Deciding Cases Without Argument: A Description of Procedures in the Courts of Appeals

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DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS

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I. INTRODUCTION

Recent increases in appellate case filings have required a number of changes in traditional federal appellate practice. One of the most notable changes has been a growing limitation on the opportunity for oral argument.[1] Few federal courts of appeals are able to schedule each case for prompt oral argument. To avoid excessive delay in deciding cases, some courts have adopted screening programs to identify and decide separately cases that do not require oral argument. Although such practices are intended to preserve the opportunity for oral argument when it will inform the deliberations of the court, concern has been expressed that the federal courts of appeals are slipping toward a "paper process" that is less visible and less open to clarification when misunderstandings occur.[2]

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1. Other significant changes in appellate court practice include greater reliance on central legal staffs and limitations on the publication of opinions. For a discussion of the use of central legal staff, see D. Meador, Appellate Courts: Staff and Process in the Crisis of Volume (1974), and Ubell, *Report on Central Staff Attorneys' Offices in the United States Courts of Appeals*, 87 F.R.D. 253 (1980). For a discussion of publication practices, see D. Stienstra, Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals (Federal Judicial Center 1985).

2. Meador, *Orality and Visibility in the Appellate Process*, 42 Md. L. Rev. 732 (1983). *See also* P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal 16-24 (1976).

Clarification of issues on appeal is but one purpose of oral argument, and some have argued that a number of other purposes may be thwarted when the opportunity for argument is extended to only those cases in which judges will find argument beneficial. Oral argument makes the appellate process more visible. With increases in the number of law clerks and other administrative assistants in the court, there is bound to be concern over the extent to which the disposition in the case is the product of judicial deliberation. Only through oral argument, it has been said, can parties confront the decision maker and be assured that the judges have attended to the arguments raised in their case. Furthermore, oral argument offers an opportunity for the judges to gather and confer in person. Although most of the screening procedures are designed to permit communication among the judges considering the case, typically communication among panel members is less convenient during the screening process than it is at the conference that usually follows oral argument. Some have argued that the opportunity for judges to deliberate together is an essential feature of the collegiality of the appellate courts, and its diminution increases the degree of isolation in which the judges work. These points are discussed in P. Carrington, D. Meador & M. Rosenberg.

This report describes the procedures and standards adopted by the federal courts of appeals for deciding cases without oral argument. It presents available statistical information, reviews local rules, and discusses responses of the clerks of the courts of appeals to a brief survey regarding court practices. The report addresses only those procedures intended to permit the disposition without argument of typical cases and does not consider special practices developed by federal courts of appeals to decide only pro se cases. It also does not attempt to evaluate the screening programs. Such an analysis, based on examination of case records, will be presented in a future report.

Origin of Screening Programs in the Federal Courts

In 1968 the Fifth Circuit Court of Appeals established a procedure for identifying and disposing of appeals on the briefs without oral argument.[3] Under this procedure each case was examined, or screened, by a judge to determine if it was appropriate for disposition on the briefs without oral argument. Suitable cases were decided by standing panels of judges, who typically communicated by mail.[4] This procedure enabled the judges of the Fifth Circuit to decide more cases and overcome a growing backlog of cases awaiting argument. Despite expressions of concern by some legal scholars and members of the bar, other federal courts in similar circumstances reluctantly adopted procedures to identify and decide cases on the briefs alone.[5]

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3. Although federal courts have traditionally permitted attorneys to waive oral argument, the Fifth Circuit was the first federal court of appeals to establish a separate procedure for deciding an appeal on the merits without oral argument. A similar plan was implemented by the Court of Appeal for the First Appellate District of California at approximately the same time. Meador, *supra* note 2, at 734.

4. The original Fifth Circuit procedure also called for disposition of cases by very brief opinions, a practice that has diminished in recent years. Rubin & Ganucheau, *Appellate Delay and Cost—An Ancient and Common Disease: Is It Intractable?* 42 Md. L. Rev. 752, 758-59 (1983).

5. *See* P. Carrington, D. Meador & M. Rosenberg, *supra* note 2. The American Bar Association has urged the preservation of oral argument. In 1974, the House of Delegates of the American Bar Association expressed its opposition "to the rules of certain United States Courts of Appeals which drastically curtail or entirely eliminate oral argument in a substantial proportion of non-frivolous appeals, and a fortiori, to the disposition of cases prior to the filing of briefs." A.B.A. Special Committee on Federal Practice and Procedure, Recommendations and Report, Item No. 134 in A.B.A. Section and Committee Reports to the House of Delegates (1974). However, a survey of attorneys conducted on behalf of the Commission on Revision of the Federal Court Appellate System (the Hruska Commission) found that the perceived importance of oral argument depended upon the type of case and that oral argument might be dispensed with in appropriate cases. Also, acceptance of the abbreviated

The benefit of screening programs is not that they may save the court the thirty minutes or so that would be spent on oral argument, but that they permit judges greater flexibility in deciding those cases that are not argued. For example, some screening procedures permit judges to decide nonargued cases at a single sitting immediately after reviewing the briefs and record; thus the judges do not have to spend time becoming reacquainted with the facts and issues before argument and before preparing the disposition.[6] Some procedures permit judges to review and decide cases at convenient times without convening the panel, rather than at scheduled times in chambers or in conference. In addition, screening procedures increase the number of cases that can be considered. Judges rarely can hear argument in more than five cases a day, or twenty to twenty-five cases a week. The time required to prepare for argument, draft orders and dispositions, and attend to other judicial duties limits all but a few judges to ten weeks of argument a year. Screening programs permit judges to allocate these two hundred or so opportunities for oral argument to cases that require clarification of issues raised in the briefs, and the judges can consider other cases on the briefs alone.[7]

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procedures appeared to be related to attorneys' familiarity with or exposure to them. T. Drury, L. Goodman & W. Stevenson, Attorney Attitudes Toward Limitation of Oral Argument and Written Opinion in Three U.S. Courts of Appeals (report to the Commission on Revision of the Federal Court Appellate System) (1974).

6. Procedures for deciding appeals without oral argument emphasize the briefing process as a means of informing the court of the issues in the case; argument is dispensed with in cases in which it would not add to the information. However, courts of appeals can also avoid duplication of information by emphasizing the role of argument in conveying information and by reducing the briefing process. The California Court of Appeal for the Third Appellate District has developed an expedited appeal procedure that limits written submission to very short documents and schedules an oral argument soon after the materials are submitted. The California Court of Appeal has found this practice to be an efficient means of addressing the issues that arise in simple cases. *See* Chapper & Hanson, *Expedited Procedures for Appellate Courts: Evidence from California's Third District Court of Appeal,* 42 Md. L. Rev. 696, 696-721 (1983). Several federal courts have experimented with this approach. The Ninth Circuit Court of Appeals employed a similar procedure for a brief period and then abandoned it in favor of a screening program that emphasizes the briefing process. For a review of the Ninth Circuit experience, see J. E. Shapard, Appeals Without Briefs: Evaluation of an Appeals Expediting Program in the Ninth Circuit (Federal Judicial Center 1984). The Eighth Circuit Court of Appeals has developed an appeals expediting program, which is used along with a screening program and which emphasizes the oral argument process. For brief descriptions of the Eighth Circuit program, see Lay, *A Blueprint for Judicial Management,* 17 Creighton L. Rev. 1047, 1066-67 (1984), and Bright & Arnold, *Oral Argument? It May Be Crucial!* 70 A.B.A. J. 68, 70 (1984). For an argument in favor of placing greater reliance on the oral submission than on the written one in developing procedures for dealing with simpler cases, see Meador, *supra* note 2.

