not dispose of the case either on the merits or on jurisdictional grounds, petitions seeking rehearing en banc will be treated in the same manner as a petition for panel rehearing, that is, they will be circulated only to the panel judges.

Exceptions in which the court will circulate petitions among all active judges for a decision on whether the matter should be reheard by the en banc court include petitions for en banc review of (1) orders entered in death penalty cases in which the scheduled execution is imminent; (2) orders allowing or disallowing appellate review under Federal Rule of Civil Procedure 23(f) of interlocutory grants or denials of class certification made by the district court; (3) orders denying in full or in part an application for a certificate of appealability; and (4) orders allowing or disallowing appellate review of interlocutory orders that the district court has certified as appealable under 28 U.S.C. § 1292(b).

C. Independent Action by the Court

Generally, a poll is requested after a party files a petition for rehearing with a suggestion for en banc review. However, any member of the en banc court may sua sponte request a poll without waiting for a party to file an en banc petition. When such a 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

If a party files a petition for rehearing with a suggestion for en banc review, the petition is first circulated only to the panel that issued the decision under review. The panel then has 14 days to comment on the petition to the en banc coordinator in the Clerk's Office. If the panel substantially modifies its decision, the decision is filed and counsel are notified of the panel's new decision. Counsel then have 14 days to withdraw, modify, or maintain the pending petition or to file a new petition for rehearing en banc.

If, however, the panel does not substantially modify its decision, the coordinator circulates the petition and the panel's comments to the en banc court. A poll may be requested within 14 days of circulation of the petition and the panel's comments by any active judge of the Sixth Circuit or by any senior or visiting judge who sat on the panel and whose decision is the subject of the rehearing. If a poll is requested, 14 days are allowed for voting. Only Sixth Circuit judges who are in regular active service and who have not recused themselves from the case may cast votes on a poll on the en banc petition itself.

If a petition for rehearing en banc is granted, the panel opinion and judgment are vacated, the mandate is stayed, and the case is returned 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, authoring 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

Once a district court denies an application for a certificate of appealability (COA), the application should be filed with the court of appeals as soon as possible following the filing of the notice of appeal.

The Office of the Staff Attorneys reviews the district court's rulings with respect to certificates of appealability to ensure that they either specify the certified issues or state why a certificate should not issue, as required by Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c). The rulings also need to comply with the two-part test enunciated in *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000), and with Sixth Circuit precedent that requires individualized analysis of the claims. *See Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (criticizing blanket denials of COAs); *Porterfield v. Bell*, 258 F.3d 484, 486 (6th Cir. 2001) (criticizing blanket grants of COAs). When the district court certifies fewer than all the claims presented in the case, the court of appeals will review the remaining issues to determine whether to grant the certificate of appealability as to those issues as well.

Certificates of appealability are generally handled as one-judge motions, but are presented to a three-judge panel whenever the petitioner is subject to the death penalty.

IX. Special Procedures for Pro Se Cases

There are no special procedures for pro se cases other than pro se parties not being required to file electronically.

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

A. The PLRA's Filing Fee Provisions and In Forma Pauperis Status

The in forma pauperis provisions of the PLRA do not violate the constitutional rights of prisoners and nonprisoners. *Hampton v. Hobbs*, 106 F.3d 1281 (6th Cir. 1997); *Floyd v. U.S. Postal Service*, 105 F.3d 274 (6th Cir. 1997). The district courts address all pauper status issues regarding prisoners under the PLRA. *McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997). The fee provisions of the PLRA do not apply to habeas corpus petitions and motions to vacate. *Kincade v. Sparkman*, 117 F.3d 949 (6th Cir. 1997). A case dismissed as frivolous before the PLRA was enacted may count as a strike for purposes of the PLRA's three-strikes provision. *Wilson v. Yaklich*, 148 F.3d 596 (6th Cir. 1998).

B. The PLRA’s “Three Strikes” Provision and In Forma Pauperis Status

Under 42 U.S.C. § 1997e, all prisoners must allege in their civil rights complaints regarding prison conditions that they have exhausted available state administrative remedies. A federal court should not adjudicate any such complaint until after exhaustion of such remedies, unless the complaint on its face satisfies 42 U.S.C. § 1997e(c)(2). *Brown v. Toombs*, 139 F.3d 1102 (6th Cir. 1998). The district court may properly dismiss a prisoner’s civil rights complaint for failure to exhaust state administrative remedies if the prisoner did not appeal the denial of his or her grievance. *White v. McGinnis*, 131 F.3d 593 (6th Cir. 1997).

C. Immigration and Naturalization Service (INS) Provisions

The court has determined that the elimination of judicial review of an INS decision declaring an alien deportable as a result of an aggravated felony conviction does not violate the Suspension Clause of the U.S. Constitution, because of the habeas corpus remedy available to the alien. *Mansour v. INS*, 123 F.3d 423 (6th Cir. 1997).

XI. Bankruptcy Appellate Panel (BAP)

A. General Information

The BAP’s central office is located in Cincinnati, Ohio, and the clerk of the U.S. Court of Appeals for the Sixth Circuit also serves as the clerk of the BAP of the Sixth Circuit. All communication to the BAP should be addressed to the “Clerk of the Bankruptcy Appellate Panel of the Sixth Circuit.”

Currently, six of the circuit’s districts authorize appeals to the BAP. Those districts are the Eastern District of Kentucky, the Western District of Michigan, the Northern District of Ohio, the Southern District of Ohio, the Middle District of Tennessee, and the Western District of Tennessee. Three districts have not authorized appeals to the BAP—the Western District of Kentucky, the Eastern District of Michigan, and the Eastern District of Tennessee. In the six districts that have authorized appeals to the BAP, every appeal is determined by the BAP unless and until a party affirmatively and timely elects to have it determined by the district court. At the time the notice of appeal is filed, the appellant or cross-appellant must file with the BAP clerk a separate written statement that indicates the party elects to have the appeal determined by the district court. In addition, any other party to the appeal may elect to have the district court decide the appeal by filing a separate written statement within 30 days of service of the notice of appeal.

The filing of the record on appeal and appendices is governed by the *Sixth Circuit Guide to Electronic Filing*. This guide is available on the court of appeals’ website, <http://www.ca6.uscourts.gov>.

B. Intake

A case is entered on the BAP’s docket and assigned a docket number after the BAP clerk receives from the clerk of the bankruptcy court a copy of the notice of appeal and a copy of the order or judgment being appealed. After the appeal has been opened, the BAP clerk sends counsel for all parties a case opening letter informing them of the date the appeal was opened and the number assigned to the case. The letter also indicates whether

the filing fee has been paid and reminds counsel that if the fee is not paid within the deadline indicated, the appeal may be dismissed for want of prosecution.

C. Preargument Conference and Mediation

The Sixth Circuit mediation attorneys review all bankruptcy appeals to determine whether a preargument conference might be helpful to the BAP or the parties. In addition, any party may request a preargument conference by filing a motion. Every preargument conference is conducted by either a circuit mediator or a panel judge designated by the chief judge. Any party involved in the case may be required to attend the conference, either in person or via telephone. The conference may consider such issues as the possibility of settlement, the simplification of issues, the use of mediation, or any other matters that the judge or conference attorney determines may aid in the disposition of the appeal.

If a judge participates in a preargument conference or becomes involved in settlement discussions in another manner under the rules, that judge may not sit on a panel that considers any aspect of the case.

D. Briefing and Motions Practice

The BAP requires attorneys to file documents electronically. Once the record on appeal has been filed with the BAP clerk, the clerk is responsible for issuing to all parties a briefing notice that provides a schedule for the filing of the brief and the appendix. Appendices are no longer required by the BAP unless a party is designating as part of the record documents that are not part of the bankruptcy court's electronic record. If, however, an appendix is necessary, the appellant should file one electronically with the initial brief. The filing of briefs is governed by material included in the *Sixth Circuit Guide to Electronic Filing*. The guide is available on the court's website at <http://www.ca6.uscourts.gov>.

The BAP disfavors the citation of unpublished decisions in briefs or oral arguments, except when a party seeks to establish *res judicata*, estoppel, or the law of the case. In these situations, unpublished decisions may be cited only if a copy of the decision is served on all other parties and on the panel. Service can be performed by including a copy of the decision in an addendum to the brief.

Motions are ruled on by the BAP clerk, by a single judge, or by a panel of three judges, depending on the type of motion. Some types of procedural motions can be decided by the BAP clerk without submission to a judge. These motions include those dealing with preparation or filing of the briefs or appendix, voluntary dismissal, dismissal for want of prosecution, extensions of time, and a request to withdraw or to substitute counsel, and any other type of motion delegated to the clerk by the panel which can be decided by a single judge under the rules. A party may seek reconsideration of any ruling on a motion by the BAP clerk by filing a motion for reconsideration within 14 days of service of notice of the order's entry.

All other motions are referred to the panel assigned to the appeal. It is extremely unlikely that a panel will have oral argument on the motion. For emergency situations, counsel are advised to contact the BAP clerk for guidance as soon as possible. Decisions on motions are released by a written order signed by the BAP clerk and entered on the docket.

The BAP strongly encourages the submission of complete transcripts. Partial transcripts may be filed if the complete transcript is voluminous. The appeal may be delayed, however, if the BAP requests additional portions of the transcript or the entire transcript.

E. Argument Panel Operations

Appeals to the BAP are scheduled for oral argument unless the panel unanimously agrees that oral argument is not necessary. The briefs filed by the appellant and the appellee should include a statement explaining why oral argument should, or need not, be permitted. A party that has not submitted a brief is not allowed to present oral argument.

Oral arguments are typically scheduled the first Tuesday and Wednesday of February, May, August, and November, depending on the caseload. Arguments are held in Cincinnati or in another location convenient to the panel members and the attorneys for the parties. Oral argument may also be held by teleconference. Once the matter is set on the panel's docket, the BAP clerk notifies counsel of the scheduled start time for arguments. Counsel are advised to check in 30 minutes prior to the start of the docket for the day. Each oral argument is recorded by the court, and a copy of the recording may be purchased from the BAP clerk for a fee, currently \$26.

F. Opinions

In cases argued to a panel, a decision may be announced from the bench at the conclusion of argument or by an order or opinion issued after the panel has heard argument and deliberated on the matter. Only those cases in which the decision is unanimous and each judge of the panel agrees that a written opinion would have no jurisprudential purpose may be disposed of in open court following oral argument.

A panel may decide to limit the precedential effect of a decision in a case and on the parties by stating such a limit in its decision. Absent such a statement, the decision of a panel is not limited as precedent for the purpose of citing the decision in briefs and oral arguments.

An opinion that the panel determines should have precedential effect is sent for publication to West's Bankruptcy Reporter, Lexis, Westlaw, and other publishers. All BAP opinions are also posted on the Sixth Circuit's website.

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United States Court of Appeals for the Seventh Circuit

I. General Information

The Seventh Circuit encompasses Illinois, Indiana, and Wisconsin. Seven federal district courts operate within the circuit. The Seventh Circuit Court of Appeals is headquartered and normally hears oral argument in Chicago. On occasion, the court will schedule oral argument at law schools within the circuit.

The court has 11 authorized judgeships. In the 12-month period ending September 30, 2010, it had 6 sitting senior judges and 10.3 vacant judgeship months.

A. Judges and Panels

1. Orientation and assignments for new judges

The chief judge, other judges, and staff help orient new judges. All recently appointed judges have selected as one of their secretaries an employee who has worked at the court for a number of years. 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.

2. Visiting judges

The court has instituted a program of inviting district judges from within the circuit to sit with the court of appeals. The court assigns a deputy clerk and sometimes a court secretary to serve as a liaison to the visiting judge. In addition, the chief judge and the circuit executive act as liaisons.

3. 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, which decide nonargued cases, convene approximately three times monthly throughout the year, and may include both active and senior judges who are randomly assigned to the panels. A death penalty panel is assigned when a death penalty appeal is filed.

B. Central Staff

1. Staff attorneys' office

The court is staffed with 25 staff attorneys, called staff law clerks. Other than supervisory staff, the staff law clerks 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 law clerks assist the judges with motions work and preparation of cases for disposition on the merits. Staff law clerks also occasionally work directly for judges who need additional temporary help with their chambers work.

2. Settlement conference program

The court employs three settlement conference attorneys. *See infra* section II.C.

II. Intake, Screening, and Settlement Programs

A. Intake

1. Information provided by attorneys

In all types of cases, 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 7 days thereafter. Appellees must file a docketing statement within 14 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.

To obtain transcripts, counsel and court reporters must use the Seventh Circuit Transcript Information Sheet, which may be obtained from the district court clerk or the court reporter. If no transcript is needed, they must certify this on the same form. Upon its completion, a copy of the form is to be sent immediately to the court of appeals clerk by the court reporter.

When less than the entire transcript is ordered, the appellant must file and serve on the appellee a description of the parts to be included and a statement of the issues to be presented on appeal. The appellee has 10 days thereafter to counter-designate additional parts. Note that Circuit Rule 10(e) requires the indexing of all transcripts included in the record on appeal.

Occasionally, after the appeal has been docketed in the court of appeals, the court may hold a case management conference to set a schedule for filing any unprepared transcripts and briefs, examine jurisdiction, simplify and define issues, and consolidate appeals and establish joint briefing schedules. Counsel may request a case management conference. These conferences are generally conducted by senior court staff, usually counsel to the circuit executive. These conferences may be held at the court or by telephone.

2. Information provided to attorneys

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

B. Screening

1. Screening for jurisdiction

Court staff review each new appeal shortly after it is docketed to determine whether potential jurisdictional problems exist. Generally, staff review 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 of the appeal. The appellees, too, may be asked for their views on jurisdictional problems. After the parties respond, court staff presents the papers to the motions panel for decision.

2. Screening for argument vs. nonargument disposition

If one judge wants oral argument, the case will generally be argued. A party may seek to waive oral argument by filing a formal motion with proof of service on all other counsel and parties. In addition, a party may, but is not required to, include in the principal brief a statement of reasons why oral argument is or is not appropriate under the criteria given in the Federal Rules of Appellate Procedure.

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. The circuit executive makes a preliminary determination whether oral argument is needed and, if so, how much time should be allocated. Staff law clerks 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 the case without argument and the court agrees. Staff law clerks prepare these cases for nonargument disposition.

3. Screening for case weighting or issue tracking

When the circuit executive reviews the briefs in the cases routed to him or her, he or she gets a general sense of the difficulty of cases and the issues they present, and uses this information in the case-assignment process, as described in *infra* section V.B.

4. Screening for other case-management issues

In addition to reviewing cases to identify those that should be consolidated for briefing or for argument before the same panel, court staff 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 schedules settlement conferences in many civil appeals. Counsel, and often the litigants, are directed to meet with one of the court's settlement conference attorneys for the purpose of exploring a voluntary disposition of the appeal. Before the conference, counsel are required to review the case thoroughly with their clients and obtain the maximum settlement authority that is feasible. These conferences may be conducted in person or by telephone. Counsel in most kinds of civil appeals may also request, individually or jointly, that a settlement conference be held. Such a request is made by letter or telephone, not by a formal motion, and may be made in confidence. Requests for conferences are granted by the settlement conference program whenever possible. Conferences are not conducted, however, in pro se, prisoner rights, immigration, social security, 28 U.S.C. § 2255, or habeas corpus cases.

Proceedings under the settlement conference program are entirely confidential. Members of the court and their staffs are not informed of what counsel, the parties, and the settlement conference attorney discuss in their efforts to reach a settlement.

III. Electronic Case Filing, Briefing, and Motions Practice

A. Electronic Case Filing

Pursuant to Circuit Rule 25, the court requires that all documents be filed and served electronically. However, this requirement does not apply to documents submitted by pro se litigants who are not themselves lawyers. Nor may documents be served electronically

on pro se parties who are not lawyers. Filing by, and service on, these pro se litigants must be done via paper copies in compliance with national and circuit rules. The court allows any party to request by motion an exemption from this rule. The motion, which need not be filed or served electronically, must provide a good reason. A motion for exemption must be filed at least seven days before the brief, petition, or other document is due.

Electronic filing is accomplished via the court's website, <http://www.ca7.uscourts.gov>. The procedures for filing are specified on the website, and paper copies of the procedures may be obtained from the clerk. Paper copies of documents are required (and will be accepted) only to the extent provided in these e-filing procedures.

Counsel who anticipate the need for emergency action while the Clerk's Office is closed should alert the Clerk's Office during business hours, and at the earliest possible time. Although documents seeking emergency relief must be filed in compliance with Seventh Circuit Rule 25, failure to provide advance notice may delay action by the court. Counsel should not expect that electronic filings will be read and acted on outside business hours, unless arrangements for the emergency filing have been made in advance.

B. Briefing

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 must be filed and served as set forth in the scheduling order. If there has been no scheduling order, the appellant or petitioner has 40 days from the docketing of the appeal to file and serve his or her brief even if the record was incomplete at the time that the appeal was docketed.

Extensions of time to file briefs are not favored. A motion for an extension, with supporting affidavits and proof of service on opposing counsel, must be filed at least five days before the brief is due.

If the appellant's retained counsel fails to file a brief, the clerk enters an order directing counsel to show cause within 14 days why the appeal should not be dismissed. If counsel is court-appointed or retained in a criminal appeal, the clerk enters an order directing counsel to show cause within 14 days why disciplinary action should not be commenced. If the appellee fails to file a brief, the clerk enters an order to show cause why the appellee should not be denied oral argument.

Good reason to allow the late filing of a brief must be shown by the tardy party; otherwise, Seventh Circuit Operating Procedure 7(a) authorizes the clerk to dismiss the appeal. In criminal appeals with court-appointed counsel, the clerk will discharge counsel and order them to show cause why the abandonment of the client should not lead to disbarment.

Court staff review the "Jurisdictional Statement" section of all briefs submitted by counsel when the brief is filed for compliance with the local and national rules. The chief judge may strike any brief that does not comply with the rules, but counsel is given an opportunity to resubmit a brief that remedies the inadequacies.

C. Motions Practice

1. General

Any affidavit in support of a motion should contain only factual information and not legal argument. For a motion for extension of time within which to file a brief, the local rules require the filing of a supporting affidavit. The motion, affidavit, and proof of service are ordinarily submitted together.

2. Composition and operation of motions panels

At least two judges are required to act on requests for bail, denials of certificates of appealability, and denials of leave to proceed in forma pauperis on appeal. Ordinarily, three-judge panels are required to dismiss or otherwise finally determine an appeal or other proceeding, unless the dismissal is by stipulation or is for procedural reasons. Three-judge panels must also act to deny a motion to expedite an appeal when the denial may result in the mooted of the appeal. All other motions are decided by a single judge, in accordance with the local rules. In the interest of expediting a decision or for other good cause, a smaller number of judges than provided in these procedures may decide any motion.

If en banc consideration of a motion is requested, no more than the normal number of judges required for such a motion need act on it. If en banc reconsideration of the decision on a motion is requested, the motion is considered by the same judge or judges who acted on the motion originally. A judge may request that any motion be considered by the court en banc.

The responsibility to handle motions is 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.

All motions are decided on the materials filed, without oral argument, unless otherwise ordered by the court. Oral argument is rarely granted. Therefore, it is imperative that counsel include all documents necessary to decide the motion, particularly in emergency situations.

The clerk is authorized to reject repetitious motions to reconsider.

3. Routine motions

Court staff read the routine motions, any affidavit in support of the motion, and any response to the motion. The designated staff member is then authorized, pursuant to such general directions and criteria as the court prescribes, to prepare an order in the name of the court either granting or denying the motion or requesting a response to the motion. If the designated staff member has any questions about what action should be taken, the motions judge is consulted. Once a panel has been assigned for the oral argument or submission of an appeal, or after an appeal has actually been orally argued or submitted for decision without oral argument, the staff member consults with the presiding judge on motions that would otherwise be considered routine.

Examples of routine motions are motions to extend time; to consolidate appeals; to expedite or schedule briefing; to intervene as of right; and to withdraw a previously filed motion before the court has acted on it.

4. Nonroutine motions

A staff law clerk reads each nonroutine motion and then presents it to the motions judge and, if necessary, the motions panel for a decision. The judge or panel then advises the staff law clerk of the decision and directs that an order be prepared accordingly. The staff law clerk then prepares the order. If the order states detailed reasons for the decision, the staff law clerk takes the original of the order to the motions judge or one of the judges on the motions panel to read and approve. The same procedure is followed whenever a judge asks to see the prepared order before it is released.

Examples of nonroutine motions are motions for leave to file a brief *amicus curiae*; for leave to file an oversized brief; to stay or recall a mandate; and for appointment of counsel.

5. Emergency motions

Staff law clerks 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.

6. Special topics or problems regarding motions

If a party properly files a response to the court's adverse ruling on the respondent's motion, 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 law clerk studies the briefs and record and prepares a draft memorandum and order in the style of a proposed reasoned order (not a bench memorandum). The staff law clerk 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 law clerk 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 law clerk 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. 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 34 panels each year. Judges sit one or two days per week.

The calendar for a particular day will generally consist of six appeals scheduled for oral argument. The amount of time allotted for oral argument will be based on the nature

of the case and is generally 10–20 minutes per side. The clerk will notify counsel of the allocation approximately 21 days before the argument.

The court has allowed counsel who cannot get to the court because of an emergency to argue using a high-quality courtroom speakerphone. In some instances, an 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

Cases are set for oral argument about a month before argument and will usually be scheduled for oral argument shortly after the last brief is due. In criminal cases, the setting of oral argument often occurs as soon as the appellant's brief is filed, and in civil cases after the appellee's or respondent's brief is filed. Counsel for the parties, or the parties themselves if they are without counsel, are notified of the setting approximately 21 days before the scheduled date of oral argument.

After receipt of the court's "Notice of Oral Argument," counsel are directed to notify the clerk, at least two days in advance of the scheduled oral argument date, of the name of counsel who will be appearing in court to present the oral arguments. A return postcard is enclosed with the "Notice of Oral Argument" for this purpose. It must be completed and returned to the clerk immediately.

Any request for waiver or postponement of a scheduled oral argument must be made by formal motion, with proof of service on all other counsel or parties. Postponements will be granted only in extraordinary circumstances.

The circuit executive reviews the briefs and sets the time for oral argument in each appeal to be argued. He or she then assembles a week's worth of cases, designating six cases to be argued on each of the five days, and balancing civil and criminal cases between 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.

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

- *Issues 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, or by lot, as the chief judge directs.
- *Death penalty cases.* The assigned panel in a death penalty case hears all matters pertaining to that case.
- *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 con-

- cludes that judicial economy considerations do not support retaining the case, in which event the panel returns the case for reassignment.
- *Successive collateral attacks.* An application for leave to file a second or successive petition under 28 U.S.C. § 2254 or § 2255 (*see also* 28 U.S.C. § 2244(b)) will be assigned to the panel that heard the prior appeal. If there was no appeal in the prior case, the application will be assigned to the current motions panel.
 - *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 Preparing Cases for the Argument Calendar

Staff law clerks participate in some argued cases, particularly those heard on “short argument days.” Staff law clerks 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 well 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 Members’ Identities

The panel judges’ names and the order of cases to be argued that day are posted at 9:00 a.m. each morning that the court is in session. Also, a card on the rostrum that day will list the names of the panel judges and their positions on the bench.

VI. Opinion Preparation and Publication

A. Types of Dispositions and Criteria for Publication

The court may dispose of an appeal by an opinion or an order. Opinions, which may be signed or per curiam, are released in printed form, are published in the Federal Reporter, and constitute the law of the circuit. Orders, which are unsigned, are released in photocopied form, are not published in the Federal Reporter, and are not treated as precedents. Every order bears the legend “Nonprecedential disposition. To be cited only in accordance with Fed. R. App. P. 32.1.”

It is the policy of the circuit to avoid issuing unnecessary opinions. However, any person may request by motion that an order be reissued as an opinion. The motion should state why this change would be appropriate.

Whether the decision will be issued by published opinion or unpublished order is determined by a majority of the panel. In general, unpublished orders are issued in frivolous appeals and in appeals that involve only factual issues or concern the application of recognized rules of law. Also, opinions in cases decided on a divided vote are usually published, as are opinions in cases decided en banc.

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 judgments without a reasoned opinion.

C. Prefiling Circulation of Opinions

Copies of a proposed opinion or order are circulated to members of the panel, who may approve the opinion or order, offer suggestions, or circulate a concurring or dissenting opinion. When a proposed opinion or order has the approval of at least two judges and the third judge has had an opportunity, if he or she so desires, to prepare a separate opinion, the decision is ready for release.

D. Citation of Unpublished Opinions

No order of the court issued before January 1, 2007, may be cited except to support a claim of preclusion (*res judicata* or collateral *estoppel*) or to establish the law of the case from an earlier appeal in the same proceeding.

E. Availability of Unpublished 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 LexisNexis 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.

F. Miscellaneous Opinion and Publication Issues

The court has set for itself goals and standard 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 standard imprudent. The details of these goals and standard times are taken from the court’s internal operating procedures. For example, a judge who has been assigned to write a draft brief for an unpublished order should circulate the draft to the remaining panel members within 21 days of the case being argued or submitted. In addition, the internal operating procedures indicate that responding to a draft of a circulated opinion by another judge is a first order of business and that judges should respond with approval, recommended changes, or notice of a separate opinion within 10 days of circulation of the draft. Further information on these procedures can be found in the circuit’s Internal Operating Procedure 9.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for Grant of En Banc Rehearing

A party who petitions that an appeal be reheard en banc must state in a concise sentence at the beginning of the petition why the appeal is of exceptional importance or with what

decision of the United States Supreme Court, the Seventh Circuit, or another court of appeals the party claims the panel decision is in conflict.

B. Treatment of Petitions for Rehearing En Banc

A petition for rehearing en banc is distributed to each active judge on the court, including the panel that originally heard and decided the appeal. Petitions for rehearing that do not suggest rehearing en banc are distributed only to the panel. Petitions for rehearing en banc are distributed to all judges entitled to vote on the petition. Thirty copies of the petition for rehearing en banc must be filed. The title page and cover should reflect that a petition for rehearing en banc is being made in order to facilitate its distribution.

C. Independent Action by the Court

Although most opinions are not circulated before filing, the circuit'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. Any active judge or a judge who was a member of the original panel may call for a vote on whether the case should be heard en banc. Only active circuit judges are actually permitted to vote. If there is no majority vote to hear the case en banc, the opinion, when published, contains a footnote that reflects the decision not to have an en banc hearing.

D. Process for Rehearing En Banc

If a petition for rehearing en banc is filed, a request for an answer (which may be made by any Seventh Circuit judge in regular active service or by any member of the panel that rendered the decision sought to be reheard) must be made within 14 days after the distribution of the en banc petition. If an answer is requested, the clerk will notify the prevailing party that an answer must be filed within 14 days from the date of the court's request. Within 10 days of the distribution of the answer, any judge entitled to request an answer may request a vote on the petition for rehearing en banc.

Ordinarily an answer will be requested prior to a request for a vote. A request for a vote on the petition (which may be made by any judge entitled to request an answer) must be made within 14 days from the distribution of the petition. If a vote is so requested, the clerk will notify the prevailing party that an answer to the petition is due within 14 days.

A simple majority of the voting active judges is required to grant a rehearing en banc. Judges are expected to vote within 14 days of the request for a vote or within 14 days of the filing of the answer pursuant to the request for a vote, whichever is later.

After the vote is completed, the authoring judge, or the presiding judge of the panel if the author is a visiting judge, will prepare and send to the clerk an appropriate order. Minority positions will be noted in the denial of a petition for rehearing en banc or the denial of a petition for rehearing unless the judges in the minority request otherwise. Minority positions will not be noted in orders granting a rehearing or rehearing en banc unless requested by the minority judge. An order granting rehearing en banc should specifically state that the original panel's decision is thereby vacated.

Only Seventh Circuit active judges and any Seventh Circuit senior judge who was a member of the original panel may participate in rehearsings en banc. Similar voting

procedures and time limits apply for requests for hearings en banc except that a staff law clerk may circulate such a request.

If a petition for rehearing en banc is granted, the panel opinion is vacated, the mandate is stayed, and the case is returned to the docket for scheduling. The court schedules two or three days per year for en banc sittings.

E. Sanctions for Unmeritorious Petitions

A party who files a petition for rehearing en banc without complying with Federal Rule of Appellate Procedure 35(b) runs a serious risk of sanctions. *See HM Holdings v. Rankin, Inc.*, 72 F.3d 562, 563 (7th Cir. 1995).

F. Other Ways the Court Works to Avoid Conflict and Inconsistency

Sometimes cases in closely related areas 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

1. 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 staff law clerks assigned this duty. The staff law clerk 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 application is facially insufficient, the staff law clerk presents it orally to the presiding judge of the motions panel. Otherwise, the staff law clerk prepares a memorandum discussing the merits of the application and makes a recommendation to the panel of judges. The memorandum alerts the judges to the 30-day deadline for a ruling. The staff law clerk will then issue the order according to the panel's directions. There are strict time limits for the staff law clerk's work.

An application for leave to file a second or successive petition under 28 U.S.C. § 2254 or § 2255 (*see also* 28 U.S.C. § 2244(b) and Circuit Rule 22.2) will be assigned to the panel that heard the prior appeal. If there was no appeal in the prior case, the application will be assigned to the current motions panel.

2. 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, and potential jurisdictional problems. Once the appeal passes the administrative screening mechanisms, the appeal is assigned to a staff law clerk along with any pending motions. The law clerk 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 the ruling of 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 law clerk may recommend that counsel be appointed. If a certificate is granted, the case proceeds to appointment of counsel, briefing, and decision on the merits.

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

3. Special procedures for capital habeas corpus cases and federal direct capital appeals

In death penalty appeals, panels are randomly assigned when the appeal is docketed, and the panel retains the case through all appeals. The chief deputy clerk oversees these cases and coordinates all activities from docketing to mandate.

IX. Special Procedures for Pro Se Cases

See infra section X.

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

A. The PLRA's Filing Fee Provisions and In Forma Pauperis Status

At the time a prisoner civil rights appeal is docketed, the clerk issues a modified Circuit Rule 3(b) fee letter, 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 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 an inmate’s release from prison, his or her 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. See *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 or 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).

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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. Ten federal district courts operate within the circuit. The Eighth Circuit Court of Appeals sits regularly in St. Louis, Missouri, and St. Paul, Minnesota. Panels also sit regularly in Omaha, Nebraska; Kansas City, Missouri; and Little Rock, Arkansas.

The court has 11 authorized judgeships. In the 12-month period ending September 30, 2010, it had 6 sitting senior circuit judges and zero vacant judgeship months.

A. Judges and Panels

1. 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 to the new 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.

2. Visiting judges

The court provides a package of materials to visiting judges, including information about Clerk’s Office procedures and opinion preparation. 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 does not post the information on the J-Net.

3. Panels

Most matters before the court are decided by panels of three judges. There are three types of panels: argument (hearing) panels, nonargument (screening) panels, and administrative panels.

a. Argument (hearing) panels

The hearing panels hear argued appeals.

b. Nonargument (screening) panels

The major function of the screening panels is to decide pro se cases and attorney-handled cases submitted without oral argument. At least three screening panels are in operation at all times. All active judges regularly sit on nonargument panels, and the chief judge sits whenever necessary to fill the third panel. Senior judges occasionally serve on screening panels. The composition of the panels changes periodically.

c. Administrative panels

Administrative panels decide presubmission motions and other preliminary issues the clerk is not authorized to handle. The administrative panels consider and decide (1) petitions for permission to file pursuant to Federal Rule of Appellate Procedure 5;

(2) motions for leave to proceed in forma pauperis; (3) applications for certificates of appealability under 28 U.S.C. § 2253; (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. Administrative panels typically consist of three judges, but one judge or the clerk may take certain actions under the local rules.

B. Central Staff

1. Staff attorneys' office

The court's staff attorneys' office currently has a staff of 20 supervisory and line attorneys. Most staff attorneys are located in St. Louis, one is in Des Moines, and all are supervised by a senior staff attorney. These attorneys assist the judges with motions, pro se cases, cases submitted without oral argument, and some argued cases. Staff attorneys also undertake special assignments at the direction of the judges.

2. Clerk's Office

The clerk of court's main administrative offices are located in St. Louis. The clerk also has a divisional office located in St. Paul. The Clerk's Office is divided into case processing units, including a docketing unit, a monitoring unit, a calendar and records management unit, and a close-out or post-submission unit.

3. Prehearing conference program

The director of the prehearing conference program uses the Appeal Information Forms filed by the parties to conduct prehearing proceedings and may request additional material from the parties, including citations, district court briefs, and memoranda of law. In most cases, the director reviews the case before the briefs and record on appeal are filed. Settlement conferences are held in Little Rock, Arkansas, St. Louis, and St. Paul. In other areas in the circuit, the program is conducted primarily by telephone, although local conferences are held if justified by the number or complexity of cases. *See infra* section II.C.

II. Intake, Screening, and Settlement Programs

A. Intake

1. Information provided by attorneys

In all civil cases other than those brought under 28 U.S.C. §§ 2241, 2254, or 2255, the appellant must file an Appeal Information Form (Form A), submit it with the notice of appeal to the clerk of the district court, and serve a copy on the appellee. The appellee may file and serve a supplemental statement (Form B) within three days after receiving service of Form A. Copies of Forms A and B can be obtained from the appellate clerk or from the clerks of the district courts. These forms allow the court to monitor the nature of its caseload more effectively; provide the director of the settlement program with information necessary to conduct prehearing proceedings; and call the parties' attention to Federal Rule of Appellate Procedure 4(a)(4), to prevent premature appeals.

Within 14 days of filing the notice of appeal, the appellant must also elect a method of producing the record from three alternatives: a joint appendix, separate appendices, or an agreed statement. At this time, the appellant must also file with the appropriate clerks of court and serve on opposing parties its election of method for producing the record, the designation of record (if required), and a statement of issues.

The court requires each nongovernmental party to file a corporate disclosure statement within seven days of receiving the notice from the clerk that the appeal has been docketed.

2. Information provided to attorneys

a. 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 section 1292(b), or has the district court entered a final order under Federal Rule of Civil Procedure 54(b)? Is there a pending motion listed in Federal Rule of Appellate Procedure 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?

b. Postfiling

When an appeal is docketed, the Clerk's Office sends a briefing schedule to all counsel establishing the deadlines for filing briefs. If a cross appeal is filed later, a revised briefing schedule is issued, but ordinarily the time for filing the appellant's opening brief will not be extended by the court. The court provides schedules summarizing the stages that are typical in both criminal and civil appeals. Briefing checklists and other practice aids are provided at the time the case is docketed.

B. Screening

1. Screening for jurisdiction

Cases are screened for jurisdictional problems by the clerk, chief deputy, and deputy-in-charge of the branch office. Jurisdictional issues or questions are referred to the staff attorneys' office or directly to an administrative panel. Jurisdictional questions may also be raised by an appellee's motion to dismiss a case on the grounds that it is not within the court's jurisdiction. Such a motion must be filed within 14 days after the court has docketed the appeal.

2. Screening for argument vs. nonargument disposition

The contents of an appellant's brief must include a statement not to exceed one page that provides a summary of the case, the reasons why oral argument should or should not be granted, and the amount of time (15, 20, or 30 minutes, or in an extraordinary case, more than 30 minutes) necessary to present the argument. If the appellee considers the appellant's statement incorrect or incomplete, the appellee may include a responsive statement in the appellee's brief.

Upon the filing of the briefs, every counseled case is screened for argument or nonargument submission. The chief judge may appoint the clerk, the senior staff attorney, or a panel or panels of judges to screen cases awaiting disposition by the court. Cases may be screened for disposition without oral argument, for abbreviated argument, or for full argument.

Parties are notified by the clerk when a case is classified as suitable for disposition without oral argument. Any party may object to the no-argument classification by filing a written request for reclassification within seven days after receiving notice. This request is sent to a panel of three judges for review. If one of the judges on the panel determines that argument is required, the reclassification is granted, and the case is placed in the pool of cases ready for oral argument. 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.

The court's policy is to initially screen all pro se appeals for submission without oral argument. Since this screening for no-argument submission is automatic upon the completion of briefing, no notice of the decision is sent to the case participants. The panel to which the pro se case is assigned may determine that oral argument is necessary, however. If the panel makes such a determination, it will instruct the clerk as to what further action is required, such as appointment of counsel for the pro se party.

Cases screened for argument are placed on the earliest available calendar, and each side is assigned 10, 15, 20, or occasionally 30 minutes of oral argument. The printed calendar specifies the time allotted each side. Printed calendars are sent to counsel through CM/ECF Notices of Docket Activity approximately one month before each court session. An Argument Response/Appearance Form is also sent, and counsel should complete and return the form immediately so as to inform the court of the name of the attorney presenting oral argument. Requests to change the schedule after the calendar has been prepared will be referred to the panel of judges assigned the case and will be granted only for good cause. The panel assigned to dispose of a case may alter the initial time allocations for oral argument or reclassify the case as suitable for disposition without oral argument.

Criminal cases are given priority on the argument calendar.

C. Preargument Settlement Conference Program

The primary purpose of the Eighth Circuit's settlement program is to provide a neutral forum to explore the possibility of settlement. In participating cases not settled through the program, the settlement conferences provide an opportunity to focus and simplify legal issues for subsequent presentation to the court through briefing or argument. The program is not available in social security cases; federal income tax cases; cases dismissed below for lack of jurisdiction; interlocutory appeals certified under 28 U.S.C. § 1292(b); cases appealed under 28 U.S.C. § 1292(a)(1); and petitions for post-conviction relief.

Settlement conferences are conducted by the director of the program or by a senior district judge on special assignment from the chief judge. They are usually held in St. Louis, Missouri; St. Paul, Minnesota; or Little Rock, Arkansas. Participation in the program is voluntary but strongly encouraged by the court. If counsel are interested in settlement, they are urged to contact or promptly respond to the inquiry of the settlement

director. Unless settlement is actively considered immediately after appeal, the passage of time prior to briefing may interfere with the possibility of settlement.

If settlement appears possible after the initial conference, the director may continue settlement efforts with the parties. A short extension of the briefing schedule may be arranged through the Clerk's Office, but participation in the settlement program does not automatically extend the dates in the briefing schedule. Settlement discussions are confidential. The director has no contact with the judges or the court's legal staff about issues discussed in the conference, unless the parties submit stipulations to the court.

III. Electronic Case Filing, Briefing, and Motions Practice

A. Electronic Case Filing

Electronic filing is mandatory in the Eighth Circuit for all attorneys unless they are granted an exemption by the court. A form for obtaining an exemption is available on the court's website. Exemptions are only granted for good cause, and the clerk is authorized to determine when to grant an exemption and whether to permit a nonexempt attorney to file a document in paper format. The clerk maintains training materials on electronic filing and provides information about registration and system requirements on the court's website.

While most case-related pleadings must be filed using the CM/ECF system, several types of documents cannot be filed electronically and must be filed in paper format. These include documents initiating proceedings under Federal Rule of Appellate Procedure 5, 15, or 21 and petitions for review filed in the first instance in the court of appeals; appendices and other record materials that must be filed in accordance with the provisions of Federal Rules of Appellate Procedure 10 and 30 and Eighth Circuit Rule 30A; and Criminal Justice Act (CJA) vouchers and attachments. Also, sealed documents must only be filed in paper format. Briefs are filed in both electronic and paper format. Paper filings should be made with the clerk's central office in St. Louis. In emergencies, the divisional office in St. Paul can accept paper filings requiring immediate attention, including applications for stays or extraordinary writs.