7. See the summary by Judge Heaney in Simmons, *Oral Argument of Appellate Cases: A Practice Worth Preserving?* J. Mo. B.A. 369, 371 (Sept. 1981). Additional advantages, as well as disadvantages, of the screening procedure are discussed in Rubin & Ganucheau, *supra* note 4.

Selection of Cases for Disposition Without Argument

Accurate identification of cases suitable for disposition without argument is the key to the proper functioning of screening programs. Rule 34 of the Federal Rules of Appellate Procedure authorizes the federal courts of appeals to discriminate among cases in offering the opportunity for argument and establishes a minimum standard to ensure availability of argument in all appropriate cases.[8] According to rule 34(a), oral argument is to be allowed unless a panel of three judges, acting under standards and procedures established by local rule, unanimously determines that oral argument is not needed. The general criteria employed by the courts in determining if a case is suitable for disposition without argument must be published with the local rules and must meet the following minimum standard:

> Oral argument will be allowed unless (1) the appeal is frivolous; or (2) the dispositive issue or set of issues have been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.[9]

The individual courts may establish their own standards and develop procedures that are suited to local needs, as long as this minimum standard is satisfied. Although such standards may seem vague, most judges, after a reasonably brief period of service, are able to identify cases in which oral argument will aid the decisional process.[10]

Trends and Variations in the Opportunity for Oral Argument

The practices of courts in deciding appeals without oral argument have changed as appellate court filings have increased. Ten

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8. The development of such a minimum national standard was one of the recommendations of the Hruska Commission. Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 48 (1975).

9. Fed. R. App. P. 34(a). Rule 34(a) also states that any party shall have an opportunity to file a statement indicating why, in his or her opinion, oral argument should be heard. Rule 34(f) permits parties to waive oral argument, with permission of the court, in cases that do not meet the standard expressed in rule 34(a).

10. Godbold, *Improvements in Appellate Procedure: Better Use of Available Facilities*, 66 A.B.A. J. 863 (1980).

thousand more appeals were filed in 1984 than were filed in 1979, the year rule 34 was amended to include the minimum standard. Although the number of appellate judges grew during this period, the number of appeals per judge still increased by 72 percent. Until recently the proportion of appeals decided on the merits without oral argument remained steady at approximately 30 percent. However, in the past four years this proportion has gradually increased—to 31 percent in 1981, 33 percent in 1982, 36 percent in 1983, and 37 percent in 1984.[11]

These national trends disguise considerable differences across individual courts of appeals. Table 1 lists the percentage of cases terminated on the merits without argument in each of the federal courts of appeals during the statistical year ending June 30, 1984.[12] The variation across the courts reflects more than simply the value placed on oral argument. Some courts have a greater proportion of cases that meet the standard expressed in rule 34(a). Also, in all the courts of appeals the parties may stipulate to disposition without argument, a practice that varies across the courts.

Geographical characteristics of the courts of appeals also appear to influence the courts' practices regarding disposition of cases without argument. Courts in which all of the judges have chambers in the same building encounter no difficulty in leaving the determination regarding argument to the regular panel; such panels can meet informally at a convenient time, or several times if necessary, to consider both argued and nonargued cases. But in large federal appellate courts, such as the Fifth and Ninth Circuits, the judges are dispersed across large geographical areas, and considerable travel time is required to assemble an argument panel. When the panels gather they must have a full calendar of cases set for argument. Thus, procedures for identifying and disposing of cases without argument appear to be most elaborate in the courts that have greater difficulty convening the argument panels.

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11. According to information supplied by the Statistical Analysis and Reports Division of the Administrative Office of the U.S. Courts, the number of cases terminated after submission on briefs increased from 3,785 in 1981 to 4,124 in 1982, 4,746 in 1983, and 5,255 in 1984. The estimates of the proportion of cases decided without argument are derived from figures published in the "Analysis of the Workload of the Federal Courts," part of the *Annual Report of the Director* of the Administrative Office of the U.S. Courts. These estimates are based on cases submitted during each of these years without regard to whether the cases were terminated during these periods. The shift in measurement from submitted cases prior to 1981 to terminated cases in recent years reflects a change in the data collection practices used by the Administrative Office. This change is not expected to affect the estimates of cases decided without argument.

12. The figures presented in the table do not correspond exactly to the number of cases decided through the screening procedures of the appellate courts, since the figures include cases the regular hearing panels disposed of without argument.

TABLE 1
Appeals Terminated on the Merits
During the Twelve-Month Period Ended June 30, 1984

Circuit	No. After Submission on Briefs	No. After Oral Argument	% After Submission on Briefs	% After Submission on Briefs, Excluding Pro Se
1st	122	369	25%	17%
2nd	236[a]	988	19%	11%
3rd	823	534	61%	50%
4th	1,037[b]	725	59%	17%
5th	884	799	53%	49%
6th	452	1,038	30%	13%
7th	428	771	36%	25%
8th	276	584	32%	26%
9th	632	1,405	31%	19%
10th	363[c]	530	—	41%
11th	857	725	54%	—
D.C.	29	498	6%	—
Fed.	201	398	34%	10%
All circuits	6,340	9,364	40%	—

NOTE: These figures are based on information reported by the clerks of the circuit courts and include submitted cases in which oral argument was waived. For some courts the figures are estimates based on a sample of cases submitted or terminated during statistical year 1984.

[a]In the Second Circuit all nonincarcerated litigants, including pro se litigants, are given the opportunity to present an oral argument to the court. Cases that are not argued include only those brought by incarcerated pro se litigants (25%), those in which counsel waived argument (42%), and those in which nonincarcerated pro se litigants waived argument (32%).

[b]This figure is correct under the new (7/1/84) definition of the category "after submission without hearing" (*see* Guide to Judiciary Policies and Procedures, vol. XI, tit. X, July 1, 1984, p. 19). If the former definition were used, the informal briefs used by pro se litigants in the Fourth Circuit would not be included in this column, and the figure would then be 153; the figure in the third column would be 17 percent.

[c]The figures for the Tenth Circuit do not include pro se cases.

The Commission on Revision of the Federal Court Appellate System (the Hruska Commission), which recommended the minimum national standard that was later incorporated into rule 34(a), recognized that circumstances vary greatly from court to court and that diverse procedures are required to meet such needs. The commission therefore urged that each court of appeals establish its own standards and procedures for disposition of cases on the briefs, as long as the national minimum standard was satisfied.[13]

13. Commission on Revision of the Federal Court Appellate System, *supra* note 8, at 43.

II. GENERAL CLASSIFICATION OF SCREENING PROCEDURES

This report compares the characteristics of the screening procedures of the federal courts of appeals. Two courts of appeals, the Second Circuit and the D.C. Circuit, are not included in the general discussion of this report because the judges in these courts rarely exercise their discretion to limit oral argument.[14] The remaining eleven courts of appeals decide a substantial number of cases without argument and can be classified as using one of these general screening approaches:

1. In one court, the regular hearing panels, without assistance from staff attorneys, select and dispose of the nonargument cases.
2. In eight courts, court staff identify nonargument cases, and special panels of judges decide them.
3. In two courts, court staff identify nonargument cases and submit them to the regular hearing panels for disposition.