A notice of docket activity is generated when any document is electronically filed. This notice represents service of the document on the parties who are registered participants in the court's electronic filing system or who have provided the clerk with their e-mail addresses. An attorney's or party's registration for electronic filing constitutes consent to service through the notice of docket activity. With the exception of merits briefs as set out under the local rules, the filing party is not required to serve a paper or electronic copy of any electronically filed pleading or document on any party receiving electronic notice. However, filing parties must still serve paper copies of pleadings or documents on parties not receiving electronic notices.

An electronic filing completed anytime before midnight Central Time is entered on the docket as of that date. All electronic versions of the pleadings must be submitted in Portable Document Format (PDF). However, exhibits that are submitted as attachments to an electronically filed pleading or the addendum may be scanned and attached if the filer does not possess a word-processing-file version of the attachment. Filers should contact the Clerk's Office for directions concerning the submission of scanned documents.

Electronic filing is voluntary for pro se litigants proceeding without counsel. Pro se litigants should consult Local Rule 25B for information on duties of the clerk and service on parties to the appeal.

The clerk is authorized under the local rules to establish a program to permit parties to file documents by facsimile.

B. Briefing

When an appeal is docketed, the Clerk's Office issues to all counsel a briefing schedule establishing the time for filing briefs. A revised briefing schedule is issued if a cross appeal is subsequently filed, but typically the time for filing the appellant's opening brief is not extended. The court's website includes instructions, pointers, and checklists to assist counsel in preparing briefs.

Upon receipt of the electronic version of the brief, the Clerk's Office reviews it for compliance with the rules and notifies counsel if any defects are noted. Counsel has five days from receipt of a defect notice to submit a revised electronic version of the brief. Failure to submit a corrected version may result in the court issuing an order to show cause or an order barring the filing of the brief.

If the brief complies with the rules, the clerk files it and sends all parties a notice that the brief has been filed. Once the filing party receives notice that the brief has been filed, the party has five days to submit 10 paper copies required under the local rules. Also, within five days of receipt of the notice that the brief has been filed, attorneys must serve one copy of the paper brief on each party separately represented or proceeding pro se. Failure to submit paper copies will result in the issuance of an order to show cause.

Attorneys exempt from filing using the CM/ECF system must submit their briefs through e-mail to an account which the Clerk's Office will provide to them. These attorneys must also comply with the other procedures concerning service and submitting the required number of paper copies. Pro se litigants who do not use the CM/ECF system must submit one paper copy of their merit briefs to the clerk by the date indicated in the court's briefing schedule.

Requests for extension of time are not favored and are not granted routinely even when all parties agree to an extension. Limited extensions may be granted to court reporters, attorneys, or pro se litigants for good cause. Extensions for more than 14 days are rarely granted.

Supplemental briefs may not be filed without leave of the court. The court may request supplemental briefs on specific issues after a case is argued or submitted without argument.

C. Motions Practice

1. 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 appli-

cations 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 matters are typically referred to an administrative panel, some matters may be decided by a single judge.

Generally, a panel of three judges must act on a motion. However, subject to Federal Rule of Appellate Procedure 27(c), the local rules permit one judge to determine any motion or exercise any power for the purpose of (1) granting leave to appeal in forma pauperis and ordering preparation of a transcript at government expense; (2) granting appointment of counsel for an indigent defendant proceeding under 28 U.S.C. § 1915; (3) denying a motion to dismiss under Local Rule 47A; or (4) ordering a temporary stay of any proceeding pending the court's determination of a stay application.

Oral argument on motions is not allowed unless the court requests it, which it seldom does.

By local rule certain types of procedural motions are decided by the court clerk. These motions include (1) applications to file briefs exceeding the page limits set forth under the federal and local rules; (2) extensions of time for filing briefs and records; (3) extensions of time designating the record under the local rules; (4) authorization to proceed on a deferred appendix under the local rules; (5) corrections in briefs, pleadings, or the record; (6) supplementation of the record; (7) consolidation of appeals; and (8) substitution of parties. Counsel should consult Local Rule 27A(a) for a full listing. If any party seeks reconsideration of an order entered under the local rule, the clerk is required to submit the matter for a ruling by a judge of the circuit.

2. 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 by the clerk for oral argument.

V. Argument Panel Operations

A. Panel Composition, Sitting Schedules, and Panel Rotation

Argument panels include active circuit judges, senior judges, district judges, and visiting judges. The active circuit judge with the most seniority presides on the hearing panel. The chief judge always presides. 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 approximately one month before the session.

The court of appeals normally sits only the second full week of each month from September through June. Each panel typically hears arguments in five or six cases each day, although the number may vary according to the state of the docket. The composition of argument panels changes every month and often 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

Approximately one month before the court session, the Clerk's Office prepares and publishes an oral argument calendar for the session. The Clerk's Office uses software to form the hearing panels and randomly assign the cases. The judges do not participate in the panel-formation or case-assignment processes.

C. Staff Role in Preparing Cases for the Argument Calendar

The court's central staff attorneys infrequently assist judges with argued cases.

D. Judicial Preparation for Argument: Materials and Timing

Approximately six to eight weeks before scheduled court sessions, the clerk sends the briefs and designated record to each judge on the upcoming argument panel. All judges on the panel read the briefs before argument, and some judges draft preargument memoranda.

E. Disclosure of Panel Members' Identities

The printed argument calendar lists the judges on each panel. Panel changes may occur after publication of the argument calendar, and the courtroom deputy will confirm the composition of the panel on the day of argument at preargument check-in.

VI. Opinion Preparation and Publication

A. Types of Dispositions and Criteria for Publication

The court rarely rules from the bench. The hearing panel usually takes the cases argued under advisement and holds a conference at the conclusion of the day's oral arguments, reaching a tentative decision in each case. The presiding judge on the panel assigns each case for preparation of a signed opinion, per curiam opinion, or dispositive order.

A judgment or order that is appealed may be affirmed or enforced without opinion if the court determines that an opinion would have no precedential value and any of the following circumstances disposes of the matter:

- a judgment of the district court is based on findings of fact that are not clearly erroneous;
- the evidence in support of a jury verdict is not insufficient;

- the order of an administrative agency is supported by substantial evidence on the record as a whole; or
- no error of law appears.

The panel determines whether the opinion in the case is to be published or unpublished, 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.

In addition, the court always publishes opinions in cases decided by the court en banc.

Counsel may request, by motion or letter to the clerk, that an unpublished opinion be published.

B. Summary Disposition

The court may on its own motion summarily dispose of any appeal without notice. However, in an in forma pauperis appeal in which a certificate of appealability has been issued, the court affords the appellant 14 days' notice before entering summary disposition if the briefs have not been filed. 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.

C. Prefiling Circulation of Opinions

The judge to whom the case is assigned circulates a proposed opinion or order to the members of the panel, who may approve the opinion, offer suggestions, or circulate a concurring or dissenting opinion. When at least two members of the hearing panel approve the proposed opinion or order and the third judge either joins or prepares a separate opinion, the decision is released and the judgment entered. The court strives to issue all opinions within 90 days after argument.

Neither published nor unpublished opinions are circulated to nonpanel judges before they are issued.

D. Citation of Unpublished Opinions

Unpublished opinions are decisions that a court designates as not precedent. Unpublished opinions issued on or after January 1, 2007, may be cited in accordance with Federal Rule of Appellate Procedure 32.1. Unpublished opinions issued before January 1, 2007, generally should not be cited. When relevant to establishing the doctrines of *res judicata* or *collateral estoppel*, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value as to a material issue and no published opinion of this or another court would serve as well. If a party cites an unpublished opinion in a document

or for the first time at oral argument and the opinion is not available in a publically accessible electronic database, the party must attach a copy of the opinion to the document or to the supplemental authority letter required by Federal Rule of Appellate Procedure 28(j). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

E. Availability of Unpublished Opinions

All published and unpublished opinions are posted daily on the court's website between 10:00 a.m. and 11:00 a.m. The opinions are also transmitted electronically to the court clerk's office of the district in which the case originated. The court's main library in St. Louis maintains a current edition of the court's slip opinions. Subscriptions to paper copies of the court's slip opinions are not available, but the court does provide a daily summary of all of its published and unpublished opinions. The summaries are available at the "Today's Opinions" link on the court's website, <http://www.ca8.uscourts.gov/cgi-bin/new/today2.pl>.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for Grant of En Banc Rehearing

Petitions for rehearing are not favored by the court and are granted infrequently. A panel may rehear a case if it questions whether its decision was correct.

Petitions for rehearing en banc require a substantial expenditure of time by judges who have not participated in the case, as well as by the hearing panel. Consequently, rehearing en banc is reserved for cases that are necessary to maintain uniformity of decisions or that raise questions of exceptional importance.

B. Treatment of Petitions for Rehearing En Banc

Only by request of a judge on the hearing panel will a petition for rehearing be treated as a petition for rehearing en banc. However, every petition for rehearing en banc is automatically deemed to include a petition for rehearing by the panel.

Successive petitions for rehearing are not allowed. In addition, the clerk will not accept any motion to reconsider the court's ruling on a petition for rehearing or rehearing en banc.

C. Process for Rehearing En Banc

Petitions for rehearing and rehearing en banc filed by attorneys and other registered users of the CM/ECF system must be filed electronically. Attorneys exempt from electronic filing and pro se parties not participating in CM/ECF must file one paper copy of the petition.

When a petition for rehearing en banc is filed, a copy is distributed to each judge on the panel and to every active judge on the court who is not disqualified in that particular case. A judge who has taken senior status may elect to participate in an en banc panel for a rehearing if the rehearing is to review the decision of a panel of which that judge was a member. The judge who has taken senior status does not participate in the vote to determine whether to grant a rehearing petition. A petition for rehearing en banc does not

remove the case from the plenary control of the panel deciding the case. The panel may grant rehearing without action by the full court.

The court strictly enforces the 14-day deadline of Federal Rule of Appellate Procedure 40(a). There is no mailing grace period. Extensions of time to file a petition must be filed before the deadline. By local rule, the clerk may grant a motion for an extension of time not to exceed 14 days. Requests for extensions of time of more than 14 days will be referred to the court. The judges have two weeks to review the petition and request a poll or a response. Unless a judge requests a poll or otherwise indicates that the petition for rehearing en banc deserves more consideration, the clerk automatically enters an order denying petitions for rehearing 21 days after circulation to the court. If a poll is requested, the Clerk's Office will request that the opposing party file a response to the petition for rehearing. No response is permitted absent the court's request. A rehearing en banc is granted if a majority of judges who are in regular active service and who are not disqualified vote affirmatively.

On their own motion, active judges or any senior judge who sat on the three-judge panel may also request a poll for rehearing en banc within the same time limit fixed for the filing of petitions for rehearing by the parties.

If a case is heard en banc, 11 additional paper copies of the briefs must be filed with the clerk.

D. Sanctions for Unmeritorious Petitions

The court may assess costs against an attorney who files a frivolous petition for rehearing en banc that is deemed to have multiplied the proceedings in the case and to have increased costs unreasonably and vexatiously. At the court's order, the attorney personally may be required to pay those costs to the opposing party.

VIII. Management of Criminal and Habeas Corpus Cases

A. Criminal Appeals

The court of appeals and each district court in the Eighth Circuit operate under a plan to expedite criminal cases. A copy of the plan can be obtained from the "Rules/References/Publications" link on the court's website, <http://www.ca8.uscourts.gov/newcoa/pubs/pubs.htm>. The Clerk's Office carefully monitors criminal case schedules, and the court requires strict compliance with all deadlines. The court strives to decide all criminal appeals within 8 to 10 months after the notice of appeal is filed.

B. Habeas Corpus Cases and Certificates of Appealability

1. Certificates of appealability

If a district court has not issued a certificate of appealability, the notice of appeal is treated as a certificate request directed to the court of appeals. The court of appeals also considers requests by habeas corpus petitioners to expand certificates of appealability to include issues for which the district court denied certification.

If a certificate is granted by the district court or the court of appeals, an attorney is appointed, and the case is screened in accordance with normal procedures for counseled cases.

2. *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, if they are not available electronically on PACER or Westlaw. The court requires a response from the Attorney General or U.S. attorney. The petitioner must also send the clerk a copy of any complaint in any federal court civil action that 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. If the record is available in electronic format, the court will review the electronic version of the record. At the time a pro se notice of appeal is filed, the clerk of the district court must transmit to the circuit court clerk the originals or paper copies of those portions of the original record that are not available through PACER, such as documentary exhibits, administrative records, and state court files.

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

A. The PLRA's Filing Fee Provisions and In Forma Pauperis Status

In *Henderson v. Norris*, 129 F.3d 481, 484 (8th Cir. 1997) (per curiam) the court determined that a prisoner is liable for the appellate filing fee the moment he or she files an appeal, and must pay it either in installments, if he or she is eligible, or in full. The circuit leaves to the district court the details of collecting the assessed fee. The circuit has determined that the PLRA's filing-fee provisions apply to mandamus petitions (*see In re Melvin Leroy Tyler*, 110 F.3d 528, 529 (8th Cir. 1997)), but do not apply to habeas actions (*see Malave v. Hedrick*, 271 F.3d 1139, 1139–40 (8th Cir. 2001) (per curiam)).

B. The PLRA's "Three Strikes" Provision and In Forma Pauperis Status

Both the Clerk's Office and the staff attorneys note prior lawsuits (civil suits or appeals) filed by pro se litigants, and review them for evidence of three qualifying strikes. The determination of whether a prisoner is in "imminent danger" for purposes of avoiding the PLRA's three-strikes provision is made as of the date the litigant seeks to file the complaint or appeal in forma pauperis. *See Ashley v. Dilworth*, 147 F.3d 715, 715 (8th Cir. 1998).

XI. Bankruptcy Appellate Panel (BAP)

A. General Information

The circuit's Bankruptcy Appellate Panel (BAP) is composed of six judges who are appointed for terms of seven years. The Judicial Council may also appoint bankruptcy judges to sit as pro tem members of a panel as the need arises. The BAP hears appeals from bankruptcy court decisions of all 10 federal districts within the circuit. Either party may instead elect to have the appeal heard by the appropriate district court.

The panel sits regularly in nine locations (St. Louis, St. Paul, Kansas City, Little Rock, Fargo, Sioux Falls, Cedar Rapids, Des Moines, and Omaha) and may conduct sessions in other cities in the circuit as required by the caseload.

The BAP's administrative office is located in the circuit's Clerk's Office in St. Louis and the clerk of the court of appeals also serves as the clerk for the BAP.

B. Intake

Upon receipt of the notice of appeal, the bankruptcy court clerk will promptly notify the clerk of the BAP of the filing. The clerk of the BAP will open an appeal file, assign a new case number, set a briefing schedule, and notify the parties and the bankruptcy court of all these actions. All requests for leave to file a late notice of appeal should be directed to the bankruptcy court from which the appeal is taken.

Upon filing of the appellant's brief, counsel for both sides will be given an opportunity to request either that oral argument be held in the case or that the case be submitted on the briefs and without oral argument. While significant weight will be given to a waiver of argument (particularly if both sides waive argument), counsel's waiver is not determinative.

The clerk will then screen the case to determine whether oral argument should be granted and, if so, how much time should be assigned for presentation of the argument. Screening typically occurs upon the filing of the appellee's brief. Cases may be screened for disposition without oral argument, for abbreviated argument, or for full argument. The panel of judges assigned to hear the case may alter the initial time assignment made by the clerk or may reclassify the case for submission without oral argument. In these situations, the clerk notifies counsel of all reclassification decisions.

If a case is classified as suitable for disposition without oral argument, a party may ask the court to reconsider the decision and grant oral argument by filing a written request for reclassification.

As soon as a case is screened for oral argument, the clerk will begin work on assigning a tentative date for the hearing. Consequently, it is essential that all counsel notify the Clerk's Office of any conflicts as soon as the appellant's brief has been filed.

Oral argument is generally allowed unless the three-judge argument panel, after examining the briefs and record, determines that one of the following factors applies: (1) the case is frivolous; (2) the dispositive issue or set of issues has been decided authoritatively; or (3) the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the decision-making process.

C. Briefing and Motions Practice

1. Electronic case filing

The BAP requires filings to be made through the use of the court's electronic case filing system (CM/ECF) unless a filer has been granted an exemption. The clerk is authorized to determine when to grant an exemption and whether and when to allow a nonexempt attorney or party to file a document in paper format. A filing in electronic format constitutes the official record in the appeal. Therefore, filers should not submit paper copies of any documents filed electronically.

The BAP will review the case through the court's electronic docket instead of the appendix required under the Federal Rules of Bankruptcy Procedure. Therefore, neither

side should prepare an appendix. In addition, original exhibits that are not available electronically through the bankruptcy court's docket must be scanned by counsel and filed electronically.

2. Briefing practice

All briefs should be filed electronically. One paper copy should be served on any party who is not a CM/ECF participant; a proof of service should be included on such briefs. Counsel should consult Federal Rule of Bankruptcy Procedure 8010 and Local Rule BAP 8th Cir. 8010A for requirements concerning the form, content, and length of briefs. The BAP clerk will provide sample briefs upon request.

If a transcript is required in the appeal, the transcript will be due approximately 30 days from the date the new appeal is opened. The appellant's brief will be due 14 days after the transcript due date. The appellee's brief will be due 14 days from the date of service of the appellant's brief. The appellant's reply brief will be due within 14 days of the service of the appellee's brief.

In cross appeals, the BAP clerk will designate which party will be the appellant and which party will be the cross-appellant. The appellant/cross-appellee's reply brief will be due within 14 days of the service of the appellee/cross-appellant's brief. The appellee/cross-appellant's reply brief will be due 14 days from the date of service of the appellant/cross-appellee's brief.

If no transcript is required, the appellant's counsel should notify the BAP clerk in writing. In these cases, the appellant's brief will be due 14 days from the date of the issuance of the briefing schedule order.

Requests for extensions of time to file briefs may be submitted in letter form. Most extension requests will be processed within 48 hours of receipt. Responses to motions for an extension of time are discouraged. Under the local rules, the clerk will not wait for a response before processing a request for an extension of time. If counsel intend to oppose the motion, they should contact the clerk by phone and indicate that they are filing a response. When such a call is received, the clerk will hold the motion. If no response is filed within two days of the filing of the motion, the motion will be processed without further delay. If granted, extensions of time to file a brief are generally limited to 14 days.

3. Motions practice

Motions for relief and supporting memoranda may be combined into a single document. Motions for rehearing may also be submitted in letter form. All motions for rehearing must be filed within 14 days of the date of the court's opinion and judgment. The three-judge panel that issued the decision in the appeal will rule on the motion for rehearing.

Three-judge administrative panels decide presubmission motions and other preliminary issues the BAP clerk is not authorized to handle (such as jurisdiction over the appeal). Under the local rules, stay motions and other emergency matters will also be submitted to three-judge panels.

D. Argument Panel Operations

Bankruptcy appeals are heard by three-judge panels. The clerk selects the members of the argument panel and designates one of the judges to serve as the presiding judge of the panel. Judges do not participate in the case-assignment process and do not hear cases

filed in their home districts. Composition of the argument panels changes constantly, making rescheduling of cases difficult. The number, timing, and location of the argument sessions will be based on the court's pending caseload. In most instances, the argument panel will travel to the district in which the case was filed to hear the argument.

The court strives to hear oral argument within 60 days of the filing of the appellee's brief. The Clerk's Office notifies counsel that a case is to be argued approximately two months in advance of the actual argument date. When the clerk sends counsel notice of the scheduled argument, the calendar notice will contain the names of the judges assigned to hear the case. The calendar notice also contains an acknowledgment form for counsel to complete and return to the clerk. This form verifies receipt of the calendar and contains the attorney information for each party.

The court records all oral arguments digitally. A copy of the recording can be obtained by downloading it from the court's website.

When a case has been screened for submission without oral argument, it will be referred to a three-judge panel randomly selected by the clerk for the preparation of an opinion and judgment. After review of the record and briefs, any judge on the panel may overrule the clerk's initial determination and direct that the case be scheduled for oral argument. In the event a case is redesignated for oral argument, the nonargument panel to which the case was initially assigned will usually become the argument panel.

E. Opinions

The court has made a commitment to decide every case within 60 days after argument. The clerk transmits notice of all judgments and orders on the day of their entry.

The panel that issues an opinion or order determines whether its opinion will be published or unpublished. Generally, all opinions will be published, although a panel retains the discretion to designate an opinion as unpublished. Counsel may ask the court to reclassify an unpublished opinion for publication by sending the clerk a letter setting forth the grounds for publication.

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United States Court of Appeals for the Ninth Circuit

I. General Information

The Ninth Circuit encompasses Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, 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, Washington; Portland, Oregon; Pasadena, California; Honolulu, Hawaii; Anchorage, Alaska; 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. Cases arising from the northern unit will normally be calendared in Seattle or Portland; from the middle unit, in San Francisco; and from the southern unit, in Pasadena.

The court has 29 authorized judgeships. In the 12-month period ending September 30, 2010, it had 20 sitting senior judges and 35.2 vacant judgeship months.

A. Judges and Panels

1. Orientation and assignments for 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 his or her 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 judge’s 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 session and a conference session, and attends a welcoming lunch.

The chief judge and the clerk arrange for the new judge’s sitting assignments. The assignments are made on an individual basis. For example, a district judge who has sat with the court of appeals may take on a heavier caseload more quickly than a judge who comes from a law practice or academia.

2. 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, which is sent to the judge 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.

3. Panels

At present, all panels are composed of no fewer than two members of the court, at least one of whom is an active judge. Every year, each active judge, except the chief judge, is expected to sit for 32 days on oral argument panels; one 3-day oral screening panel; one 3-day motions panel; and one 1-day certificate of appealability panel. Senior judges are given a choice as to how many cases they will hear.

The court occasionally utilizes appellate or district judges from other circuits for panels when there are insufficient circuit judges to constitute a panel. It is court policy that district judges not participate in cases from their own districts. In addition, the court attempts to avoid assigning district judges to appeals of cases over which other judges from their district have presided (either on motions or at trial) as visiting judges.

B. Central Staff

The court has consolidated many of its staff offices under the direction of the clerk of court.

1. Staff attorneys' office

The court has 83 staff attorneys, who are supervised by a chief deputy clerk. About three-quarters of the attorneys are hired for one- or two-year periods, and they are subject to a maximum five-year employment term. The office also includes paralegals, who assist in pro se cases and direct criminal appeals, and administrative staff.

Non-staff attorneys, such as case management attorneys, pro se attorneys, and death penalty law clerks, perform a number of tasks for the court rather than for individual judges, including the following:

- *inventory*: Review the briefs and records in each case in order to identify the primary issues raised in the case and to assign a numerical weight to the case that reflects the relative amount of judge time that will likely have to be spent on the matter.
- *research*: Review briefs and records, research legal issues, and prepare memorandum dispositions for oral presentation to three-judge panels, in cases that are not calendared for oral argument.
- *motions*: Process all motions, except for procedural motions disposed of by the clerk, filed in a case prior to assignment of a particular panel for disposition on the merits. The motions attorneys also process emergency motions filed under the local rules, and motions for reconsideration of orders filed by motions panels.

2. Clerk's Office

The clerk, a chief deputy clerk, 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. Inquiries regarding rules and procedures may be directed to any of the four offices. The Clerk's Office also includes paralegals, who process procedural motions, Criminal Justice Act (CJA) vouchers, and cost bills, as well as a floating pool of administrative staff.

3. Appellate commissioner

The appellate commissioner is an officer appointed by the court to rule on, review, or make recommendations on a variety of nondispositive matters, such as application by appointed counsel for compensation under the Criminal Justice Act. The commissioner also serves as a special master as directed by the court.

4. Circuit mediators

The court's Circuit Mediation Program is staffed by a chief circuit mediator and eight circuit mediators who work exclusively for the court of appeals. Eight of the mediators reside in the court's San Francisco headquarters and one is located in the Seattle office. The mediators are permanent members of the court staff. They are highly experienced attorneys from a variety of practices who have had extensive training in mediation, negotiation, and appellate practice. The circuit mediators work with lawyers and their clients to settle civil and administrative cases on appeal. Because of strict confidentiality policies, the mediators work independently of the judges and other units of the court.

C. Technological Resources

In the Ninth Circuit, both the San Francisco and Pasadena courthouses have cameras installed in the courtrooms, which provide the capability to broadcast hearings in other locations within the building. The Ninth Circuit also accepts media requests to televise oral arguments. The court posts videos of en banc proceedings and other noteworthy cases on its website.

II. Intake, Settlement Program, and Inventory

A. Intake

1. Information provided by attorneys

In appeals from the district court, the appellant's counsel must simultaneously submit to the clerk of the district court the notice of appeal, the filing fee, and the appellate docket fee. In appeals from the bankruptcy appellate panel and the Tax Court, the notice of appeal and fees are submitted to the clerk of the court from which the appeal is taken. Petitions for review and applications to enforce federal agency orders, and fees for those petitions and applications, are submitted to the clerk of the court of appeals. If the fees are not paid promptly, the court of appeals clerk will dismiss the case after transmitting a warning notice.

A party filing an appeal is required to attach to the notice of appeal a Representation Statement that identifies all parties to the action, along with the names, addresses, and telephone numbers of their respective counsel, if any. The Representation Statement is not required in criminal cases; appeals arising from actions filed pursuant to 28 U.S.C. §§ 2241, 2254, and 2255; and appeals filed by pro se appellants.

Within seven days of the docketing of a counseled civil appeal or non-immigration agency case, the appellant-petitioner is required to complete and submit the Ninth Circuit Mediation Questionnaire. The appellee-respondent may submit the questionnaire, but is not required to do so. The clerk sends the questionnaire to counsel when the time scheduling order is transmitted. The sole purpose of the mediation questionnaire is to help the mediators assess the settlement potential of the case. The appeal may be dis-

missed if the appellant-petitioner fails to submit the questionnaire within seven days. The requirement for filing a mediation questionnaire does not apply to an appeal in which the appellant-petitioner is proceeding pro se; habeas cases; immigration petitions for review, and petitions for writs.

2. 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 cases filed by unrepresented litigants, the case-opening information includes a copy of the court's informal brief form and instructions regarding its use.

3. Review for jurisdiction

At case opening, attorneys assigned to the motions and pro se units review all cases for jurisdictional defects. Cases found to be jurisdictionally deficient are promptly presented to the next available motions panel with a recommendation that the case be dismissed.

B. Circuit Mediation Program

Shortly after a counseled civil appeal or nonimmigration agency case is docketed, circuit mediators review the mediation questionnaire to determine if a case appears suitable for the court's Circuit Mediation Program.

Almost all civil and agency cases in which the parties are represented by counsel are eligible for inclusion in the program. The program generally excludes cases in which a party is proceeding pro se; habeas cases; and petitions for writs. Nonetheless, panels of judges do refer such cases to the program from time to time. Immigration cases are included on a limited basis. *See infra* section XI.C.

The mediators use the mediation questionnaire to help identify cases that might be appropriate candidates for inclusion in the program. This questionnaire is filed in the Ninth Circuit within seven days of the docketing of an appeal or a petition for review. In most cases, once a mediator reviews the questionnaire, the court will order counsel to participate in a settlement assessment conference via telephone. Clients are not expected to participate in this initial conference. The telephonic conference typically lasts from 30 minutes to one hour and includes a discussion of the case's litigation and settlement history. At the conclusion of the call, counsel and the mediator will decide whether further discussion would be fruitful. Additional follow-up telephone calls may be required before a consensus is reached about whether a case will be included in the mediation program. If all agree that mediation is not warranted, the mediator will discuss with counsel any procedural or case management issues that may require attention and will enter an order reflecting the procedural agreements made. If there is consensus to proceed to mediation, the appeal will be included in the program.

Approximately 10 percent of the program's cases come from referrals by panels of judges and by the appellate commissioner. Judges usually refer cases after oral argument, but before they submit the matter for decision. Sometimes the judges will inquire whether counsel believe such a referral would be beneficial; at other times they will simply refer the case. The appellate commissioner sometimes refers attorneys' fees matters. Once a

case has been referred, the assessment process generally follows the same process as that for cases chosen using the mediation questionnaire.

Counsel may request that a case be included in the program. All such requests will be kept confidential if counsel so request.

The mediators may act on their own initiative in any matter pending before the court that has not been assigned to a merits panel. If a panel has been assigned, the mediators may act only with the permission and at the direction of the panel.

Mediation is not necessarily limited to the case that is in the Ninth Circuit. As long as all parties are in agreement, the discussions may include additional parties and related cases in other courts, as well as issues that are not part of any litigation.

Once a case is selected for inclusion in the program, the mediator may conduct follow-up conferences with counsel and the parties in separate or joint sessions. These follow-up sessions may be held in person or on the telephone. In-person mediations may be held at the court or, in appropriate cases, in other locations. When an in-person mediation is scheduled, the mediator will make every effort to hold the session in the venue that is most convenient for the greatest number of participants. Mediators will, thus, travel to locations throughout the Ninth Circuit when warranted.

Settlement-related information disclosed to a circuit mediator is kept confidential and is not disclosed to judges deciding the appeal or to any other person outside of the program participants. Documents and correspondence related to settlement are maintained only in the circuit mediation office and are never made part of the main Ninth Circuit case file. E-mail correspondence and documents sent directly to the mediators or to the mediation office are maintained separately from the court's Case Management/Electronic Case Files system.

Appeals and petitions for review are assigned to all the mediators randomly, regardless of subject matter, with a few exceptions. Petitions for review related to the Bonneville Power Administration are assigned to a particular mediator, as are petitions for review related to certain decisions of the Federal Energy Regulatory Commission. In addition, all cases originating in Washington are assigned to the mediator located in Seattle.

Mediators have the authority to vacate or extend the briefing schedule and to enter other procedural orders, but will do so only if all counsel are in agreement. If counsel cannot agree, a motion must be filed.

A motion or petition for reconsideration, rehearing, modification, or clarification of an order entered by a mediator should be referred initially to that mediator. If the mediator declines to reconsider the order, the motion or petition will be referred to the chief circuit mediator. Orders of the chief circuit mediator are subject to review by a panel of no fewer than two judges.

The clerk refers all Federal Rule of Appellate Procedure 42(b) voluntary dismissal motions to the mediation office when the office has conducted or scheduled a conference with the parties. The clerk notifies the mediation office before assigning to a calendar a case that has been selected for mediation.

C. Inventory

After the briefing is completed, the staff attorneys responsible for case management inventory cases in order to weigh them by type, issue, and difficulty. The weight of a case

is merely an indication of the amount of judicial time that will probably be required to dispose of the case. The inventory process enables the court to balance judges' workloads and hear at a single sitting unrelated appeals involving similar legal issues.

The information identified by the inventory 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 can be presented to the same conference panel.

Drawing upon a computerized file of cases involving similar legal issues, the Clerk's Office compiles as many clusters of cases as there are panels designated for sittings. Cases in each cluster have the same numerical weight total. The total is established by the court as appropriate for any one panel. The Clerk's Office respects, to the extent possible, certain priorities when compiling the clusters.

Case management attorneys also assign a weight to each appeal. The weights—1, 3, 5, 7, 10, and 24—reflect the complexity of each appeal and the amount of judge time the staff attorney predicts will be spent on the matter. One-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, and 24-weight cases are death penalty cases.

One-weight cases must be eligible for submission without oral argument under Federal Rule of Appellate Procedure 34(a). In addition, they should meet the following criteria: (1) the result is clear; and (2) the applicable law is established in the Ninth Circuit based on circuit or Supreme Court precedent. Pro se cases are presumptively classified as one-weight.

III. Electronic Case Filing, Briefing, and Motions Practice

A. Electronic Case Filing

All attorneys and court reporters are required to submit all filings electronically using the court's Appellate Electronic Case Files (Appellate ECF) system unless the court grants a request to be exempted from the requirement. Filers seeking an exemption must complete the Appellate ECF Exemption Form found on the court's website. If an exempt filer registers for the Appellate ECF system, that registration will abrogate the exemption. Use of the court's Appellate ECF system is voluntary for all parties proceeding without counsel.

Certain documents are exempt from the electronic filing requirement, including petitions for review of agency orders; petitions for permission to appeal; and requests for compensation for services and reimbursement for expenses under the Criminal Justice Act. Counsel should consult Ninth Circuit Rule 25-5(b) for the full list of exempt documents.

Registration for the Appellate ECF system constitutes consent to electronic service. If an attorney has successfully applied for an exemption from the electronic filing requirement, that attorney must serve paper copies consistent with the provisions under the Federal Rules of Appellate Procedure; other parties to the litigation must also serve the exempt attorney in that fashion.

B. Briefing

A party may seek either an oral or a written extension of time to file a brief. If good cause is shown, the clerk may grant a single extension of no more than 14 days to file an opening, answering, or reply brief. Requests for extensions of more than 14 days are granted only upon a written motion supported by a showing of diligence and substantial need. This motion must be filed at least 7 days before the due date for the brief. The motion must be accompanied by an affidavit or declaration that includes all of the information listed in Ninth Circuit Rule 31-2.2(b).

If the appellant-petitioner fails to file the opening brief for a civil appeal or agency case according to the time schedule set by the clerk or within an extension of time granted by the court, the clerk will dismiss the case no sooner than 14 days after the brief's due date has passed. When the opening brief in a direct criminal appeal is not timely filed, the clerk issues a default order instructing the counsel to correct the deficiency within 14 days and file a motion for relief from default. The default order warns the counsel that failure to respond to the order in a timely fashion will result in the counsel being relieved of his or her appointment.

The clerk refers all direct criminal appeals involving pro se appellants directly to the motions attorneys for action.

In all instances in which the appellant-petitioner fails to respond to a default order, the matter is referred to the next available motions panel for disposition. In instances of failure to prosecute (other than failure to file the opening brief or respond to an order to show cause), the clerk can issue a default order directing the appellant-petitioner to correct the deficiency and, if appropriate, file a motion for relief from default. If the appellant in a civil appeal or petitioner in a petition for review fails to comply with the default order, the clerk will dismiss the case without further notice. If the appellant in a direct criminal appeal fails to respond within the time set, the matter is referred to the next available motions panel for appropriate action.

C. Motions Practice

Counsel are encouraged to make every effort to contact opposing counsel prior to the filing of any motion and to either inform the court of the position of opposing counsel or provide an explanation regarding the efforts made to obtain that position.

1. Motions acted on by the clerk

The court has delegated to deputy clerks the authority to decide the motions listed in Appendix A of the court's General Orders, such as motions for extension of time, to file oversized or consolidated briefs, to expedite, to stay appellate proceedings, and for voluntary dismissal.

2. Motions acted on by the appellate commissioner

The court has delegated broad authority to the appellate commissioner to review a wide variety of motions, such as motions concerning the appointment, substitution, and withdrawal of counsel; motions for reinstatement; motions for leave to intervene; and motions to seal or unseal documents. The appellate commissioner may deny a motion for dispositive relief, but may not grant such a motion unless it is filed under Federal Rule of Appellate Procedure 42(b).

3. Motions heard by the motions panels

The motions panel rules on substantive motions, including motions to dismiss, for summary affirmance, for bail, and similar motions.

A motion for clarification, rehearing, or reconsideration of an order issued by a motions panel is referred to the panel that entered the order, unless the case has been assigned to a panel on the merits. In the latter situation, the motions panel must contact the merits panel before disposing of the motion.

4. Selection of motions panels

A single motions panel is appointed for the entire circuit. The clerk assigns judges to the three-judge motions 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 motions panel rotate as lead judge, second judge, and third judge. The identities of the motions panel members are posted on the first day of the month on the court's website.

5. Procedures for disposition of motions by the motions panel

All three judges of the motions panel participate in ruling on motions that dispose of the appeal. Other substantive motions are presented to two judges; if the two are in agreement, they decide the motion. The third judge participates only if (1) one of the other members of the panel is disqualified or is otherwise unavailable; (2) the other members of the panel disagree on the disposition of a motion; or (3) he or she is asked to participate by the other members of the panel.

A motions panel sits in San Francisco once a month for three days. Judges may appear by video. Motions attorneys orally present motions to the panel. For complex motions, the motions attorneys may prepare and transmit to the panel in advance bench memoranda, the moving papers, and relevant portions of the record. Motions are referred by the Clerk's Office to the motions attorneys, who transmit them to the judges of the motions panel.

Disposition of cases presented to the motions panel ordinarily will be by unpublished memorandum or order. If, in the judgment of the panel, a decision warrants publication, the resulting order is included in the daily prepublication report and specifically flagged as a decision arising from a motions panel.

6. Emergency motions

To file an emergency motion, the movant must certify that such a motion is necessary to avoid irreparable harm and that relief is needed within 21 days.

When an emergency motion is filed, it is immediately referred to the motions attorney unit. A motions attorney will contact the lead judge of the motions panel, or, if he or she is unavailable, the second judge and then the third judge of the motions panel. That judge then may either grant temporary relief or convene the motions 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. Messages left at times other than regular office hours are recorded and monitored on a regular basis by the motions attorneys. Callers should make clear the nature of the emergency and the reasons why next-business-day treatment is not sufficient.

IV. Oral Screening Panels and Written Screening Panels

A. Oral Screening Panels

All 1-weight cases are directed to the court's research staff attorneys. Cases weighted other than 1 (i.e., 3, 5, 7, 10) are sent to argument panels to be processed by judges and their law clerks in chambers.

An oral screening panel sits in San Francisco once a month for three days. If a judge appears by video, case materials are sent to the judge's chambers prior to the panel. The research staff attorneys prepare proposed memorandum dispositions and orally present the proposed dispositions to the panel. After the staff attorneys have presented each case, the panel members discuss the proposed disposition and make any necessary revisions. If the three panel members unanimously agree with the disposition, the panel directs the presenting attorney to file the approved disposition pursuant to General Order 6.9.

Disposition of cases presented at the oral screening panels ordinarily will be by unpublished memorandum. If, in the judgment of the panel, a decision warrants publication, the resulting opinion is included in the daily prepublication report and specifically flagged as a decision arising from an oral screening panel.

All three judges must agree that the case is suitable for screening before a case is disposed of by an oral screening panel. Any one judge may reject a case from the oral screening calendar. Judges normally reject any case that does not meet the screening criteria.

If a case is rejected from the oral screening calendar, it is re-weighted and scheduled on an argument calendar. The proposed disposition and the rejecting judge's reasons for rejecting the case are sent to the calendar unit for forwarding to the oral argument panel assigned to the case.

B. Written Screening Panels

Written screening panels hear cases deemed suitable for submission without oral argument. The court appoints three-judge panels to serve on written screening calendars. The panel may consist entirely of senior judges. Such panels are selected at random by the Clerk's Office at the close of the calendar year and serve for the succeeding year.

When a written screening panel indicates that it is ready to be assigned cases, staff attorneys send the requested number of cases taken from among the cases designated as those eligible for screening under the court's General Order 6.5(a). The panel advises the Clerk's Office as to which member of the panel will have the writing assignment. The designated authoring judge prepares and circulates in each case an optional bench memorandum and a proposed disposition for comment and approval by the other judges. The authoring judge is responsible for forwarding the written disposition to the Clerk's Office for filing.

The calendar unit transmits the materials on a rotating basis to the panels that have been appointed to serve on the written screening calendar. The writing assignment is also rotated among the three panel members.

V. Argument Panel Operations

A. Panel Composition, Sitting Schedules, and Panel Rotation

The clerk sets the time and place of court calendars, taking into account, for at least six months in advance, the availability of judges, the number of cases to be calendared, and the places of hearing required or contemplated by statute or policy. The random assignment of judges by computer to particular days or weeks on the calendar is intended to equalize the workload among the judges. Also, the aim in selecting panels is to enable each active judge to sit with every other active and senior judge approximately the same number of times over a two-year period and to assign active judges an equal number of times to each of the locations at which the court holds hearings.