An overview of these three approaches reveals how the procedures used in each approach work together.

One federal court of appeals—the Third Circuit—has not developed special screening procedures for other than pro se cases. From filing through assignment to a panel, cases that meet the standards of rule 34(a) progress through the court in the same manner as more demanding cases do. Only after assignment to a panel do the cases become differentiated.

The appeal process in the Third Circuit begins when the notice of appeal is filed. The clerk's office sends a letter to the litigants explaining the requirements of the appellate process and indicating a

14. The Second Circuit does not have a screening program for deciding whether a case should be argued. Except for cases involving incarcerated pro se litigants, which are not argued, all cases that have been briefed are argued unless the parties request that they be submitted without argument and the presiding judge of the panel approves. In the D.C. Circuit the chief staff counsel may, in the course of assigning cases to the argument calendars, recommend that a case be decided without argument. Such a recommendation is most common in pro se cases. The recommendation along with the case materials is sent directly to the panels.

general schedule for each step in the process. In most cases the parties complete the case record and submit briefs according to the schedule; if either or both of the parties want to diverge from this schedule or seek interim relief while the appeal is being processed, the appropriate motion is filed with the clerk.[15] There is minimal involvement by the court's legal staff.

When the briefing process is completed cases are placed on the argument calendar as space becomes available, and the briefs and case records are sent to the judges who will serve on the panel. At this point the responsibility for the cases is transferred from the clerk's office to the judges. It is at this time that the cases may be sorted into two categories—those that will be heard and those that will be decided on the briefs. The judges review the briefs and record for each case upon receipt and determine whether argument is required. In reaching this decision the panel members consider the preferences and stipulations of the litigants. If the panel determines that argument is required, it may also establish the amount of argument time permitted. The average argument time for each side is fifteen to twenty minutes. The judges inform the clerk of the decision regarding argument, and the clerk then informs the litigants. If argument is not to be heard, one of the judges prepares a draft disposition, which is considered when the panel gathers to hear argument in the rest of the cases. The nonargument cases are usually decided without dissenting or concurring opinions, and the opinions are likely to remain unpublished.

Eight courts of appeals (the First, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits) have adopted screening procedures in which court staff identify cases suitable for disposition without argument and special panels of judges review this designation and decide the cases without argument. The following description is a broad outline of these procedures.

When the briefs are filed and the cases are ready for submission to the panels, court staff—usually one or more of the staff attorneys—review the cases to identify candidates for disposition without argument. Staff may review all cases or only certain types of cases. Once cases are identified, staff attorneys prepare information to aid the panel in deciding each case. This information may be no more than a summary of the issues in the case, or it may be as detailed as a draft disposition with a supporting memorandum.

15. In most of the courts, motions are decided by a separate rotating judicial panel. Staff attorneys may also be involved in reviewing the appeal to identify jurisdictional issues at an early stage, before the resources of the court are expended in the process. The practices of the courts of appeals in deciding motions are not discussed in this report.

In any event, such information is usually prepared by staff attorneys rather than the law clerks of the individual judges.

These materials are forwarded with the briefs and case records to special panels of judges established to consider cases without argument. In some courts, the membership of such panels changes on a regular basis (in one court, as frequently as each week), whereas in others it remains fixed for a year. Cases are referred to the panels in rotating order. Each member of the panel examines the materials and determines if the cases are suitable for disposition without argument. If one or more panel members disagree with the staff's recommendation for disposition of a case without argument, the case is returned to the clerk's office for placement on the argument calendar. If the panel members agree to decide a case without argument, they determine the merits of the appeal and one of the members drafts a disposition.

The extent to which the panel members confer during this process varies greatly. In some courts, the special panels convene and deliberate in the customary fashion. In other courts, the panel members never convene, but communicate by mail and telephone. Several courts, in order to guard against improper disposition, have adopted additional procedures, such as rejecting cases in which there would be a dissenting opinion and returning them to the clerk for placement on the argument calendar.

Two other courts of appeals (the Sixth Circuit and the Federal Circuit) have also adopted screening procedures in which court staff review cases and identify those suitable for disposition without argument. However, staff refer the nonargument cases to the regular argument panels instead of special screening panels.

Although eleven courts of appeals use one of the three general approaches discussed above in deciding cases without argument, each court has implemented these general practices in ways that accommodate its own needs and traditions. Chapters 3 and 4 describe in detail the practices of the individual courts of appeals.

III. IDENTIFICATION OF CASES

This chapter describes the procedures the courts of appeals use to review and prepare cases prior to assigning them to a three-judge panel. The procedures used by each court are summarized in tables 2 and 3. This chapter focuses almost exclusively on the ten courts that have established procedures for staff review of cases prior to panel assignment—those courts, in other words, that have adopted formal, specialized screening procedures. The practices of another court—the Third Circuit, which does not use staff screening but decides many cases without argument—are included in those parts of the discussion that are relevant to that court. As noted earlier, the practices of the Second Circuit and the D.C. Circuit are not examined in the general discussion of this report.[16]

This chapter addresses a number of issues:

1. When in the life of a case does screening occur?
2. Who screens the cases?
3. What materials are used in screening cases?
4. What criteria are used in screening cases?
5. Do those who screen cases prior to their assignment to a panel prepare any materials for the panel's use?
6. Do counsel for the parties contribute to the screening decision?

When Does Screening Occur?

In most courts of appeals screening is based on the briefs and therefore takes place after the briefs have been filed. The principal

16. *See supra* note 14.

TABLE 2
Identification of Cases by Staff

Circuit[1]	When Screening Occurs	Who Screens the Cases	Material Used for Review	Screening Criteria Used	Material Prepared by Staff for Screened Cases
1st	Usually after submission of appellee's brief; sometimes after submission of appellant's brief	Senior staff attorney screens all cases and recommends to the duty panel those suitable for disposition without argument.	Briefs and record	Fed. R. App. P. 34 standards and the characteristics of the case	Staff law clerks prepare a proposed opinion or a memorandum regarding an order, whichever is appropriate.
3rd	After filing of the briefs	A hearing panel may decide not to hear argument in a case.	Briefs and record	Fed. R. App. P. 34 standards and internal operating procedures, which list circumstances in which judges usually vote to eliminate oral argument and those in which they usually vote for oral argument	N/A
4th	After submission of appellant's brief; evaluation may change when appellee's brief is reviewed	The staff director or supervisory staff attorney reviews the cases, using the appellant's brief. After appellee's brief is filed the case is assigned to a staff law clerk for preparation of memoranda, etc. The staff law clerk may suggest that the staff director reconsider the screening recommendation. A three-judge panel then reviews staff recommendations for disposition without argument.	For the initial screening the senior staff relies on the appellant's brief. The staff law clerk then reviews the record, the appellee's brief, and any other material filed with the case.	Fed. R. App. P. 34 standards and criteria developed by the staff director that specify the types of cases to be screened for non-argument. The staff screens fewer cases for oral argument when their backlog of pro se cases is large or the court needs more cases to fill the oral argument calendar.	Staff law clerks prepare a proposed opinion and covering memorandum for the panel. When they want the opinion revised, some judges ask the staff law clerk to do this; others ask their personal law clerk to do it.