Every year, each active judge, except the chief judge, is expected to sit for 32 days of oral arguments. With the approval of the Executive Committee, the chief judge may hear fewer monthly calendars than active judges do.

Each court calendar usually consists of one week of multiple sittings.

B. Assignment of Cases to Panels

At the time of assigning judges to panels, the clerk does not know which cases ultimately will be allocated to each of the panels. The court makes every effort to ensure that calendars are prepared objectively and that no case is given unwarranted preference. The only exception to the rule of random assignment of cases to panels is that a case heard by the court on a prior appeal may be set before the same panel upon a later appeal. If the panel that originally heard the matter does not specify its intent to retain jurisdiction over any further appeal, the parties may file a motion to have the case heard by the original panel.

Direct criminal appeals receive preference and are placed on the first available calendar after briefing is completed. Many other cases, including certain types of civil appeals, are accorded priority by statute or rule. Their place on the court's calendar is a function of both the statutory priority and the length of time the cases have been pending.

C. Staff Role in Preparing Cases for the Argument Calendar

The staff attorneys' role in argued cases is limited to special assignments or situations in which 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 to the three judges for preparation of bench memoranda. These memoranda are circulated to the other panel members about 10 days before oral argument.

E. Disclosure of Panel Members' Identities

The names of the judges on each panel are released to the general public on the court's website on the Monday of the week preceding argument. 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.

F. Oral Argument

The clerk sends a master calendar notice to all counsel of record about five weeks prior to the date of oral argument. A motion for continuance should be filed immediately if counsel find it impossible to meet the assigned hearing date.

The location of hearing notice indicates how much time will be allotted to each side for oral argument. Argument times generally range from 10 to 20 minutes per side. Arguments are digitally recorded for the use of the court, but the recording does not represent an official record of the proceedings. The recording may be accessed the day following argument via the court's website.

At the conclusion of each day's argument, the judges on each panel confer on the cases they have heard. Each judge expresses his or her tentative views and votes in reverse order of seniority. The judges reach a tentative decision regarding disposition of each case and whether it should be in the form of a published opinion. The presiding judge then assigns each case to a judge for the preparation and submission of a disposition.

VI. Opinion Preparation and Publication

A. Types of Dispositions and Criteria for Publication

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 an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or a motion that is not intended for publication under Circuit Rule 36-2 is designated as 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. Under local rule, "publication" means to make a disposition available to legal publishing companies to be reported and cited.

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; (2) calls attention to a rule of law that appears to have been generally overlooked; (3) criticizes existing law; (4) involves a legal or factual issue of unique interest or substantial public importance; (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; (6) is a disposition of a case following a reversal or remand by the United States Supreme Court; or (7) is accompanied by a separate concurring or dissenting expression, and the author of that separate expression requests publication of the disposition of the court and the separate expression.

B. Prefiling Circulation of Opinions

Opinions are not circulated before filing. The court circulates a prepublication report that summarizes opinions that will be filed two days later and notes whether any opinion affects cases pending before other panels.

C. Citation of Unpublished Opinions

Unpublished dispositions and orders of the court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

Unpublished dispositions and orders of the court issued on or after January 1, 2007, may be cited to the courts of this circuit in accordance with Federal Rule of Appellate Procedure 32.1. Unpublished dispositions and orders of the court issued before January 1, 2007, may not be cited to the courts of this circuit, except in any one of the following circumstances:

1. They may be cited to this court or to any other court in this circuit when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.
2. They may be cited to this court or to any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.
3. They may be cited to this court in a request to publish a disposition or order made pursuant to Ninth Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

D. Availability of Unpublished Opinions

Memoranda, which are unpublished, are available in full text on the court's website and on Westlaw and LexisNexis. Orders are not made available except by special order of the court.

E. Miscellaneous Opinion and Publication Issues

Within 60 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 14 days from the date of service to notify the court of any objections. If the request is granted, the unpublished disposition will be redesignated as an opinion.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for Grant of En Banc Rehearing

An appropriate ground for petitions for rehearing en banc is 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

When the clerk receives a timely petition for rehearing en banc, copies of the petition are sent to all active judges. If the panel grants rehearing, it advises the other members of the court, and the petition for rehearing en banc is deemed rejected without prejudice to its renewal after the panel completes action on the rehearing. Cases are rarely reheard en banc. If no petition for rehearing en banc has been submitted and the panel votes to deny rehearing, an order to that effect is prepared and filed.

If a petition for rehearing en banc has been filed, any judge can, within 21 days from receipt of the en banc petition, request notice of the panel's recommendation as to en banc consideration. When the panel's recommendation is given to the court, any judge has 14 days to call for en banc consideration, whereupon a vote is taken. If no judge requests notice of the panel's recommendation within 21 days of the receipt of the en banc petition, the panel enters an order denying rehearing and rejects the petition for rehearing en banc.

If no petition for rehearing en banc has been filed, any judge can, within 21 days from the filing of the opinion, sua sponte call for en banc consideration, whereupon a vote is taken.

Any active judge who is not recused or disqualified and who entered active service before the request for an en banc vote is eligible to vote. A judge who takes senior status after a call for a vote may not vote or be drawn to serve on the en banc court. This rule is subject to two exceptions: (1) a judge who takes senior status during the pendency of an en banc case for which the judge has already been chosen as a 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, who is an active or senior judge appointed by the chief judge to supervise the en banc process, is responsible for recording the en banc votes and circulating the final tally to the court. The en banc coordinator's duties also involve supervising time schedules for each case under en banc consideration, including the extension, suspension, or compression of time schedules for such cases; circulating periodic reports on the status of en banc cases; and, for good cause, suspending en banc proceedings.

If the en banc call fails to receive a majority of votes, the panel resumes control of the case. The panel then enters an appropriate order denying en banc consideration. The order does not specify the vote tally.

The panel before which a case is presented may also call for a vote that the case be heard en banc. If the call is made before the panel hears the case, the panel instructs the clerk to remove the case from the calendar. The panel circulates its call for an en banc hearing to all members of the court with a memorandum giving the reasons for a hearing en banc. If the case fails to receive a majority of votes to be heard en banc, it is returned to the three-judge panel.

If a party petitions for hearing or rehearing en banc, the court will not order a hearing or rehearing en banc without giving the other parties an opportunity to express their views concerning whether hearing or rehearing en banc is appropriate. If no petition for en banc review is filed, the court will not ordinarily order a hearing or rehearing en banc

without giving counsel an opportunity to respond on the appropriateness of such a hearing.

C. Rehearing by the Full Court

Because 11 of the court's judges participate in the ordinary en banc proceeding, a majority of the court's active judges may vote to have the case reheard by the full court after the en banc court acts.

D. Process for Rehearing En Banc

When the court votes to rehear a matter en banc, the chief judge enters an order that indicates this. The vote tally is not communicated to the parties. The three-judge panel opinion or memorandum cannot be cited as precedent by or to the court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

The en banc court, for each case or group of related cases heard en banc, consists of the chief judge of the circuit and 10 additional judges drawn by lot from the active judges of the court. In the absence of the chief judge, an eleventh judge is drawn by lot, and the most senior active judge on the panel presides.

The drawing of the en banc court is performed by the clerk or a deputy clerk of the court in the presence of at least one judge and takes place on the first working day following the date of the order taking the case or group of related cases en banc.

If a judge whose name is drawn for a particular en banc court is disqualified or recused, or knows that he or she will be unable to sit at the time and place designated for the en banc case or cases, the judge immediately notifies the chief judge, who directs the clerk to draw a replacement judge by lot.

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 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. If any issues have been isolated for specific attention, the order can also set forth those issues and request additional briefing.

After the case has been submitted to the en banc court, the judge who is senior in service among those voting with the majority assigns the writing of the majority opinion. In the event that more than one judge expresses a minority view, the senior judge among those sharing that view may assign the writing of a dissenting opinion without restricting any judge in the expression of individual views. A judge is not selected to write a majority or dissenting opinion unless the judge's workload permits the judge to circulate the opinion within 45 days.

E. Sanctions for Unmeritorious Petitions

As provided by Federal Rule of Appellate Procedure 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 the payment of single or double court 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 for giving nonpanel judges an opportunity to suggest amendments to panel opinions, either sua sponte or in response to a petition for rehearing. A prepublication report is circulated that summarizes opinions that will be filed in two days and indicates how issues resolved in those opinions 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 (COA) 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 COA. *United States v. Asrar*, 108 F.3d 217, 218 (9th Cir. 1997). If no specific request for a COA is made, a notice of appeal will be deemed an application for a COA.

If the district court grants a COA as to any or all issues, the court of appeals establishes a briefing schedule at case opening, and the appellant is required to brief the issues certified by the district court. If the appellant concludes during the course of preparing the opening brief that an uncertified issue should be discussed in the brief, the appellant must first brief all certified issues under the heading “Certified Issues” and then, in the same brief, may discuss any uncertified issues under the heading “Uncertified Issues.” Uncertified issues raised and designated in this manner are construed as a motion to expand the COA and will be addressed by the merits panel to the extent it deems appropriate. Except in the extraordinary case, the court does not extend the length of the brief to accommodate uncertified issues. The appellee may, but need not, address any uncertified issues in its responsive brief. The court affords appellees an opportunity to respond before any relief is granted on any previously uncertified issue.

If the district court denies a COA as to all issues, the appellant may file a motion for a COA in the court of appeals within 35 days of the district court’s entry of its order (1) denying a COA in full, or (2) denying a timely filed post-judgment motion, whichever is later. If the appellant does not file a COA motion with the court of appeals after the district court denies a COA motion in full, the court of appeals deems the notice of appeal to constitute a motion for a COA. If the court of appeals appoints counsel to represent the appellant, the counsel is given additional time to file a renewed COA motion.

All express or implied COA requests are presented by staff attorneys to a monthly COA panel of the court consisting of two judges. Any single judge may grant a certificate of appealability.

If, after the district court has denied a COA in full, the COA panel also denies a COA in full, the appellant may file a motion for reconsideration.

When a COA panel grants a COA in part and denies a COA in part, a briefing schedule is established, and no motion for reconsideration will be entertained. The appellant

must brief only those issues that are certified or otherwise proceed as described above regarding uncertified issues.

Recommendations regarding appointment of counsel are handled on a case-by-case basis. Appointment is not automatic.

C. Special Procedures for Capital Habeas Corpus Cases

In criminal appeals that involve judgments of death and that finally dispose of the case, the clerk, upon completion of briefing, assigns the appeal to a death penalty panel composed of active judges and senior judges willing to serve on death penalty panels. However, when an execution is scheduled and no stay is in place, the clerk may select a panel to hear the appeal and any emergency motion whenever in the clerk's discretion it would be prudent to do so.

Once a case is assigned to a death penalty panel, the panel handles all matters pertaining to the case, including motions for leave to file a second or successive petition or motion, appeals from authorized second or successive petitions or motions, any related civil proceedings, and remands from the United States Supreme Court.

When a case is pending before a death penalty en banc court, any additional applications for relief pertaining to that case are assigned to the panel with responsibility for that case, unless the question presented is such that its decision would resolve an issue that is before the en banc court. In such circumstances, the additional application is assigned to the en banc court. The determination as to whether the case is assigned to the panel or the en banc court is made by the chief judge in consultation with the concerned panel and the en banc court.

For appeals heard by the en banc court, the clerk includes in the pool of names of all active judges the names of those eligible senior judges willing to serve on the en banc panel. An eligible senior judge is one who sat on the panel whose decision is subject to review. Judges are assigned by random drawing from the pool, in accordance with the local rules. Review by the en banc court includes not only orders granting or denying applications for a COA and motions to stay or vacate a stay of execution, but also all other issues on appeal.

When seeking a stay of execution, counsel must communicate with the clerk by telephone as soon as it is evident that emergency relief will be sought from the court. Any motion for a stay of execution filed before a case has been assigned to a death penalty panel is presented for decision to a motions panel. Once a death penalty panel has been assigned, that panel must then decide all subsequent matters (unless the case is then before the en banc court).

If the panel affirms the denial of a first section 2254 petition or section 2255 motion in a capital case and denies a stay of execution, any judge of the court may request en banc rehearing and issue a temporary stay of execution.

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 (PLRA)

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 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 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 clerk dismisses the appeal pursuant to Ninth 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.

XI. Immigration Cases

A. General Resources Information

The Ninth Circuit provides immigration practice resources on its website, including the *Ninth Circuit Immigration Outline* and a copy of the American Immigration Council's Practice Advisory on *How to File a Petition for Review*.

The *Ninth Circuit Immigration Outline* provides information regarding (1) relief from removal (e.g., asylum, cancellation of removal, adjustment of status); (2) motions to reopen or reconsider immigration proceedings; (3) criminal issues in immigration law; and (4) attorney fees and recoverable expenses under the Equal Access to Justice Act.

B. Briefing and Motions Practice

1. Briefing

The briefing schedule is set when the court docketed the petition for review, unless a motion to stay removal is filed with the petition. If a stay motion is filed, the briefing

schedule is set after disposition of the motion. Certain motions (e.g., a motion to dismiss the case) automatically stay the briefing schedule.

The briefing schedule is dependent on the respondent's timely filing of the certified administrative record. If the record is late, the court will revise the schedule; no motion by the petitioner is necessary. The early filing of the petitioner's opening brief does not advance the due date for the respondent's answering brief.

2. Motions practice

Each motion in an immigration case must inform the court whether the petitioner is in the custody of the Department of Homeland Security or at liberty. Neither a notice of motion nor a proposed order is required. Motions may be supported by an affidavit or declaration. Each motion should provide the position of the opposing party.

All emergency and urgent motions must conform to the provisions of Ninth Circuit Rule 27-3. Prior to filing an emergency motion, the moving party is required to contact an attorney in the motions unit in San Francisco.

The filing of a motion to stay removal temporarily stays the order of removal until further order of the court. If the motion to stay is filed with the petition for review, the briefing schedule will not be set until the court resolves the motion. If no motion to stay is filed with the petition for review, a briefing schedule will be set and there will be no stay in place. A later-filed motion to stay vacates the existing briefing schedule.

The response to the motion to stay is due 90 days from the filing of the motion (during which time the petitioner is covered by the temporary stay described above). If the respondent fails to submit a response within the time set, this will be construed as a statement of nonopposition, a briefing schedule will be set, and the stay will continue absent further order of the court. If the respondent files an opposition, any reply is due 7 days from service of the opposition.

C. Mediation Program

The court has adopted the selective use of mediation to help resolve certain immigration cases. While petitioners in immigration cases are not required to file a mediation questionnaire (the document the court uses to assess suitability of a case for mediation), panels of judges routinely refer certain cases to the Mediation Program. When a petitioner is able to adjust status, or when a change in the law clearly requires a remand, counsel may request that a case be included in the Mediation Program.

XII. Bankruptcy Appellate Panel (BAP)

A. General Information

The Ninth Circuit Judicial Council has authorized seven bankruptcy judges to serve on the BAP; however, as of April 2011, only six bankruptcy judges serve on the BAP. BAP judges are all active bankruptcy court judges from districts within the Ninth Circuit, and all maintain a regular trial docket in their home districts. BAP judges are appointed by the circuit for a seven-year term. At the end of that term, a BAP judge may seek reappointment for an additional three years.

The BAP also routinely uses pro tem judges in order to give appellate experience to other bankruptcy judges within the Ninth Circuit. Pro tem judges sit for one-day merits calendar assignments and have equal votes with the regular BAP judges.

The BAP hears cases nine months out of the year, and the three-judge panels travel to various venues in the Ninth Circuit. The BAP does not normally hold hearings during April, August, and December.

The BAP utilizes both teleconferencing and videoconferencing and continues to explore the use of new technology to facilitate more convenient hearings for counsel and litigants. Videoconference equipment in both the Pasadena and San Francisco courtrooms allows litigants to appear in scheduled cases via live video from bankruptcy courthouses throughout the Ninth Circuit.

The BAP is staffed by its clerk, two staff attorneys, and other personnel who maintain the files and dockets and otherwise run the business of the court.

B. Intake

The appellant must attach to the notice of appeal filed in bankruptcy court a copy of the entered judgment, order, or decree from which the appeal is taken. The clerk of the bankruptcy court forwards these items to the BAP clerk. If the notice of appeal is filed before entry of the order being appealed, it is the appellant's duty to forward to the BAP clerk a copy of the judgment or order immediately upon entry.

As soon as the statement of issues, designation of record, and any transcripts that have been designated are filed with the bankruptcy court, the clerk of the bankruptcy court transmits to the BAP clerk a certificate that the record is complete. After receiving the certificate, the BAP clerk notifies the parties of the date the certificate is filed at the BAP, and this date constitutes the date of entry of the appeal on the docket under the federal rules. The record is retained by the clerk of the bankruptcy court. The BAP clerk may request a copy of the record from the clerk of the bankruptcy court.

The BAP may elect to transfer an appeal to the district court to further the interests of justice, such as when a timely statement of election has been filed in a related appeal, or for any other reason the panel deems appropriate.

C. Briefing and Motions Practice

1. Electronic case filing

Electronic filing using the BAP's Case Management/Electronic Case Files system is mandatory for all attorneys, unless they are granted an exemption by the BAP from using the CM/ECF system. However, any litigant who is not a licensed attorney authorized to practice before the BAP must obtain permission by filing a motion with the BAP if the litigant wants to register for BAP electronic filing. Some documents currently may not be filed electronically, including the appendix that accompanies a party's brief. Unless it is specifically ordered, the BAP neither requires nor allows the filing of paper copies when a document is electronically filed.

The BAP does not accept for filing documents transmitted by facsimile machine (fax), except in emergency circumstances. The permission of the BAP clerk, prior to the transmittal of the document, is always required. Any document transmitted to the BAP by fax must be served on all other parties by fax or hand delivery, unless another form of service is authorized by the BAP clerk and the method of service is expressly stated on

the proof of service. Within three days after the fax transmittal, the filing party must file a signed original and the necessary copies with the BAP.

2. Briefing practice

The BAP issues a briefing order in most appeals shortly after the appellant files the notice of appeal rather than waiting for receipt of a certificate of record from the bankruptcy clerk. The BAP does this to encourage and facilitate the expeditious resolution of appeals.

An appellant's failure to file a brief in a timely manner may result in the dismissal of the appeal. A brief received after the due date will not be accepted for filing unless it is accompanied by a motion for an extension of time and the motion is granted. The panel has no obligation to consider a late brief. Sanctions may be imposed, such as the waiver of oral argument, monetary sanctions, or dismissal of the case.

3. Motions practice

The BAP receives approximately 40 to 50 motions per month. After a motion is filed with the BAP, the motion is immediately reviewed and summarized by a staff attorney. The staff attorney prepares a written analysis and recommendation, as well as a proposed form of order.

The BAP judges rotate sitting on monthly motions panels. These panels consist of one to three judges who decide the motions. The motion, any responses or replies, and the staff attorney's workup are transmitted to the motions panel judges by e-mail or overnight delivery. Motions panel judges immediately review the paperwork, and communicate their votes and modifications of the proposed order to one another and to the staff attorney. Motions are decided without hearing unless the court orders otherwise. Hearings on motions are extremely rare. Occasionally, the panel judges will differ, which results in a dissent or a separate concurrence on the motion. Rulings by a motions panel are not binding on the merits panel.

The BAP judges may delegate to the BAP clerk authority to act on motions that are subject to disposition by a single judge under the Federal Rules of Appellate Procedure, on the condition that the order entered on the motion does not dispose of the appeal or resolve a motion for stay pending appeal. The order disposing of the motion is subject to reconsideration by a judge if a written request for judicial review is received within 14 days of the entry of the order.

D. Argument Panel Operations

The BAP clerk provides notice of the time and place of argument. Once the hearing date is scheduled, a motion for continuance is granted only under exceptional circumstances. The BAP clerk typically sets oral argument to occur 30 to 45 days after the briefs are filed.

Each appeal is heard by a panel of three judges. The panel may determine that oral argument is not needed either sua sponte or on motion for submission of the appeal on the briefs. If the panel determines that oral argument is not needed, it will issue an order to that effect.

The panel may hear and dispose of an appeal by sitting en banc. An en banc hearing or decision of an appeal is not favored and ordinarily will not be ordered unless it appears

to be necessary to maintain uniformity of the panel's decisions, including, without limitation, when the appeal challenges an existing precedent of the panel. A party may file a motion to request that the panel hear and decide an appeal en banc. In addition, two or more of the judges assigned to hear and decide the merits of an appeal, including any pro tem judge, may request that the panel hear and decide an appeal en banc. The request should be made at the time the brief is filed.

If a timely request for an en banc hearing and decision is made, the BAP clerk will promptly poll the regular members of the panel who are eligible to participate in the disposition of that appeal. The appeal will be heard and decided en banc if (1) at least five regular members of the panel are eligible to participate, and do participate, in the vote; or, if fewer than five members of the panel are eligible to participate in the en banc call, the chief judge of the Ninth Circuit, after consultation with the presiding judge, designates such pro tem judges as may be necessary to bring the number of the judges considering the en banc call to five, and all five judges vote; and (2) a majority of the judges polled vote in favor of the request. If no affirmative vote as described above is obtained within 14 days of the initial polling, the matter will not be heard en banc.

If the panel votes to hear and decide a matter en banc, the en banc panel consists of all members of the panel eligible to participate in the appeal's disposition, but in no event may an en banc panel consist of fewer than five judges.

About one-fourth of all BAP appeals go through the entire process of briefing, oral argument, and decision on the merits. Of the appeals that completed that process for the 12 months ending December 31, 2010, the median time from commencement of the appeal to final disposition was 7.9 months. The median time from submission to final disposition was less than a month. One hundred and four appeals were disposed of on the merits, and the reversal rate was about 10%.

E. Opinions

The panel disposes of all appeals by entry of an opinion, memorandum, or order. Opinions are published and bind the panel as precedent unless they are modified or reversed in an opinion issued by the panel sitting en banc, or unless they no longer are precedent as a result of changes in the law, whether by act of Congress or by decision of the Ninth Circuit Court of Appeals or the Supreme Court. Memoranda and orders are not published, have no precedential value, and may not be cited except when relevant under the doctrine of law of the case, or under rules of claim or issue preclusion.

If the disposition is published, the BAP clerk releases a copy to recognized channels for dissemination to the public. An order may be designated for publication under limited circumstances, and when published, an opinion may be used for any purpose for which an opinion is used.

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United States Court of Appeals for the Tenth Circuit

I. General Information

The Tenth Circuit encompasses Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming, and portions of Yellowstone National Park located in Montana and Idaho. Eight federal district courts operate within the circuit. The headquarters for the Tenth Circuit is in Denver, Colorado, and most oral arguments are heard in Denver. The court may hear cases at any place within the circuit. The court will occasionally hold a full session in one of the states in the circuit.

The court has 12 authorized judgeships. In the 12-month period ending September 30, 2010, it had 9 sitting senior circuit judges and 15 vacant judgeship months.

A. Judges and Panels

1. Orientation and assignments for new judges

New judges are introduced to the court's work gradually. Usually they first hear orally argued cases, and then they are introduced to screening and conference cases. The order depends on the time of year the new judge enters on duty. The chief and other judges serve as mentor judges, and the circuit executive and the clerk provide manuals with information about the court's procedures.

2. Visiting judges

All visiting judges receive a manual that covers procedures, gives guidelines for opinion format, and provides local maps and information.

3. Panels

Judges usually sit in panels of three; however, two-judge panels are used to dispose of certain routine calendar and special writ matters. In addition to the hearing panels, the court has a number of standing committees and rotating standing panels that consider motions, emergency motions, and any other items requiring immediate attention or not involving oral argument. In this court, unlike most other circuit courts, the judges have primary responsibility for screening cases.

a. Screening panels

All active judges and, at their option, senior judges, serve on screening panels. The court creates four three-judge panels each year; panels generally 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.

b. Jurisdictional panels

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.

All cases are screened for jurisdictional defects. When a jurisdictional defect is suspected, the court orders a brief on the issue. If it is determined that the court lacks jurisdiction, the proceeding is dismissed.

c. Conference calendar panels

Every other month three conference calendar panels are scheduled to review 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 infra* section IV.

d. Special proceedings panels

The Office of Staff Counsel maintains a list of randomly constructed two- and three-judge panels to decide certain substantive motions, including motions for bail, stay, or mandamus, motions for authorization, and motions to enforce plea agreements. Staff counsel present the matters to the panels. If the matter is assigned to a two-judge panel, panel members may request a third judge if the issues appear to be especially difficult or important or to break a tie vote.

e. Clerk’s panels

Periodically, the chief judge assigns two judges to serve as a “clerk’s panel” and to decide procedural motions that, pursuant to Federal Rule of Appellate Procedure 27, do not require a three-judge panel but may require judicial action prior to assignment of the case to a merits panel.

f. Capital panels

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.

B. Central Staff

1. Office of Staff Counsel

The Office of Staff Counsel provides major assistance to the judges on selected types of cases, particularly those that do not require oral argument. In addition to assisting in the disposition of Rule 34 cases on the conference calendar, the office handles a group of procedural and substantive matters generally referred to as “special or original proceedings,” including (1) motions for bail or release pending appeal; (2) motions for stay or injunctive relief on appeal; (3) petitions for writs of mandamus or prohibition; (4) motions for authorization to file a second-or-successive habeas petition; and (5) motions to enforce plea agreements. The office also processes Criminal Justice Act (CJA) vouchers for recommendation to the presiding judicial officer and the chief judge’s specified delegate. Finally, the office has prepared and annually updates reference handbooks that summarize circuit case law on topics of general and specific relevance. Court personnel, especially new chambers staff, use these reference works.

The Office of Staff Counsel currently has a staff of 16 permanent line staff attorneys organized into four teams: three teams handle conference calendar cases, and one team processes original and special proceedings.

2. Clerk's Office

The clerk of court is assisted by the chief deputy clerk and a large staff. The Clerk's Office's duties are (1) receiving and accounting for monies paid to the court; (2) initiating a docket for each appeal; (3) managing dockets and performing quality control on all documents filed electronically; (4) managing records and other court materials; (5) issuing calendars of cases for court sessions; and (6) entering orders and opinions of the court as authorized and issued by the judges. In addition, attorneys in the Clerk's Office specialize in screening cases for jurisdictional defects.

Since enactment of the Prison Litigation Reform Act (PLRA), the attorneys in the Clerk's Office prepare a fee status memorandum for the screening judge on all prisoner cases. In addition, attorneys in the Clerk's Office prepare a screening memo for every civil case.

3. Circuit mediation office

The court currently employs three circuit mediators. *See infra* section II.C.

II. Intake, Screening, and Settlement Programs

A. Intake

1. Information provided by attorneys

Parties who are represented by appointed counsel are required to designate record materials for transmission by the district court clerk. Pro se parties are not required to file a designation. The court has identified certain items that may not be included in the record without specific authorization. These items include appearances; bills of costs; depositions, interrogatories, and other discovery matters, unless used as evidence; lists of witnesses or exhibits; and procedural motions or orders. Counsel should consult Local Rule 10.3(E) for a full list of prohibited items. In addition to identifying pleadings and orders, the designation should include necessary parts of the transcript. All transcripts on file with the district court should not automatically be included in the record transmitted to the court, and counsel should designate only essential parts for transmission.

All appellants must file a docketing statement on a form furnished by the Clerk's Office within 14 days after filing the notice of appeal. An original and four copies must be filed. The court strongly disfavors motions to strike or amend the docketing statement and arguments over its contents.

The docketing statement must include a copy of each of the following documents when it is filed in the court of appeals: (1) the district court docket entries, including an entry for the notice of appeal; (2) the final judgment or order appealed from; (3) any pertinent findings and conclusions, opinions, or orders which form the basis for the appeal; (4) any motion filed under Federal Rule of Civil Procedure 50(b), 52(b), 54, 59, or 60, including any motion for reconsideration, together with the dispositive order, if any; (5) any motion for extension of time to file the notice of appeal, along with the dispositive order, if any; and (6) the notice of appeal.

2. 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 that is available on the court's website.

B. Screening

1. Screening for jurisdiction

Attorneys in the Clerk's Office screen all cases for jurisdictional defects. When a jurisdictional defect is suspected, briefs are ordered. If the court determines that it lacks jurisdiction, the proceeding is dismissed.

2. Screening for argument vs. nonargument disposition

When merits briefs are filed in civil cases and those cases are at issue, the appeals are submitted to a judge for screening. Each active judge is a member of a three-judge screening panel. During the screening process, the judges review each case to determine whether it should be directed to the oral argument calendar, assigned to a separate calendar without oral argument, or disposed of by the screening panel. If any judge on the screening panel or on a nonargument panel believes oral argument would be helpful, the case is set for oral argument. Certain types of appeals, such as capital cases and most direct criminal appeals, are placed directly on the oral argument calendar without screening.

Typically, complex cases are placed on the oral argument calendar, and simple cases are held in chambers for the screening judge to prepare a proposed disposition, which is circulated to the other two judges on the screening panel. 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, including the reasonableness of the sentence, or in which oral argument has been waived.

All other cases are sent to the conference calendar, where they are assigned to the Office of Staff Counsel. Some categories of cases, such as social security appeals, are forwarded automatically for disposition on the conference calendar. Staff counsel also handle all mandamus, stay, and bail cases, as well as motions for stay, for authorization to file a second-or-successive habeas petition, and to enforce plea agreements. The cases placed on the conference calendar are prepared by staff under the direction of a mentor judge.

3. Screening for case weighting or issue tracking

The court does not formally rank or weight cases or track issues.

C. Circuit Mediation Office

The primary purpose of a mediation conference is to explore the possibilities of settlement. A conference is also used to clarify issues and resolve procedural problems that may interfere with the smooth handling or disposition of the case.

The Circuit Mediation Office schedules a case for a mediation conference based on information included in the docketing statement submitted by the appellant, usually before briefing and sometimes before the transcript is completed. If a case is not sched-

uled for a conference, a party may request one by contacting the office. Any request for a conference may be treated as confidential. A mediation conference may be scheduled in any civil case except pro se, social security, and habeas corpus appeals. Also, conferences are not scheduled in criminal appeals. The mediation program operates separately from the court's decisional processes, and filing deadlines are not automatically extended by the scheduling of a mediation conference. However, the mediator does have the authority to extend deadlines in appropriate cases.

The office is staffed by three attorney-mediators, who conduct both telephone and in-person conferences. Most conferences are conducted by telephone. The mediators typically conduct the conferences in a series of joint and separate sessions, talking with both sides together and then with each side separately. Counsel should set aside at least two hours for the initial conference, and in some cases the discussions may go no further than this first conference. In other cases, follow-up discussion may continue for days or weeks, and sometimes longer.

All communications in the course of a conference or in any subsequent discussions are kept confidential. Nothing said during the discussions is placed in the record or disclosed by anyone to anyone not participating in the mediation process. Counsel and parties may not refer to or quote any statement made during the course of these discussions in their briefs or at oral argument, or in any proceeding in any other court.

Under Local Rule 33.2, the appellant's or petitioner's counsel is required to initiate a conference with opposing counsel to fully explore settlement no later than 30 days after the filing of the last brief. However, in cases in which the circuit mediation office has conducted a mediation conference, the appellant's or petitioner's counsel is not required to initiate a conference. A Rule 33.2 conference is also not required in cases involving pro se litigants, relief from criminal convictions, or social security appeals.

III. Electronic Case Filing, Briefing, and Motions Practice

A. Electronic Case Filing

Electronic case filing (ECF) is mandatory for all attorneys filing in the Tenth Circuit. All attorneys registered to file electronically have consented to use the court's ECF system for service, and filing may be accomplished through the system. Counsel must continue, however, to include a certificate of service in the brief. The court provides an *ECF User Manual* on its website that includes information and instructions for filing briefs, motions, and other documents electronically.

B. Briefing

Counsel must file briefs via ECF and must also submit seven hard copies of the brief to the court within two business days of filing the brief electronically. Indigent pro se litigants aren't required to submit their briefs using ECF. They may file paper briefs—an original and three copies—and must serve one copy on the counsel for each party separately represented.

The court disfavors motions for extensions of time to file briefs. Briefs are made available to judges soon after the cases are assigned to hearing panels, which is generally many weeks before the scheduled argument date.

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.

On the front cover of the principal brief, a party should include a statement on whether oral argument is desired. A statement also is required when no oral argument is desired. If oral argument is requested, an explanation of the reason oral argument is necessary must follow the conclusion of the brief. 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.

C. Motions Practice

1. General

After the principal briefs are filed, a party may file a motion to waive oral argument and to submit a case on the briefs. If filed within 10 days of the scheduled argument date, the motion must show why an earlier filing was not possible.

Every motion must state the position of the opposing party or why the moving party was unable to learn the opposing party's position. In this regard, parties must make reasonable efforts to contact opposing parties well in advance of filing a motion. Any party may file a response in opposition to a motion within 14 days after service of the motion, but the court may act on motions for procedural orders at any time, without waiting for a response.

As they do with briefs, parties may use the court's electronic filing system to serve motions on other parties to the proceedings. However, if any party to the appeal is pro se or otherwise exempt from electronic filing, service must be accomplished by traditional means.

2. Procedural motions

The court has provided by local rule that specified types of procedural orders may be disposed of by the clerk, but any party affected by such action may seek review by the court. Some of these types of motions are motions to correct a brief or pleading; to consolidate appeals; to substitute parties; to appear as *amicus curiae*; and to expedite or continue cases. Counsel should consult Local Rule 27.3(A) for a full listing. For difficult or problematic procedural motions, assigned staff consults with the clerk or chief deputy. If the issue requires judicial attention, it is referred to the clerk's panel with a recommendation.

3. 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 to panels by attorneys in the Clerk's Office.

Under the local rules, the court will consider motions to affirm or dismiss only on one of the following grounds: (1) the appeal is not within the jurisdiction of the court; (2) there is a supervening change of law; (3) the appeal is moot; (4) the appeal should be remanded for additional trial court or administrative proceedings; or (5) there is a motion from the government to enforce a plea waiver.

4. Emergency motions

Any motion that requests a ruling within 48 hours after filing must be plainly marked "EMERGENCY" and must be accompanied by a certificate stating (1) the reason or reasons the motion was not filed earlier; (2) the date the underlying order was entered; (3) the time and date the order becomes effective; and (4) the telephone numbers and e-mail addresses for all counsel of record and, where available, unrepresented parties. In immigration cases seeking a stay of removal or other emergency relief, the petitioner must attach to the motion a copy of the transcript from the immigration judge's ruling, if relevant, plus copies of the written rulings of the immigration judge and Board of Immigration Appeals.

IV. Nonargument Decision-Making Practices

Once briefs and other relevant papers are sent to a hearing panel, the judges and staff counsel receive 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 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 include (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; and (5) reassignment of the matter for oral argument.

V. Argument Panel Operations

A. Panel Composition, Sitting Schedules, and Panel Rotation

For orally argued cases, the length of time between filing the briefs and oral argument will vary depending on the type of case and the size of the court's backlog, if any. Criminal and other special cases receive priority. Parties who want to waive oral argument and submit the case on the briefs must file a motion at least 10 days before the scheduled argument.

The judges typically sit in panels of three and hear oral argument during regularly scheduled sessions of court, which take place in January, March, May, September, and November. If needed, shorter calendars are set in the off months, especially in the summer. Litigants may always seek emergency relief, however, by contacting the Clerk's Office. Generally, four panels sit for up to five days, and each panel hears five or six cases per day. Each active judge, other than the chief judge, may sit up to four days.

Each side is given 15 minutes for argument. Any extension of that argument time must be obtained from the court in advance of oral argument, and will be granted only in extraordinary cases. Counsel may divide the argument time as they agree, although some limitations are built in by the short time allowed for oral argument. The court does not favor divided arguments on behalf of a single party or multiple parties with the same interests.

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. Assignment of judges to hearing panels are made randomly using a software program developed by the court. The program the court uses to assign judges to panels equalizes the number of times judges sit with one another over a period of one year. Approximately 60 to 90 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 e-mails the proposed calendar, along with the entry of appearance form containing a certificate of interested parties, to each panel member. When the proposed calendar goes out, the clerk asks each judge to advise him or her within 7 to 10 days whether the parties or attorneys in the cases present any recusal or conflict issues. If conflicts are presented, the clerk makes the necessary adjustments, then publishes and circulates the final calendar.

C. Staff Role in Preparing Cases for the 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 Members' Identities

Attorneys may obtain the identities of panel members for a particular case beginning on the Monday prior to the week of oral argument. Those panel assignments are posted on the Tenth Circuit's website. Once panel members' identities 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 and Criteria for Publication

It is the court's policy that it need not write an extensive disposition in every appeal but may, in its discretion, use a terse judgment such as the one word "affirmed." Nevertheless, virtually all final dispositions of an appeal are in one of two forms: a published "opinion" or a not-for-publication "order and judgment." Pro se cases are usually handled by summary disposition.

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 means that the panel believes the case involves application of no new points of law that would make the decision of value as a precedent.

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. Published opinions may be authored by a particular judge or may be issued per curiam.

B. Criteria for Judgment Without Opinion

The court may dispose of an appeal or petition by way of an unpublished order and judgment. Disposition in the form of an order and judgment does not mean that the case is unimportant. It means the case does not require application of new points of law that would make the decision a valuable precedent.

C. Prefiling Circulation of Opinions

Nearly always, the court reserves judgment at the conclusion of oral argument. The judges confer promptly after completion of a day's calendar. If the presiding judge of the panel is in the tentative majority, that judge assigns the case to a panel member to prepare an opinion or order and judgment. A copy of a proposed disposition is circulated by the authoring judge to the members of the panel. If the disposition is designated as a published decision, it is also circulated to the entire court. After members of the panel have concurred or had an opportunity to prepare separate opinions, the disposition is filed with, and immediately released by, the clerk.

D. Citation of Unpublished Decisions

The citation of unpublished decisions is permitted to the full extent of the court's authority under the Federal Rules of Appellate Procedure. Unpublished decisions are not precedential, but may be cited for their persuasive value. They may also be cited under the doctrines of law of the case, claim preclusion, and issue preclusion. Citation to unpublished opinions must include an appropriate parenthetical notation.

If an unpublished decision cited in a brief or other pleading is not available in a publicly accessible electronic database, a copy of it must be attached to the document when it is filed and must be provided to all other counsel and pro se parties. Where possible, references to unpublished dispositions should include the appropriate electronic citation.

Parties may cite unpublished decisions issued prior to January 1, 2007, in the same manner and under the same circumstances as are allowed by Federal Rule of Appellate Procedure 32.1(a)(i) and Tenth Circuit Local Rule 32.1(A).

E. Availability of Unpublished Opinions

Not-for-publication orders and judgments are made available to the unofficial reporters that serve practitioners in specialized areas of law. In addition, all orders and judgments are available electronically through Lexis, Westlaw, and PACER.

VII. Rehearing and Rehearing En Banc Practice

A. Grounds for Grant of En Banc Rehearing

A request for en banc consideration is disfavored. The court grants en banc review only when necessary to maintain uniformity of the circuit's decisions, to comply with a U.S. Supreme Court ruling in conflict, or to consider an issue of exceptional importance.

Certain procedural and interim matters, such as stay orders, injunctions pending appeal, appointment of counsel, leave to appeal in forma pauperis, leave to appeal a non-final order, and leave for an abusive litigant to appeal are not matters subject to en banc consideration. The court will not entertain en banc requests with respect to these matters. Requests for reconsideration of panel determinations on such matters will be treated as petitions for rehearing to the judges or panel entering the order from which the request for reconsideration arises.