(continued)

TABLE 2 *(Continued)*

Circuit[1]	When Screening Occurs	Who Screens the Cases	Material Used for Review	Screening Criteria Used	Material Prepared by Staff for Screened Cases
5th	*Criminal cases:* for those requiring oral argument, after submission of appellant's brief; for others, after submission of appellee's brief *Civil cases:* for certain case types, after all briefs have been filed	Staff attorneys review all criminal cases and some civil cases. Their recommendations are reviewed by a three-judge panel.	*Criminal cases:* sometimes only appellant's brief, sometimes all briefs *Civil cases:* all briefs	Fed. R. App. P. 34 standards. Also, staff attorneys screen cases in which experience has shown that argument is unlikely: prisoner cases, § 2255 cases, civil federal question cases, civil cases in which the U.S. is a party, civil rights cases other than title VII, and Social Security cases.	Usually the staff attorney prepares a bench memorandum outlining the issues and the contentions of the parties. If there are more nonargument cases than the staff can prepare, some cases are returned to the clerk, who forwards them to the screening panels without memoranda.
6th	At two stages: (1) after notice of appeal is received; (2) after any substantive motion is filed or appellant's brief is filed, whichever occurs first	The central legal staff reviews all cases and makes recommendations about argument to a three-judge panel.	District court decision, motions, briefs, and record	Local rule that cites Fed. R. App. P. 34 and lists circumstances in which a case may be disposed of without argument. Two nonargument cases are assigned to each hearing panel—approximately 500 nonargument cases per year.	The central legal staff prepares bench memoranda and proposed dispositions for the cases they recommend for nonargument. They also prepare an appendix of relevant record proceedings when the materials have not been satisfactorily submitted by counsel.
7th	After submission of the briefs and record	The circuit executive identifies cases unlikely to require argument. The senior staff attorney reviews suggestions by appellees to decide cases without argument. The staff recommendations are sent to a panel.	Briefs and record, as well as suggestions of appellee	Fed. R. App. P. 34 standards	Staff attorneys prepare memoranda on cases recommended for nonargument.

(continued)

TABLE 2 *(Continued)*

Circuit[1]	When Screening Occurs	Who Screens the Cases	Material Used for Review	Screening Criteria Used	Material Prepared by Staff for Screened Cases
8th	After appellee's brief is filed	A senior staff attorney or deputy-in-charge makes an initial recommendation about argument and sends it to a three-judge panel.	Briefs, record, and district docket sheet	Fed. R. App. P. 34 standards, a set of written guidelines, and a "mental checklist" prepared by senior staff attorney	The screener prepares a brief summary of the case's history and issues and a screening sheet that indicates whether argument is recommended. These materials are sent to one judge on the panel. If the judge agrees with the recommendation, the case is usually returned to the staff for a draft disposition, but some judges prefer to have their own law clerk prepare the disposition. The full panel then reviews the opinion; if one judge believes argument is needed, the case is sent to an argument panel.
9th	Usually after completion of briefing process, but when there is no backlog, after receipt of appellant's brief	Staff law clerks identify cases for nonargument; the supervisory staff attorney reviews these designations and sends them to a three-judge panel.	Briefs and record	Fed. R. App. P. 34 standards and written guidelines in a staff attorneys' handbook. Also, staff attorneys screen for nonargument cases that are simple and straightforward. The number of staff attorneys limits the court to 56 nonargument cases per month.	Staff law clerks prepare bench memoranda that are thorough discussions of the facts and issues and that suggest a disposition. Occasionally a screening panel requests that the staff law clerk who wrote the memorandum prepare a draft disposition.

(continued)

TABLE 2 *(Continued)*

Circuit[1]	When Screening Occurs	Who Screens the Cases	Material Used for Review	Screening Criteria Used	Material Prepared by Staff for Screened Cases
10th	First after docketing statement is submitted (within 21 days after filing of notice of appeal) and subsequently after briefs are filed	Appeals expediters (attorneys in the clerk's office) review the cases; then the chief judge reviews their recommendations. The rule 34 (three-judge) committee then reviews the designations and assigns the cases to a three-judge rule 34 panel.	Docketing statement, briefs, and record	Local rule that cites Fed. R. App. P. 34 and describes the types of cases to be designated for nonargument. Direct criminal appeals are almost always argued.	After the panel has accepted the nonargument recommendation, the staff law clerks do whatever the judges request (e.g., read briefs, prepare bench memoranda, draft orders and opinions).
11th	*Civil cases:* after all briefs have been filed *Criminal cases:* after appellant's and appellee's briefs have been filed	The staff director and supervisory staff attorneys review cases and make recommendations concerning argument. The cases recommended for nonargument are assigned to the staff attorneys for preparation of memoranda. A screening panel reviews the recommendations.	Briefs and record	Local rule that cites Fed. R. App. P. 34	For some cases the staff attorneys prepare screening memoranda outlining the facts and relevant precedents and suggesting a disposition. Sometimes a panel member asks the staff attorney who wrote the memorandum to do additional work on the case.

(continued)

TABLE 2 *(Continued)*

Circuit[1]	When Screening Occurs	Who Screens the Cases	Material Used for Review	Screening Criteria Used	Material Prepared by Staff for Screened Cases
Fed.	After appellee's brief has been filed	An evaluation committee, consisting of the clerk, senior technical assistant, and two deputy technical assistants, reviews the cases and sends a recommendation to a hearing panel.	Briefs and appendixes	Fed. R. App. P. 34 standards. The guiding question is, Will argument assist the court?	The evaluation committee prepares an evaluation report form, which makes a recommendation concerning argument and reports the nature of the case and the apparent issues. The committee also notes, when feasible, cases past, pending, or to be argued that appear to raise the same issues.

NOTE: N/A = not applicable.

[1]The D.C. Circuit and the Second Circuit courts of appeals are not included in this table because they decide very few cases without argument. *See* note 14 in the text.

TABLE 3
Role of Counsel in Identification of Cases

Circuit[1]	Court Rules for Request for Argument or Waiver of Argument	Notification of and Opportunity to Object to Nonargument Designation	Court Response to Attorneys
1st	Counsel may file a stipulation, joined in by all parties, for submission on the briefs without argument.	After notification, counsel has 7 days (10 if from Puerto Rico) to file a statement why argument should be heard.	Panels review requests for waiver and objections to nonargument on a case-by-case basis.
3rd	Within 7 days of filing of appellee's or respondent's brief, counsel may file a statement setting forth reasons for argument. Counsel may also file a request to waive argument.	After notification of nonargument designation and disposition, attorneys may file a letter objecting to the nonargument disposition.	Merits panels consider requests for argument or waiver of argument. Objections to nonargument are considered by the panel assigned the case.
4th	Attorneys may include in their briefs a statement setting forth the reasons for argument. A request for waiver of argument may be made at any time.	Notification is by receipt of the decision on the merits. Attorneys may object by filing a petition for rehearing.	Requests for argument are considered in screening. Requests for waiver of argument are usually granted. Requests for rehearing are rarely granted.
5th	Counsel are instructed to include in the brief a statement why argument would be helpful or should be waived.	Notification is by receipt of the disposition on the merits. Attorneys may object.	Requests for argument or waiver of argument are given considerable deference, especially when both sides agree and argument is not required. If a request for argument is denied, the decision on the merits must be unanimous. Objections to nonargument disposition are considered.
6th	Counsel may include in the brief a statement why argument should be heard.	Notification is by receipt of the disposition on the merits. Attorneys may object through a petition for rehearing.	Panels deny requests for waiver if they feel argument would be helpful.