B. Treatment of Petitions for Rehearing En Banc

If a petition for rehearing does not request en banc consideration, it is circulated only to the panel of judges that decided the appeal, who then vote on the petition. If en banc consideration is sought by a party, the reference to the en banc request must appear on the cover page and in the title of the petition. Eighteen hard copies of the petition requesting en banc consideration must be filed in addition to the required electronic filing. A pro se party proceeding without prepayment of fees may file a paper original and three copies. Untimely en banc requests are transmitted to the full court only upon express order of the hearing panel.

In the exceptional instance when rehearing en banc is granted, the initial panel's judgment is vacated, the mandate is stayed, and the case is restored to the docket as a pending appeal, unless the court specifically orders otherwise. However, the entire panel opinion is not necessarily vacated. The rehearing may be limited to particular issues, or the en banc court may affirm, without a new opinion, parts of the panel decision already entered.

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 seems inconsistent with circuit precedent.

D. Process for Rehearing En Banc

Nondefective petitions for en banc consideration or reconsideration are distributed to each active judge on the court, plus any senior circuit judge, district judge, or visiting judge who sat on the original panel. Only active circuit judges have a vote on the en banc request, although a senior Tenth Circuit judge who was on the original panel may elect to hear the case if an en banc rehearing is granted. En banc hearing or rehearing will occur only if a majority of all the active circuit judges, except those recused in the case, vote to that effect. The court will not reconsider the denial of either an en banc petition or an en banc disposition.

E. Sanctions for Unmeritorious Petitions

If the court finds that a petition for rehearing or rehearing en banc is wholly without merit or was filed for the purpose of delay, the court may tax a sum of up to \$500, and may require counsel personally to pay the amount taxed to the opposing party.

F. Other Ways the Court Works to Avoid Conflict and Inconsistency

During the 10-day prefiling circulation of opinions for publication, nonpanel judges may direct 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

Within 14 days after filing the notice of appeal or motion for release, the party seeking relief must file a memorandum containing a statement of facts necessary for an understanding of the issues presented; the grounds for relief, including citation to relevant authorities; and a statement of the defendant's custodial status and reporting date if relevant. The court must be notified of any change in custodial status pending the review process.

The court prioritizes criminal appeals by seeking to reduce the length of time between filing the briefs and conducting oral argument. Specifically, the circuit hears most criminal appeals as soon as they are fully briefed. Joint briefing is encouraged, but not required, in criminal appeals involving more than one appellant or appellee. The court encourages the United States to file a consolidated brief whenever possible, though it is not required. A motion to file a consolidated brief may be granted even if the appeals are not consolidated. Every effort is made to set codefendants' appeals before the same panel.

When the court affirms a criminal conviction, bail usually will be revoked at the time the mandate issues but may be revoked sooner. A copy of the final judgment, a copy of the opinion of the court, and directions as to costs, if any, constitute the mandate.

B. Habeas Corpus Cases and Certificates of Appealability

In screening habeas corpus cases, the court considers a request for a certificate of appealability while also considering its 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, perhaps appoint counsel, and route the appeal to the argument or nonargument calendar. If the appellee declines to file a brief, the screening judge may grant the certificate and order one.

In most capital cases filed in the court, a stay of execution is already in place. If it is not, however, the habeas petitioner must file a separate statement advising the court of the date of the execution. This statement, which may be on a form provided by the district court, must certify the existence of a death sentence, state the execution date, and list any previous related cases in federal court and any related cases pending in any other court. The district court clerk must immediately notify the circuit court clerk of the statement's filing and forward a copy of the statement and the petition, with supporting documents, to the circuit court clerk.

The court does not require a separate request for a certificate of appealability in death penalty appeals. The notice of appeal constitutes a request addressed to the court of appeals. The issues should be addressed in the briefs. If the court denies a certificate of appealability, it can take no further action. If it grants a certificate of appealability, the court will grant a temporary stay of execution to prevent the appeal from becoming moot. Before a stay of execution is vacated or denied, the court will rule on the merits of the appeal. All other Tenth Circuit rules apply in death penalty cases unless they are inconsistent with Local Rule 22.2.

IX. Special Procedures for Pro Se Cases

Most pro se cases are decided by 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.

Pro se litigants may file documents in paper form. In a given case, however, a pro se party who is the named appellant, petitioner, respondent, or appellee may seek permission to file using the court's electronic system. Pro se litigants seeking permission to submit documents via ECF should first file a motion for permission in hard copy form at the earliest opportunity. The motion should be filed in the proceeding in which the party seeks to file. If approved, the pro se filer will be authorized to submit documents via ECF in that matter only.

Pro se parties are not required to file a designation of record for transmission by the district court clerk to the circuit court clerk.

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

A. The PLRA's Filing Fee Provisions and In Forma Pauperis Status

All prisoners filing civil actions or appeals must pay the full amount of the filing fee. 28 U.S.C. § 1915(b)(1). Consequently, if a prisoner tenders no filing fee, or less than the full fee, when a notice of appeal is filed, the district court will 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 will 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 pleading was submitted to the district court. The appeal should be processed and submitted to the court in the normal course, as required by Federal Rule of Appellate Procedure 3(d). The appellate court does not need to wait for the district court's determination of the prisoner's eligibility for paying less than the full filing fee. When the district court makes its determination, it will enter an order and send a copy to the circuit court. If the in forma pauperis application reveals that the prisoner has no assets and no means to pay an initial partial fee, the district court's determination order must reflect that finding. 28 U.S.C. § 1915(b)(4).

If the appellant is able to pay the filing fee, the appellant must authorize the custodian to deduct payments from his or her institutional account, and the custodian will pay the assessment. Notice will be given to the court if the prisoner does not provide the information required under the PLRA or does not authorize payment from his or her institutional account. Filing fee payments must be made to the clerk of the district court pursuant to Federal Rule of Appellate Procedure 3(e).

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 an as needed basis.

XI. Bankruptcy Appellate Panel (BAP)

A. General Information

The nine BAP judges sit in three-judge panels and hear appeals from the decisions of the bankruptcy courts in the Tenth Circuit. Currently, all districts in the Tenth Circuit participate in the BAP. As in other circuits, appeals to the BAP require the consent of all parties to the appeal; otherwise, the appeal will be transferred to the appropriate United States district court. An appellant files an election with the bankruptcy court, and the appellee files an election with the BAP. Appeals from decisions by either the BAP or a district court are taken directly to the U.S. Court of Appeals for the Tenth Circuit.

The principal office of the clerk of the BAP is located in Denver, Colorado. The personnel for the BAP Clerk's Office are the clerk of the BAP, a staff attorney, and a deputy clerk. Staffing for the BAP Clerk's Office is based on projected caseload and is subject to the same reduced staffing level as other federal appellate court units.

B. Intake

The BAP does not require a completed record on appeal to process an appeal, and consequently, appeals to the BAP are transmitted by bankruptcy courts earlier than appeals to the district court. Generally, the BAP processes an appeal and assigns a case number on the same day that a notice of appeal is filed in the bankruptcy court. The BAP provides briefing deadlines as soon as an appeal is processed so that the case can proceed quickly, and the BAP monitors deadlines to ensure that the appeal is being prosecuted.

Separate notices of appeal, together with the prescribed fee, are required with respect to each order being appealed. Parties may not seek review of multiple orders using a single notice of appeal.

All parties, other than governmental parties, must file a Statement of Interested Parties, disclosing by name any interested party who is not listed in the notice of appeal; the names of any parent corporation and any publically held corporation that owns, directly or indirectly, 10 percent or more of the equity interest in a party that is a corporation; the names of any prior attorneys who have not yet entered an appearance; and any generic descriptions. An interested party includes all parties that have a financial interest in the outcome of the appeal. If there are no interested parties, a statement to that effect must be filed. The Entry of Appearance, Statement of Interested Parties, and Statement Regarding Oral Argument may be combined into one document.

When a notice of appeal is filed, the bankruptcy court clerk docket the notice of appeal, serves a copy on all parties identified in the notice of appeal, and notifies the BAP clerk of the filing of the notice of appeal. The BAP clerk must also be notified by the bankruptcy court clerk of the filing of any motion to extend time to file the notice of appeal and the order disposing of the motion; any post-judgment motion regarding the appealed judgment or order and the order disposing of the motion; and any elections. This notice constitutes “transmission of the record” for the purpose of complying with the Federal Bankruptcy Rules.

C. Electronic Case Filing, Briefing, and Motions Practice

1. Electronic case filing

The BAP has adopted mandatory electronic case filing. Procedures and guidance for filing electronically and system requirements are posted on the court’s website. For those individuals who are exempt from mandatory electronic filing, the BAP accepts filings for all papers by hand delivery, mail, fax, and e-mail, and a paper is considered timely filed if it is received before 12:00 midnight (Mountain Time) on the date the paper is due.

2. Briefing practice

The requirements for a brief are given in the federal rules and BAP Local Rule 8010-1. The appellant’s opening brief is due 45 days from the date of the notice that the appeal has been docketed with the BAP.

The appendix must be filed separately from the briefs. The appendix must be consecutively paginated and must have a table of contents with the page number on which each item appears. When more than one party files an appendix, the parties should avoid including items already incorporated in a previous appendix and should incorporate those items by reference.

Copies of documents filed under seal with the bankruptcy court should be filed in paper form in an addendum separate from the appendix, accompanied by a motion to place the addendum under seal with the court.

3. Motions practice

The requirements for motions practice are given in the federal rules and BAP Local Rule 8011-1. Generally, a party is allowed seven days to respond to a motion, but the court may shorten or extend this period. The movant may file a reply to a response within seven days after service of the response.

If a party filing a motion or responding to a motion has not yet filed its Statement of Interested Parties as required by the local rules, the motion or response must be accompanied by a Statement of Interested Parties.

Before filing an emergency motion, the moving party must give the clerk of the BAP as much advance notice as possible. The motion should be filed with the BAP and served on opposing counsel by the quickest method available. An emergency motion must be accompanied by an appendix containing a copy of (1) the notice of appeal, (2) the order or judgment appealed, and (3) any other paper filed with the bankruptcy court that is necessary to decide the motion.

The BAP will consider only one motion for rehearing from each party to the appeal.

D. Argument Panel Operations

The BAP generally allows oral argument when a party requests it. The Statement Regarding Oral Argument, indicating whether a party is requesting oral argument, must be filed within 14 days after the date of the notice that the appeal has been docketed with the court. A party may amend its request no later than the filing of its initial brief.

The BAP schedules appeals for oral argument after considering the length of time a case has been ready for argument, the number of appeals requesting oral argument from a district, and panel judge assignment. To the extent practicable, the BAP schedules oral argument in the district in which the appeal arose, and the appeal will be placed on the first available calendar for that district. The BAP also allows argument by telephone conference or videoconference.

When a case is placed on an oral argument calendar, the BAP sends all parties a Notice of Oral Argument, giving the time and place of the scheduled argument. The Notice of Oral Argument also includes an Oral Argument Acknowledgment Form. Each attorney or unrepresented party is required to sign and return this form to the BAP clerk within 14 days, indicating whether the attorney or party intends to appear for oral argument or to arrange for another attorney to appear in his or her place. Any party who does not file the required statement may not participate in oral argument without leave of court. After the Notice of Oral Argument is issued, the date or place of the argument will not be changed without leave of the court.

A BAP judge may not hear an appeal originating in his or her own district, and may elect not to hear an appeal from a district in which the judge has assisted. In addition to this restriction, panel judges from the Eastern and Northern Districts of Oklahoma may not be assigned to a case arising in those districts.

Argument time is limited to 15 minutes for the appellant and 15 minutes for the appellee, but may be reduced or expanded by the court at the time of the hearing.

E. Panel Review

BAP appeals are generally resolved within an average of less than 60 days from the time the appeal is submitted to a panel to the time that a decision is entered. The average time from the filing of the notice of appeal to the entry of decision is approximately 160 days.

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United States Court of Appeals for the Eleventh Circuit

I. General Information

The Eleventh Circuit encompasses nine districts in Alabama, Florida, and Georgia. The Eleventh Circuit Court of Appeals is headquartered in Atlanta, Georgia, but panels also hear appeals in Jacksonville, Florida; Miami, Florida; Montgomery, Alabama; and occasionally in any other location that has adequate facilities.

The court has 12 authorized judgeships. In the 12-month period ending September 30, 2010, the court had 5 sitting senior judges and 4.7 vacant judgeship months.

A. Judges and Panels

1. *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.

2. *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

1. *Staff attorneys' office*

The staff attorneys' office consists of a central legal staff, which serves the court at large rather than individual judges. The principal task of the office is to assist in the disposition of appeals through the preparation of legal memoranda. The types of cases the office presently handles include (1) direct criminal appeals involving sentencing guidelines and guilt or innocence issues; (2) all pro se appeals, including collateral attacks on criminal convictions by state and federal prisoners, and civil rights suits under 42 U.S.C. § 1983; (3) employment discrimination cases; (4) immigration cases; and (5) social security appeals.

There are also three specialized units within the office. The Jurisdiction Unit assists the court in the initial review of all appeals filed for the purpose of determining appellate jurisdiction. The Issue Tracking Unit tracks and catalogs relevant legal issues. The Motions Unit processes certain substantive motions, including those for in forma pauperis status; certificates of appealability for 28 U.S.C. §§ 2254 and 2255 appeals; transcripts at government expense; and motions to appoint, withdraw, or substitute counsel.

2. *Circuit mediation office (The Kinnard Mediation Center)*

The court employs five mediators. They are full-time court employees with extensive trial and appellate experience, as well as extensive experience in negotiation, mediation,

and Eleventh Circuit practice and procedure. The circuit mediators are located in Atlanta and Miami. *See infra* section II.C.

II. Intake, Screening, and Settlement Programs

A. Intake

1. Information provided by attorneys

A Civil Appeal Statement (CAS) must be filed within 14 days of the date that a civil appeal is docketed. A CAS is required in all counseled civil cases, including actions seeking review of administrative agency orders. No CAS is required in cases involving a criminal appeal, a pro se or incarcerated appellant or petitioner, an immigration appeal, or an appeal from a habeas corpus action filed under 28 U.S.C. §§ 2241, 2254, or 2255.

2. Information provided to attorneys

When the appeal is docketed in the court of appeals, parties are provided with a notice advising them of the court of appeals docket number and any deadlines applicable at the time of docketing. The initial notice may provide the parties with the briefing schedule if all necessary transcripts are on file at the time of docketing. If the appeal is not ready for briefing at the time of docketing, a subsequent notice of briefing schedule will be provided to the parties. When an opinion is issued, the parties are advised of the rules pertaining to rehearing, attorneys' fees, and the mandate, as well as whether costs have been assessed.

B. Screening

1. Screening for jurisdiction

If, upon review of the district court docket entries, order and/or judgment appealed from, and the notice of appeal, it appears that the court may lack jurisdiction over the appeal, the court may request that counsel and pro se parties advise the court in writing of their position with respect to the jurisdictional questions raised. The presence of a jurisdictional question does not stay the time for filing the appellant's brief. The due date for filing the appellee's brief will be postponed until the court determines whether and how the appeal should proceed. If the court permits the appeal to proceed, a new due date will be set for filing the appellee's brief.

2. Screening for argument vs. nonargument disposition

In their briefs, 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.

Although a decision without oral argument generally must be unanimous, if parties have stipulated to waive oral argument, a unanimous opinion is not necessary. However, any judge of the screening or 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.

Currently, attorneys in the staff attorneys' office write screening memoranda on all direct criminal appeals (including motions to withdraw as counsel pursuant to *Anders v.*

California) and social security appeals except those directed to the oral argument calendar, counseled habeas corpus cases, federal motions to vacate sentence, employment discrimination cases, immigration cases appealing decisions of the Board of Immigration Appeals, and all pro se cases. The staff attorneys' office sends the memorandum, via the Clerk's Office and electronically to the initiating judge, who writes an 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 pro se mandamus petitions. The staff attorney prepares a memorandum to the court that addresses the issues raised by the petitioner, states the result of the investigation or examination, and recommends disposition.

3. 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 15 minutes per side or 30 minutes per side for oral argument.

C. Mediation Resource

1. Kinnard Mediation Center (KMC)

The court offers the parties and their counsel a confidential, risk-free opportunity to evaluate their case with an informed, neutral mediator.

The KMC (formerly known as the Circuit Mediation Office) helps to explore possibilities for voluntary settlement and narrow and refine the issues on appeal as much as possible, and it assists in the resolution of any procedural issues. Most civil cases are eligible for mediation. Parties may confidentially request mediation in eligible cases; otherwise, KMC staff schedule mediation conferences in most of the eligible appeals. In addition, hearing panels may refer cases to the KMC for mediation either before or after oral argument. Once the KMC schedules mediation, participation is generally mandatory; however, a party may request that the KMC remove a case from mediation. The court's circuit mediators conduct the mediation conferences at KMC locations in Atlanta, Miami, or Tampa.

2. Mediation participation

By authority of the court, an active or senior judge of the court of appeals, a panel of judges (either before or after oral argument), or the KMC may direct counsel and parties in an appeal to participate in mediation conducted by the court's circuit mediators. Parties may also confidentially request mediation. Mediations are official court proceedings, and the KMC circuit mediators act on behalf of the court.

3. Mediation sessions

Mediation sessions are customarily held in person at a KMC location, but are sometimes conducted by telephone. All participants (e.g., counsel, client, representative, insurer) must be available in person or via telephone throughout the mediation process, except as waived by the mediator in advance of the mediation date. Should waiver of party availability be granted by the mediator, counsel must have the authority to respond to settle-

ment proposals. The mediator may require the physical presence of the party at an in-person mediation or the telephone participation of the party in a telephone mediation.

If a party is a governmental or other entity for which settlement decisions must be made collectively, the availability, presence, or participation requirement may be satisfied by a representative authorized to negotiate on behalf of that entity and to make recommendations to it concerning settlement.

A judge who participates in the mediation or becomes involved in the settlement discussions will not sit on a judicial panel that deals with that appeal.

Communications from and relating to the mediation are confidential and are not disclosed during any proceeding before any court or adjudicative body. Such communications are also not disclosed to anyone not involved in the mediation or otherwise not entitled to be kept informed about the mediation unless the written consent of each mediation participant is obtained. Counsel's motions, briefs, or argument to the court do not contain any reference to the KMC.

The court requires, except as waived by the circuit mediator, that counsel in appeals selected for mediation send a confidential mediation statement assessing the appeal to the KMC before the mediation. The KMC will not share the confidential mediation statement with the other side, and it will not become part of the court file.

III. Electronic Case Filing, Briefing, and Motions Practice

A. Electronic Case Filing

In January 2012, the Eleventh Circuit implemented voluntary electronic filing (CM/ECF), except as otherwise required by circuit rule or the *Eleventh Circuit Guide to Voluntary Electronic Filing* (<http://www.ca11.uscourts.gov/documents/pdfs/GO 37.pdf>).

No unrepresented party may file electronically; unrepresented parties must submit documents in paper format. The clerk will scan such documents into the ECF system, and the electronic version scanned by the clerk will constitute the official record of the court as reflected on its docket.

B. Briefing

In general, the appellant must serve and file a brief within 40 days after the date on which the record is deemed filed. The time for filing an appellant's brief begins on the date the court reporter files the transcript, or, if no transcript is prepared or all necessary transcripts are on file, the date that the appeal is docketed in the court of appeals. The appellee must then serve and file a brief within 30 days after service of the last appellant's brief. The appellant may serve and file a reply brief within 14 days after service of the last appellee's brief. *See* 11th Cir. R. 31-1.

Eleventh Circuit Rule 31-1(b) contains a list of motions (such as transcripts at government expense, appointment of counsel) the filing of which may affect the briefing schedule set forth in Rule 31-1. If any of those motions are pending in either the district court or the court of appeals at the time the appeal is docketed or thereafter, the time for briefing is stayed pending resolution of the motion.