(continued)

TABLE 3 *(Continued)*

Circuit[1]	Court Rules for Request for Argument or Waiver of Argument	Notification of and Opportunity to Object to Nonargument Designation	Court Response to Attorneys
7th	Parties are instructed to file a formal motion for waiver, with proof of service to all parties.	After notification, parties may object through a statement explaining why argument should be heard.	Court considers suggestions for waiver made by parties seeking affirmance or enforcement of a lower court or agency ruling.
8th	Counsel are required to state in their briefs whether argument is requested.	After notification, counsel has 5 days to file a request for reclassification.	Screening panel and court give substantial weight to requests for argument or waiver of argument. Objections to nonargument designation are reviewed by the initial screening judge. Judges vary in the weight they give these objections.
9th	The court is considering adoption of a rule requiring parties to indicate in the briefs whether argument is required.	Within 7 days of notification, counsel may file a statement why argument should be heard.	Screening panel receives objections and disposes of them as appropriate.
10th	Attorneys are instructed to state, in the docketing statement or briefs, why argument should be heard. After filing of appellee's brief, counsel may file a motion to waive argument.	After notification by the clerk, counsel may within 7 days file a statement why argument should be heard.	Most requests for argument are granted. Requests for waiver are granted if made by both parties and are usually denied if one party objects. Objections to nonargument designations are considered by the rule 34 committee.

(continued)

TABLE 3 *(Continued)*

Circuit[1]	Court Rules for Request for Argument or Waiver of Argument	Notification of and Opportunity to Object to Nonargument Designation	Court Response to Attorneys
11th	Counsel are instructed to include in the brief a statement of preference for or against oral argument. A party desiring waiver of a case designated for argument must file a motion for waiver before the hearing date.	Notification is by receipt of the disposition. Counsel may file a motion for panel reconsideration or a suggestion for rehearing en banc.	Statements concerning argument are accorded due weight. If both parties agree to submission on the briefs, the case is generally decided without argument. If a request for argument is denied, the decision on the merits must be unanimous.
Fed.	Pro se litigants receive a notice from the clerk that they may request argument. Attorneys may file a statement in support of argument.	After notification, parties may respond with reasons why argument would help the court or with answers to points raised in an opposing brief.	Requests for waiver are usually granted. A request for argument is often granted, but more frequently the nonargument designation is maintained.

[1]The D.C. Circuit and the Second Circuit courts of appeals are not included in this table because they decide very few cases without argument. *See* note 14 in the text.

difference among the courts is whether only the appellant's brief is used or both the appellant's and appellee's briefs are used.

Five courts (the First, Seventh, Eighth, Eleventh, and Federal Circuits) normally wait for both the appellant's and appellee's briefs before starting the screening process. This is usually the practice in the Ninth Circuit as well, although when the court is current with regard to its caseload each case is screened on the appellant's brief only. In the Fourth Circuit the staff director and the supervisory staff attorney usually screen a case after only the appellant's brief has been received. However, the staff law clerks, who prepare memoranda and proposed opinions after the appellee's brief has been filed also, may suggest that the classification based on review of only the appellant's brief be changed.

In the Fifth Circuit, a civil case is reviewed after both parties' briefs have been filed, but a criminal case is reviewed after only the appellant's brief has been submitted. If it appears from the appellant's brief that a criminal case requires oral argument, it is returned to the clerk, who places it on the argument calendar. Otherwise, completion of the screening process is postponed until the appellee's brief is filed.

The Sixth and Tenth Circuits' screening practices are unusual in that cases are reviewed more than once as they progress through the court. The Sixth Circuit first examines a case after the notice of appeal has been received, using the district court decision as the basis for review. At this point the staff attorneys are looking primarily for jurisdictional defects, but they may also flag the case for nonargument disposition if appropriate. The case is next evaluated either after the filing of any substantive motion or after filing of the appellant's brief, whichever occurs first; thus, since motions are atypical, the principal review is based on the briefs. The Tenth Circuit requires submission by counsel of a docketing statement within twenty-one days after the notice of appeal is filed. A case is first screened when the docketing statement is received. Over the life of the case several different individuals in the court will review the case, and by the time this review has been completed both appellant's and appellee's briefs will have been received and examined as well.

Who Screens the Cases?

In every court of appeals a three-judge panel makes the ultimate decision concerning disposition of a case without argument.[17] However, in the ten courts that have adopted formal screening programs, the initial selection of cases for nonargument disposition is usually made by staff attorneys, either alone or in conjunction with other members of the court staff.[18]

Six courts have assigned screening to the staff attorneys exclusively. However, these courts differ in the amount of discretion they allow the staff law clerks and the senior or supervisory law clerk. In the Sixth Circuit each staff attorney reviews cases and makes recommendations concerning argument. In the Fifth Circuit staff attorneys also designate cases for disposition without argument, but a second staff attorney reviews their decisions before they are submitted to the judges. Other courts give greater responsibility to the senior staff than they do to the junior staff. In the Ninth Circuit the supervisory staff attorney reviews the decisions of the staff law clerks. In the Fourth and Eleventh Circuits the staff director and the supervisory staff attorney are the principal screeners; they pass the nonargument cases on to the staff law clerks for preparation of memoranda and proposed opinions. If during the course of this preparation the staff law clerks believe that a case would benefit from argument, they may suggest to the staff director or supervisory staff attorney that the case be reclassified, but they do not have the primary responsibility for review of cases. In the First Circuit the senior staff attorney alone reviews the cases and prepares the recommendations.

In two courts the senior staff attorney and another member of the court staff share the screening responsibility. In the Eighth Circuit the senior staff attorney screens the cases in St. Louis, and the deputy-in-charge reviews the cases in St. Paul. The Seventh Circuit has assigned the primary screening function to the circuit executive, who makes the recommendation on argument; the senior

17. The courts vary in the type of panel to which the screened cases are sent. The composition and role of these panels are discussed in chapter 4.

18. Although staff attorneys play a major role in screening in many courts of appeals and therefore are discussed in many sections of this report, the report does not focus on the overall functions of staff attorneys. They perform many duties in addition to screening, none of which are discussed here. For example, staff attorneys work on pro se cases and make recommendations to the panels concerning requests for assignment of counsel, in forma pauperis relief, and certificates of probable cause. *See* Ubell, *supra* note 1.

staff attorney reviews only counsel's requests for argument and for waiver of argument.[19]

In the two remaining courts (the Tenth and Federal Circuits) several individuals participate in the screening procedure. The Tenth Circuit's review process consists of several stages, and a different individual or group is involved at each stage. Cases are first reviewed by the appeals expediters (attorneys in the clerk's office). Their recommendations are then reviewed by the chief judge, who passes the nonargument cases to the rule 34 committee, a committee of three judges selected once each year. This committee reviews the nonargument designations and then assigns the nonargument cases to rule 34 panels. The Tenth Circuit is the only court of appeals that involves judges in the screening decision prior to assignment of a case to a panel for a decision on the merits.

In the Federal Circuit the individuals involved in the screening procedure make the screening decision jointly rather than in stages as in the Tenth Circuit. An evaluation committee meets at the beginning of each month to review cases and to make recommendations concerning argument. This committee is composed of the clerk, the senior technical assistant, and two technical assistants (attorneys trained in disciplines that bear on the cases filed in this court, such as engineering and chemistry). Prior to the monthly meeting the committee members look over the cases, but the screening decision is arrived at by consensus after discussion of the cases.

Materials Used for Screening

The screening decision is usually based on the briefs and the record. However, several courts of appeals use additional material as well.

In the Sixth Circuit, in which a case is reviewed first after the notice of appeal is filed and again after a substantive motion or the appellant's brief is filed, the screeners examine the district court decision and motions. The Tenth Circuit, which reviews cases at several stages, uses the docketing statement filed by counsel in the first stage and the briefs in later stages. The Eighth Circuit includes the district docket sheet in the collection of materials reviewed in reaching the screening decision. In some courts, sugges-

19. The circuit executive of the Seventh Circuit was formerly the senior staff attorney, and he continued to screen cases when he became the circuit executive.

tions from counsel also are reviewed during the screening process. This topic will be discussed below.

Criteria Used for Screening

There is considerable variation in the form and the specificity of the criteria used by the courts of appeals in screening cases from the argument calendar. All the courts, including the three that have not established a program to screen cases prior to assignment to a panel, have adopted a local rule that cites the standards for oral argument established in Federal Rule of Appellate Procedure 34. However, several courts have gone beyond this minimum compliance with the federal rules and have elaborated their screening criteria in either a local rule or additional court documents.

Local rules in the Sixth and Tenth Circuits describe the types of circumstances or cases in which these courts may choose disposition without argument. In the Third Circuit, in which the screening decision is made by the three-judge hearing panels, internal operating procedures provide the judges with standards against which to measure their screening decisions. These internal operating procedures list both the circumstances in which the judges usually vote for oral argument and those in which they generally vote against it. The staff attorneys in the Fourth, Eighth, and Ninth Circuits follow detailed written guidelines that list the characteristics of cases generally designated for nonargument.[20] In the Ninth Circuit, these guidelines are contained in the staff attorneys' handbook.

Although the Fifth Circuit has not adopted written guidelines that specify the kinds of cases to be decided without argument, in practice the staff attorney screens certain types of cases that experience has shown are less likely to require oral argument. These include prisoner cases with and without counsel, section 2255 cases with and without counsel, civil federal question cases, civil cases in which the United States is a party (e.g., federal tort claims act cases, bankruptcy cases, and agency cases other than tax cases), civil rights cases other than title VII, and Social Security cases.

In addition to case types and characteristics, several other factors may be considered in the screening decision. In the Fourth Circuit the size of the argument calendar and the staff attorneys' backlog of pro se cases are weighed in the process of selecting cases

20. The Fourth Circuit's screening guidelines are currently under review by a committee of four appellate judges.

for nonargument disposition. On occasion fewer cases are screened to ensure that the court can fill the scheduled oral argument calendar or to enable the staff attorneys to give attention solely to pro se cases. Similarly, in the Fifth Circuit, when a backlog of cases referred to the staff attorneys develops, the excess cases are returned to the clerk's office unscreened for transmission directly to the screening panels.

In the Ninth Circuit the staff attorneys consider two factors in addition to case characteristics. First, the nonargument cases must be simple and straightforward enough that a judge can read the briefs and bench memoranda and reach a decision in a relatively short time. Second, because the number of staff law clerks available for preparation of the bench memoranda is limited, the court has established a ceiling of approximately fifty-six nonargument cases each month.

The Sixth Circuit also has placed a limit on the number of screened cases submitted to the panels. All cases are screened by the staff attorneys, but the number sent to the panels for summary disposition is governed by the number of daily argument calendars. On each daily calendar are placed two cases recommended by the central legal staff for disposition without argument; given 257 daily argument calendars in statistical year 1983, 514 nonargument cases were submitted by the staff for summary disposition.

In some courts, requests from parties for oral argument or for waiver of oral argument may be one of the criteria used in the screening decision. This point is discussed in a later section of this chapter.

Material Prepared by Staff for Use by the Panels

The staff attorneys play a central role not only in screening cases but also in preparing materials for the panels to use when reviewing and deciding the cases recommended for disposition without argument.[21] In some courts the staff attorneys prepare

21. In two courts staff attorneys do not prepare materials for the panels. In the Third Circuit, in which staff attorneys do not screen cases, other than pro se appeals, before their assignment to panels, the staff plays no role in the disposition of the nonargument cases. The Federal Circuit employs several technical assistants and a motions attorney rather than staff attorneys. In this court there is no staff involvement in the disposition of the nonargument cases after the evaluation committee sends its recommendations to a panel. The evaluation sheet prepared for the panel reports the nature of the case, the apparent issues, and, if possible, cases past, pending, or to be argued that raise the same issue.

draft dispositions, whereas in others their participation is confined to bench memoranda. The preparation and revision of materials in some courts may be affected by judge or panel preferences.

The staff attorneys in three courts of appeals (the First, Fourth, and Sixth) routinely prepare proposed dispositions for the judges' use. In the Fourth Circuit, in which all proposed decisions are in the form of an opinion, the staff law clerks write covering memoranda as well; depending on the nature of the case, these memoranda may be very brief or may include proposed alternative dispositions and a discussion of the procedural history of the case. Staff attorneys in the Sixth Circuit also prepare memoranda to accompany the draft decisions sent to the panels. Staff attorneys in the First Circuit prepare a proposed opinion or memorandum regarding an order, depending on what is appropriate.

A slightly more common practice is to have the staff attorneys prepare memoranda only, setting out the facts, issues, or history of the cases recommended for nonargument. This is the practice in four courts (the Fifth, Seventh, Ninth, and Eleventh). In the Fifth, Ninth, and Eleventh Circuits, the staff attorneys' memoranda include suggested dispositions for the cases, but these memoranda are not proposed decisions. On occasion, however, a panel member may ask the author of a memorandum to prepare additional material on the case, including a draft disposition. In addition, in the Fifth Circuit staff prepare a proposed opinion when the screening process reveals that the court lacks jurisdiction over the appeal.

In the Eighth Circuit the kind of material prepared for a case is determined in part by the judges who receive the staff attorney's screening recommendation. The initial screener (the senior staff attorney or deputy-in-charge) writes a brief summary of the case's history and the issues and then prepares a screening sheet that indicates whether argument is recommended. When the case is assigned to a panel, these materials are sent first to a single panel member for review. When this judge agrees with the recommendation for nonargument disposition, the following procedure is usually carried out: The case material is sent back to the staff attorneys; the staff attorneys prepare a draft decision; and the draft decision is sent to all three panel members. However, a few judges prefer to have their personal law clerks prepare the draft decision. Because each staff attorney is permanently assigned to two judges, and because the staff attorneys know the identity of the initial screening judge, they can anticipate when they will be asked to prepare the draft decision and when the judge will assign it instead to an in-chambers law clerk.