In lieu of the appendix identified in Federal Rule of Appellate Procedure 30, the court requires that the parties file record excerpts as set forth in 11th Cir. R. 30-1 and 30-2. As of July 2011, cases originating from district courts in the Northern, Middle, and Southern

Districts of Alabama; the Middle District of Georgia; and the Northern District of Florida are part of the court's Electronic Records on Appeal (EROA) program. In those cases, the parties are required to file expanded record excerpts. The instructions for preparing the expanded record excerpts are available on the court's website at <http://www.ca11.uscourts.gov/eroa/index.php>.

C. Motions Practice

1. Composition and operation of motions panels

Before a merits panel is assigned, motions requiring decision are presented to single judges or motions panels (depending on the motion) randomly assigned from the administrative motions log. Composition of these motions panels is changed at the beginning of each court year in October and after a change in the court's membership.

In matters requiring panel action, the papers are sent to the first judge (initiating judge), who will transmit them to the second judge with a recommendation. The second judge, in turn, sends them along with a recommendation to the third judge, who returns the file and an appropriate order to the clerk.

After an appeal is assigned to a nonargument or oral argument calendar, motions in that appeal are circulated to that panel rather than to an administrative motions panel.

Motions panels decide motions without hearing argument except in unusual circumstances.

2. Procedural motions

The clerk is authorized, subject to review by the court, to act for the court on a number of unopposed procedural motions (e.g., to extend time for filing briefs, to supplement or correct records) and on certain opposed procedural motions listed in 11th Cir. R. 27-1(c).

3. Substantive motions

A single judge may, subject to review by the court, act on any request for relief that may be sought by motion, except to dismiss or otherwise determine an appeal or other proceeding. Two-judge panels may act on specified motions as determined by the court.

4. Emergency motions

Emergency motions, whether addressed to the court or an individual judge, must be filed with the clerk and not with an individual judge. To expedite consideration of a motion by the court in a genuine emergency, counsel are encouraged to notify the Clerk's Office by telephone of the anticipated filing and to describe the emergency. Emergency motions are assigned to panels in rotation from a separate emergency routing log. The papers are forwarded to all panel members simultaneously.

IV. Nonargument Decision-Making Practices

When the last brief is filed, an appeal is sent to the staff attorneys' office for prescreening classification. If the staff attorney is of the opinion that the appeal does not warrant oral argument, a brief memorandum is prepared and the appeal is returned to the clerk for routing to one of the court's active judges. In appeals involving multiple parties, the staff attorney may recommend that only some parties be heard on oral argument. If the judge

agrees that the appeal does not warrant oral argument, he or she forwards the briefs and a proposed opinion to the two other judges on the panel.

If a party requests oral argument, all panel judges must concur that the appeal of that party warrants oral argument, and there may be no special concurrence or dissent. If a party does not request oral argument, all panel judges must concur that the appeal of that party does not warrant oral argument.

In other appeals, when oral argument is requested by a party and the staff attorney is of the opinion that oral argument should be heard, the staff attorney may recommend that an appeal be assigned to the oral argument calendar, subject to later review by the assigned oral argument panel.

If a determination is made that oral argument should be heard, the appeal is placed on the next appropriate calendar, consistent with the court's calendaring priorities. At that time a determination of the oral argument time to be allotted to each side is made.

V. Argument Panel Operations

A. Panel Composition, Sitting Schedule, and Panel Rotation

To ensure complete objectivity in assigning cases, the names of the active judges for the sessions of the court are drawn by lot for the entire court year. The circuit executive and a scheduling committee of active judges take into account a fixed number of available weeks for each active judge and the available sittings for the court's senior judges, visiting circuit judges, and visiting district judges to determine a sitting schedule.

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 up to 22 appeals, with up to 6 cases scheduled per day. To the extent possible, cases assigned to an oral argument calendar are selected from the area in which the session is to be held.

Court policy allows up to 15 minutes of oral argument per side in most cases. For more complex cases and capital cases, the court allows 30 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 six weeks 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 equal number of different types of litigation for consideration.

C. Staff Role in Preparing Cases for the 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 copies of the briefs for the appeals on the calendar. The judges read the briefs prior to oral argument.

E. Disclosure of Panel Members' Identities

The Clerk's Office may disclose the names of the panel members for a particular session two weeks in advance of the session, or earlier if an exception is granted by the court. At the time the clerk issues a calendar assigning an appeal to a specific day of oral argument, the clerk will advise counsel of when the Clerk's Office may be contacted to learn the identity of the panel members.

VI. Opinion Preparation and Publication

A. Types of Dispositions and Criteria for Publication

The court usually disposes of appeals on the merits with unpublished or published opinions. The policy of the court is that the unlimited proliferation of published opinions is undesirable because it tends to impair the development of a cohesive body of law. The basic policy of the court is to exercise resourcefulness in fashioning new methods for increasing judicial efficiency and reducing the volume of published opinions. Judges of the court will exercise appropriate discipline to reduce the length of opinions by using techniques that will result in brevity without sacrificing quality.

A majority of the panel determine whether an opinion should be published. Opinions that the panel believes have no precedential value are not published.

B. 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.

C. Citation of Unpublished Opinions

Although unpublished opinions may be cited as persuasive authority, they are not considered binding precedent. If the text of a cited unpublished opinion is not available on the Internet, a copy of the unpublished opinion must be attached to or incorporated within the brief, petition, motion, or response in which the citation is made. The court will not give the unpublished opinion of another circuit more weight than the opinion is to be given in that circuit under its own rules.

The court generally does not cite its "unpublished" opinions because they are not binding precedent. The court may cite them when they are specifically relevant in determining whether the predicates for res judicata, collateral estoppel, or double jeopardy exist in the case; in ascertaining the law of the case; or in establishing the procedural history or facts of the case.

D. Availability of Unpublished Opinions

The Eleventh Circuit posts all opinions (published and unpublished) on its website at <http://www.ca11.uscourts.gov>.

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. Alleged errors in a panel's determination of state law, or in the facts of the case, or errors asserted in the panel's misapplication of correct precedent to the case are matters for rehearing before the panel but not for en banc consideration.

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 rehearing en banc. However, a petition for rehearing is not treated as a petition for rehearing en banc.

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 without full court action.

C. Independent Action by the Court

Any judge on the panel or any active judge of this court may suggest an en banc rehearing by submitting a letter to the chief judge, and copies to the other active and senior judges of the court and any other panel member.

D. Process for Rehearing En Banc

A party may not respond to a petition unless requested to do so by the court. A grant of a petition for rehearing en banc vacates the panel opinion and stays the mandate.

When rehearing en banc is granted, appeal managers are appointed. The appeal managers include the judge of the authored panel opinion, the judge who requested an en banc rehearing, and a judge who dissented from or specially concurred in the panel opinion, if they are active circuit judges of this court. The chief judge may also designate other active circuit judges as appeal managers.

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

1. Certificates of appealability

Consistent with Rule 11(a) of the rules governing proceedings under 28 U.S.C. § 2254 or § 2255, the district court “must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Prior to issuing its final order, the district court may “direct the parties to submit arguments on whether a certificate should issue.” If the

district court denies the applicant a certificate of appealability, the applicant must appeal the district court's final order and must apply to the court of appeals for such a certificate within the context of that appeal.

An application to the court of appeals for a certificate of appealability may be considered by a single circuit judge. The denial of a certificate may be the subject of a motion for reconsideration but not the subject of a petition for panel rehearing or a petition for rehearing en banc.

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 the Antiterrorism Effective Death Penalty Act (AEDPA) and issues identification or 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 30 days of filing. In the course of drafting screening memoranda, the staff attorneys' office also reviews for exhaustion, for 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 a motion to vacate, set aside, or correct sentence must use the appropriate form provided by the clerk of court, except in a capital case.

2. 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 prior to oral argument will be replaced on the panel. Capital cases are specially scheduled for oral argument and not placed on regular oral argument calendars. The Clerk's Office has a full-time capital case team, which is responsible for all case-processing duties in capital cases.

IX. Special Procedures for Pro Se Cases

When a pro se brings any habeas corpus action, counsel will normally be appointed before the case is calendared for oral argument.

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

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.

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United States Court of Appeals for the Federal Circuit

I. General Information

The Federal Circuit has jurisdiction over certain types of cases, such as international trade, government contracts, patents, trademarks, and select monetary claims against the United States government.

The court's panels hear cases mostly in Washington, D.C., but also in other cities on occasion (e.g., Detroit, Pasadena, and San Francisco). The 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. The court has 12 authorized judgeships. For the 12-month period ending September 30, 2011, it had 17 judges.

A. Judges and Panels

1. Orientation and assignments for new judges

Orientation programs offered by the Administrative Office of the U.S. Courts (AO) and the Federal Judicial Center (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.

2. Visiting judges

In recent years, the court has had visiting judges from throughout the judicial system assist the court in conducting its business. The court welcomes the varied viewpoints, experiences, ideas, and information these judges offer.

3. Panels

In addition to merits panels (which consider briefs; hear oral argument, if any; decide the case; and render appropriate opinions), the court also has regular motions panels. Each month, the chief judge appoints a three-judge motions panel and designates a lead judge.

B. Central Staff

1. Office of General Counsel (OGC)

The Office of General Counsel is responsible for assisting the court with the disposition of motions filed before a case is assigned to a merits panel. The OGC is also responsible for providing comments regarding possible conflict or confusion in circulated precedential opinions when a judge requests comments. In addition, the OGC is responsible for memoranda in cases that are being heard by the court en banc.

2. Office of General Counsel staff

The Office of General Counsel consists of eight attorney positions and two secretarial staff positions. Most of the attorneys have degrees in science or engineering and are registered to practice before the U.S. Patent and Trademark Office.

II. Intake, Screening, and Settlement Programs

A. Intake

1. Information provided by attorneys

a. All cases

A party who has a legal right to appeal a decision from a district court to a court of appeals must file a notice of appeal with the district court within the time set forth in Federal Rule of Appellate Procedure 4. Only the party who files a notice of appeal may challenge all or any part of the trial court judgment. At the time of filing the notice of appeal, the party must submit the number of copies required by Federal Rule of Appellate Procedure 3(d).

An attorney representing the party on appeal must file a completed appeal information sheet with the district court.

b. Administrative agency appeals

In an appeal arising from a U.S. Patent and Trademark Office 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. For all other agencies, the appellant must file a notice of appeal or petition for review and must pay the filing fee. All attorneys must become members of the bar of the court and file an entry of appearance and certificate of interest.

2. Information provided to attorneys

When an appeal is docketed, all attorneys and pro se litigants are provided with a docketing packet, which includes the notice of docketing, rules of practice, admission form (counsel only), and entry of appearance form, and in Merit Systems Protection Board cases, a discrimination waiver form.

B. Screening

1. 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.

2. Screening for argument vs. nonargument disposition

The court staff does not screen cases for argument or nonargument disposition. All counseled cases are automatically scheduled for oral argument, unless the court finds that the appeal is frivolous, the dispositive issues have already been decided, or the process wouldn't be significantly aided by oral argument.

3. Screening for case weighting or issue tracking

The court does not assign case weights or track pending issues.

C. Mediation Program

The Federal Circuit initiated a mediation program in October 2005. All counseled cases are eligible for the mediation program. Participation in the court's mediation program is mandatory for all cases selected for participation in the program that were docketed after

September 18, 2006. The circuit mediation officers contact the principal counsel in each case to determine if the case is a good candidate for mediation. If at the outset, mediation officers determine that mediation would not be fruitful, then mediation efforts cease. Counsel may jointly request that a case be included in the mediation program.

There is a chief circuit mediator and a circuit mediation officer, who administers the program. There are also approximately 15 volunteer mediators. These volunteer mediators are not currently practicing law, but may be associated with a firm and must recuse themselves if a conflict arises.

The representative who attends the meeting must have the power to make independent decisions and be able to settle the case. This requirement may be waived or modified only if the circuit mediation officers concur and the circumstances dictate.

In calendar year 2010, statistics provided by the Circuit Mediation Office show that 36 appeals were settled (30 patent and 6 nonpatent) via mediation. In addition, the office reported an overall success rate of 43% of appeals selected for mediation, specifically, 41% for patent and 60% for nonpatent.

III. Electronic Case Filing, Briefing, and Motions Practice

A. Electronic Case Filing

Currently, the court only permits parties to file paper briefs and appendices. In May 2012, the court will implement mandatory electronic filing (CM/ECF) for attorney filers.

The Federal Circuit utilizes PACER (Public Access to Court Electronic Records) for electronic filing and docketing.

B. Briefing

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.

To aid filers, the Federal Circuit has published a "Top Ten Reasons Why Briefs Are Rejected" checklist, which can be found on its website at <http://www.cafc.uscourts.gov/top-tens/top-ten-reasons-why-briefs-are-rejected.html>.

C. Motions Practice

1. Composition and operation of motions panels

Each month, the chief judge appoints a three-judge motions panel and designates a lead judge.

After a motion is filed, the Clerk's Office stamps the motion as "received" and reviews the motion for compliance with the court's rules, primarily Federal Rule of Appellate Procedure 27 and Federal Circuit Rule 27. If the motion is in substantial compliance, the motion is "filed." If the motion requests relief that may be granted by the clerk, then the clerk may grant the motion or may refer it to the Office of General Counsel. Examples of motions that a clerk may grant or deny include procedural motions and unopposed nonprocedural motions. See Federal Circuit Rule 27(h) for further information on the clerk's authority to grant motions. Even if the clerk is authorized to act on a particular motion, the clerk may refer the matter to a judge or panel, or may defer the matter to the

merits panel. 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.

For motions that require action of a judge or panel and are filed before a case is scheduled on a calendar, the Office of General Counsel prepares orders for signature of the clerk or a judge. The Office of General Counsel is responsible for assisting the motions panel in processing such motions. After the appeal has been calendared, the clerk refers all motions to all members of the merits panel.

If the motion is transmitted to the Office of General Counsel, then that office prepares an order. Each month, one judge serves as the lead motions judge. Certain motions may be resolved solely by the lead motions judge, and others require disposition by a panel of judges. The order is reviewed, signed, filed, and processed by the court. A copy is mailed to each pro se party or to the principal counsel. If immediate action is required as a result of the order, the principal attorneys may be called (see Practice Note to Federal Circuit Rule 27). Summaries of orders are also entered in the court's PACER system daily.

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 11 or 12 active judges. Thus, each active judge serves as lead judge about one month per year and sits as a panel member on approximately two other monthly panels per 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 Office of General Counsel, which in turn presents them to the motions panel.

2. 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. The Office of General Counsel presents emergency motions promptly to the lead judge, who elects to decide the motion alone or to obtain a decision by the motions panel.

3. Special topics or problems regarding motions

To aid filers, the Federal Circuit has published a "Top Ten Reasons Why Motions Are Rejected" checklist, which is available on its website at <http://www.ca9.uscourts.gov/top-tens/top-ten-reasons-why-motions-are-rejected.html>.

IV. Nonargument Decision-Making Practices

Cases in which the petitioner or appellant is proceeding pro se are automatically scheduled for submission on the briefs, not for oral argument. However, a pro se party, or any party in a case in which oral argument is not initially scheduled, may move for oral argument and, if one judge agrees, oral argument will be allowed. These submitted cases are assigned to a merits panel, which also hears argued cases. The briefs of all panel cases, both argued and nonargued, are sent to the panel members as early as possible. 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.

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 usually are 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 five to six weeks in advance of the session. Parties generally are allotted 15 minutes per side for argument. Thirty minutes per side is the maximum allotment.

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 sometimes assigned to the panel that decided the earlier appeal or petition. A case that is remanded by the Supreme Court is referred to the panel or to the en banc court that previously decided the matter, subject to the circumstances provided by the court's Internal Operating Procedure #15.

Cases in which the appellant is proceeding pro se (most frequently Merit Systems Protection Board cases) are not argued, 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 Preparing Cases for the Argument Calendar

The central staff has no role in preparing cases for the argument calendar.

D. Judicial Preparation for Argument: Materials and Timing

Each judge prepares individually for oral argument. Briefs, records, and other case-related materials are distributed to the merits panel as early as possible before the hearing date. The court's policy is that briefs will be read by each of the panel judges before oral argument.

It is the court's policy that 15 minutes per side be the normal time allocation for oral argument, and that 30 minutes per side be the maximum time allocation. A judge in disagreement with the normal time allocation will inform the presiding judge. In a case that initially has been designated for no oral argument, oral argument will be held on the request of one member of a panel. The presiding judge will notify the clerk of any change in the time allocation, no later than seven days prior to the date of argument, to enable the clerk to notify counsel well before the first day of the panel session.

E. Disclosure of Panel Members' Identities

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 and Criteria for Publication

Dispositions of appeals may be announced in a precedential opinion, nonprecedential opinion, or judgment of affirmance without opinion under Federal Circuit Rule 36. Dispositions of motions and petitions are announced in precedential or nonprecedential orders.

The court uses the terms *precedential* and *nonprecedential*. It does not use *published* and *nonpublished*. The court's view is that the current heavy 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 that 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 the following:

- the case is a test case;
- an issue of first impression is treated;
- a new rule of law is established, or an existing rule of law is criticized, clarified, altered, or modified;
- an existing rule of law is applied to facts significantly different from those to which that rule has previously been applied;
- an actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued;
- a significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case, is set forth; or
- a new interpretation of a Supreme Court decision, or of a statute, is set forth.

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.⁵⁵

Rule 36 affirmances are generally not issued in nonargued cases. They are used in cases in which, for example, the Board of Contract Appeals (BCA) has applied settled law to complicated facts. The court uses Rule 36 affirmances less than it once did, but

⁵⁵ Federal Circuit Rule 36.

adheres to the belief that Rule 36 affirmances may be appropriate when the court has heard oral argument.

C. Prefiling Circulation of Opinions

When a nonprecedential opinion is approved by a majority of the panel and all panel votes are in, the authoring judge sends the opinion and any concurring or dissenting opinions to the administrative services office, which copies the materials and delivers them to the clerk for issuance.

In contrast, after all panel votes are in on a precedential opinion or order, the opinion is circulated to all active and senior judges for comment. A copy also is sent to the Office of General Counsel, at the discretion of the authoring judge, for comment on any appearance of confusion or conflict between the language in the opinion and that in earlier opinions of the court or its predecessor courts.

D. Citation of Unpublished Opinions

Nonprecedential opinions and orders and Rule 36 judgments may not be used or cited as precedent, except where necessary to support assertions of *res judicata*, collateral estoppel, or law of the case, and must include a notice regarding their nonprecedential effect.

E. Availability of Unpublished Opinions

The court's nonprecedential opinions, like its precedential ones, are available on the court's website, as well as from commercial services.

F. Miscellaneous Opinion and Publication Issues

A request by a panel member, or a motion from a party, seeking reissuance of a nonprecedential opinion or order as a precedential disposition, will only be granted by a unanimous vote of the judges on the merits or motions panel that decided the case or matter. If such a request or motion is granted, the author of the opinion will revise it appropriately.

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 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; and (4) the initiation, continuation, or resolution of a conflict with another circuit.

B. Treatment of Petitions for Rehearing En Banc

1. 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 not vote. 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 request a response from the nonpetitioning parties before the voting deadline. The new voting deadline is 7 working days (14 working days during the summer session) after distribution of the response. If the nonpetitioning party declines to file a response, the new voting deadline is 7 working days after the clerk distributes a routing slip indicating that no response will be filed.

A panel member who desires action on the petition marks the vote sheet and transmits it to the clerk, with copies for the other panel members and any memorandum of reasons attached. If the vote of the panel is to grant the petition, the clerk issues an order granting the petition for panel rehearing fashioned to fit the circumstances.

2. 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.

3. Combined petition for panel rehearing and rehearing en banc

If a party files a combined petition for rehearing and rehearing en banc, the petition is distributed first to the panel to be decided in the same manner as a petition for panel rehearing without an accompanying petition for rehearing en banc. 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 Office of General Counsel 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 Prison Litigation Reform Act. (See *infra* section X.)

There are no special procedures in nonprisoner pro se cases; however, the court provides a pro se guide to assist 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. However, the Federal Circuit Bar Association provides pro bono representation in selected cases before the Federal Circuit.

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

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.