Some judges in the Fourth Circuit also prefer to call on their personal law clerks in addition to the staff law clerks in preparing screening materials. Although every case recommended for nonargument is sent to the judges with a draft opinion written by a staff law clerk, some judges assign their personal law clerks the task of revising these opinions.

In contrast to the procedures used in all of the other courts of appeals, in the Tenth Circuit the staff law clerks function much as personal law clerks do—but for the nonargument cases only. They assist in the preparation and disposition of the nonargument cases only after a three-judge panel has reviewed and accepted the recommendation made by the appeals expediters, chief judge, and rule 34 committee. Then they perform any task the panel requests, including reading briefs, preparing bench memoranda, and drafting orders and opinions.

Role of Counsel and Parties in Identification of Cases

In many courts of appeals counsel and litigants are instructed in the local rules that they may file a request for either oral argument or waiver of oral argument. In most courts they are also given an opportunity to object after the nonargument designation has been made. The courts' responses to requests and objections vary, ranging from case-by-case and judge-by-judge decisions to courtwide policies granting considerable deference to these statements.

Requests for Argument or for Waiver of Argument

Eight courts of appeals (the Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, and Federal) provide attorneys and parties with guidelines for requesting oral argument; in each court these guidelines are articulated in the local rules.[22] In five of these eight courts (the Fourth, Fifth, Sixth, Eighth, and Eleventh), requests must be made in the briefs; thus, the briefing schedule sets a time limit on attorney and party contributions to the screening decision. The rules of the Third Circuit allow slightly more time; requests must be filed within seven days of the submission of the last brief. In the Tenth Circuit attorneys may make their requests either in the briefs or in the docketing statement, which must be submitted

22. The Federal Circuit also sends a notice to all pro se litigants, but not to attorneys, advising them that they may file a request for oral argument.

within twenty-one days after the notice of appeal is filed. It appears that the Federal Circuit has not established a deadline for requests for argument.

Four courts (the First, Seventh, Ninth, and D.C.) have not adopted a rule or device to instruct the parties in the procedure to be used in requesting oral argument. The Ninth Circuit is considering the adoption of a local rule that would require the parties to indicate in their briefs whether oral argument is desired.

Among the courts that have provided attorneys and parties with guidelines for requesting oral argument, three (the Eighth, Tenth, and Eleventh Circuits) appear to require, rather than simply allow, such a statement. In contrast, some courts have a rule permitting requests but do not, according to the clerks, emphasize the availability of the procedure.

Although the Second Circuit does not screen cases for nonargument, it does permit attorneys and nonincarcerated pro se parties to specify whether they wish to argue their case. The court sends each attorney and pro se litigant a form that asks them to specify whether they desire oral argument; this form must be submitted by the time the brief is filed.

Seven courts (the First, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits) indicate to parties the procedure to use in requesting waiver of argument. In three of these courts (the Fifth, Eighth, and Eleventh Circuits), the briefs are the suggested vehicle for these requests.[23] The remaining four of these courts (the First, Fourth, Seventh, and Tenth) require attorneys and parties to file a separate statement.[24] The Tenth Circuit indicates that this statement should be made in a motion after appellee's brief has been filed, whereas the First, Fourth, and Seventh Circuits do not set a deadline for the request for waiver of argument.

The courts of appeals respond to suggestions from counsel and litigants in a variety of ways, but most give them considerable attention. The Eighth and Tenth Circuits, which require attorneys and parties to state their preferences concerning argument, give substantial weight to these statements. The Tenth Circuit usually grants requests for argument; requests that argument be waived

23. Although the Eleventh Circuit instructs attorneys to include waiver requests in their briefs, these requests may be made by a motion at any time before the case is heard.

24. To request waiver of argument, litigants in the Second Circuit must use a form sent by the court to all nonincarcerated parties and, as noted earlier, must file this form by the time they submit their brief. Because the Second Circuit hears argument from all parties except incarcerated pro se litigants, the only pertinent requests are those for waiver; these are usually granted.

are granted when all the parties ask for submission on the briefs and usually are not granted if one party objects.

Several other courts also assign considerable importance to suggestions from attorneys and parties, even though these courts do not require—and may not even encourage—such participation. In the Fifth and Eleventh Circuits requests for waiver of argument in which both sides agree are seriously considered. These courts also give considerable deference to requests for oral argument: If any side in a case requests argument and argument is denied, the decision on the merits must be unanimous or the case must be returned to the argument calendar. Dissenting or concurring opinions are permitted only when the attorneys and parties for both sides waive oral argument or when neither side requests argument. The Ninth Circuit also follows this policy. In the Federal Circuit waiver requests are usually granted, and requests for argument are frequently granted.

In two courts suggestions from counsel or litigants have some influence in certain conditions. The Fourth Circuit gives these suggestions greater weight when the screeners are in doubt about whether or not to recommend argument. The Seventh Circuit takes special note of the request when appellees who are seeking affirmance or enforcement of a ruling by a lower court or an agency request submission on the briefs.

In the remaining courts of appeals (the First, Third, and Sixth) the requests from the attorneys and parties are decided on a case-by-case basis, and there is no overall approach or policy on the matter. These courts do not assign differential weight to certain kinds of requests, parties, or cases.

Objections to Nonargument Designation

After a three-judge panel makes a unanimous decision to dispose of a case without argument, five courts of appeals (the First, Seventh, Ninth, Tenth, and Federal) send notification to attorneys and parties that their case has been placed on the nonargument calendar. The Eight Circuit sends notification only to attorneys; pro se litigants receive notice of the nonargument decision when they receive a copy of the opinion on the merits. The attorneys and parties in these courts may then file an objection, stating the reasons they believe argument should be heard. In the Federal Circuit the objection may take one of two forms: a statement of the reasons for argument or a set of answers to points raised in the opponent's brief. In the Eighth Circuit, attorneys and parties must raise the objection within five days of notification, whereas in the First, Ninth, and Tenth Circuits they must raise it within seven days after re-

ceiving the notice. The Seventh and Federal Circuits do not appear to impose a time limit on objections.

Four courts of appeals (the Fourth, Fifth, Sixth, and Eleventh) do not notify attorneys and parties when the nonargument designation is made. Instead, the decision on the merits serves as notice. In these courts attorneys and parties may make an objection through a petition for rehearing.

The Third Circuit sends attorneys and parties notification of the nonargument designation just prior to the convening of the panels; they may file an objection to the nonargument designation through a letter to the court.

The information about the courts' responses to objections is limited. Certainly no court defers to these objections as a matter of course, but, beyond this, little can be said about the weight given to protests from counsel or litigants. It appears that objections to nonargument designation are usually considered by the panels or by the initial judge of a panel—in contrast to the requests for argument or for waiver of argument, which seem to be evaluated by both the staff screeners and the judges.[25]

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25. This issue was not directly addressed in the questionnaire submitted to the clerks of the courts of appeals. However, comments made by some of the clerks suggest that objections to the nonargument designation are submitted directly to the panels.

IV. COMPOSITION AND RESPONSIBILITIES OF JUDGE PANELS

Although appellate court legal staff may make an initial determination about the argument status of a case, the final decision is always made by a three-judge panel. According to Federal Rule of Appellate Procedure 34, the panel members must unanimously agree that a case need not be argued; if even one judge disagrees with this evaluation, the case is placed on the oral argument calendar.

This chapter describes the kinds of panels used by the courts of appeals and the procedures these panels use in reviewing the screening designations and disposing of the nonargument cases. The Third Circuit is not included in this discussion because it does not use staff to screen cases and therefore does not have a review process. In this court the hearing panel decides whether a case will be argued and then disposes of the case, either with argument or on the briefs. The following discussion is based on information presented in table 4.

Who Reviews Staff Recommendations and Decides the Cases?

After the staff has evaluated a case and made a recommendation concerning argument, either a special panel or a regular hearing panel reviews the staff's decision. Most courts of appeals (eight) use special panels; only two (the Sixth and Federal) assign the nonargument cases to hearing panels. Although the courts that use special panels may refer to them by different names (e.g., duty panels, screening panels, rule 34 panels), and although in some courts these panels perform duties in addition to their screening function, these eight courts have a common goal: to route the nonargument cases to panels other than the regular hearing panels.

Regardless of the type of panel to which the cases are assigned, the panel performs certain general screening functions. Using the materials prepared by staff, as well as the briefs and record, the panel decides whether each case designated for disposition without argument can be disposed of by this method and, when the judges agree unanimously that it can be, the panel takes the case under submission and disposes of it. If only one member of the panel believes that a case has been screened incorrectly and that it would benefit from oral argument, the case is returned to the clerk's office for placement on an argument calendar. A panel may decide as well that a case assigned for argument has been classified incorrectly and should be decided on the briefs instead. In all the courts of appeals, when the hearing panels reclassify a case from argument to nonargument, these panels decide the case on the briefs. However, hearing panels in the Sixth Circuit never reclassify a case from argument to nonargument; they hear all cases the staff designates for argument. In the Seventh Circuit, too, the hearing panels do not reclassify cases that the staff has screened for argument, although they may reclassify cases at the request of counsel.

The reclassification rates reported here, which for most courts are based on subjective estimates by the clerks, vary considerably across the courts. In general, a greater proportion of cases are reclassified from nonargument to argument than are reclassified from argument to nonargument. In only two courts do the hearing panels find that at least 7 percent of the cases designated for argument should have been designated for nonargument (10 percent in the Fifth Circuit and 7 percent in the Eighth Circuit); the proportion appears to be much smaller in the other courts.

In contrast, in five courts of appeals (the Fourth, Fifth, Eighth, Ninth, and Tenth) the panels find that around 10 percent or more of the cases designated for nonargument should have been designated for argument. In the Ninth Circuit the rate of reclassification of nonargument cases may be as high as 20 percent, and in the Tenth Circuit it may be as high as 15 percent. At the opposite pole are three courts of appeals (the First, Seventh, and Federal) in which reclassification from nonargument to argument is rare or infrequent.

TABLE 4
Composition and Responsibilities of Judge Panels

Circuit[1]	Review of Staff Recommendations	Reclassification of Cases[2]		Special Panels		Procedure Used to Decide the Case[3]
		Nonargument Cases	Argument Cases	Selection	Composition	
1st	A duty panel reviews the designation for nonargument, and if it agrees with the designation, it takes the case under submission and disposes of it.	If a panel member decides a case designated for nonargument should be argued, the case is returned to the clerk for placement on the argument calendar. This happens rarely.	If the panel decides a case designated for argument should not be argued, it decides the case without argument. This happens infrequently.	The chief judge and circuit executive select the duty panels a year in advance. Each month a different panel serves.	Three active circuit court judges	The duty panel reviews the designation for nonargument and decides the merits of the case through telephone calls and exchange of memoranda.
3rd	N/A	N/A	N/A	N/A	N/A	Members of the merits panels consider the nonargument cases at the conference that follows daily arguments.
4th	A screening panel reviews the designation for nonargument, and if it agrees with the designation, it decides the merits of the case.	If a panel member determines that oral argument would be of assistance, the panel notifies the clerk, who transfers the case to the argument calendar. This happens in about 10% of the cases.	A case reclassified as a nonargument one by a hearing panel is decided by that panel. This happens rarely—in 1% of the cases.	Screening panels are established yearly by random selection of the participating judges. Each judge sits equally with all other judges. Each time a panel comes up in rotation, it is assigned a single case.	All active and senior judges, excluding the chief judge	The staff law clerk's proposed decision is sent to all three judges on the screening panel; the record and briefs are sent to the lead judge. The judges circulate the record and briefs among themselves and confer by telephone or letter. When all reach a conclusion, the lead judge sends in the disposition.

(continued)

TABLE 4 *(Continued)*

Circuit[1]	Review of Staff Recommendations	Reclassification of Cases[2]		Special Panels		Procedure Used to Decide the Case[3]
		Nonargument Cases	Argument Cases	Selection	Composition	
5th	A screening panel reviews all designations by the staff attorneys and decides the merits of the nonargument cases.	If a panel member determines that a case should be argued, the clerk's office is notified and the case is moved to the argument calendar. This occurs in approximately 10% of the cases.	If a hearing panel decides a case designated for argument should not be argued, it decides the case on the briefs. This happens in about 10% of the cases.	Panels are drawn from the active judges by lot each year. Each three-judge panel serves for a year.	Three active judges	The initial judge of the panel reviews the recommendation of the staff attorney and then prepares a draft disposition. This and the case materials are forwarded to the second judge, who either approves or returns the case to the clerk to put it on the argument calendar. The third judge does the same, sending the clerk instructions either to file the disposition or to place the case on the argument calendar. The panel members communicate by memoranda or telephone.
6th	Hearing panels review the cases recommended for nonargument and decide the merits of the nonargument cases.	If any judge disagrees with the designation, the case is calendared for argument. This happened in about 5% of the cases in statistical year 1983.	The panels never reclassify a case from argument to nonargument.	N/A	N/A	The hearing panels decide the merits of the nonargument cases when they convene to hear the argument cases.

(continued)

TABLE 4 *(Continued)*

Circuit[1]	Review of Staff Recommendations	Reclassification of Cases[2]		Special Panels		Procedure Used to Decide the Case[3]
		Nonargument Cases	Argument Cases	Selection	Composition	
7th	Motions panels review the cases designated for nonargument and decide the merits of the cases.	If any judge disagrees with the designation, the case is transferred to the argument calendar. This happens less than 5% of the time.	All cases designated for oral argument are heard unless the court grants a subsequently filed motion to waive oral argument. This occurs rarely.	A single judge is designated the motions judge; the previous motions judge and the next one in line to serve as motions judge round out the panels. The panels change weekly.	Three judges	The panel usually waits until 6 or more cases are available for consideration and then convenes to discuss them. The staff attorneys who prepared the memoranda often participate in the discussion.
8th	A screening panel reviews the designations and disposes of the nonargument cases.	The first screening judge may concur with the designation or may assign the case to the argument calendar. The next two judges may do the same. This happens in 10%–12% of the cases. Occasionally a case is deliberately calendared for hearing before a panel that includes the judge who requested reclassification.	If a hearing panel reclassifies a case as a nonargument one, it notifies the clerk to remove the case from the calendar and disposes of the case without hearing. This happens in 6%–7% of the cases.	Screening panels are reconstituted three times a year. The judges are selected in alphabetical rotation.	Three active and senior judges, excluding the chief judge a disposition. The	The first screening judge receives the briefs, record, docket sheet, and screening sheet and supervises preparation of a disposition. The draft disposition and briefs are sent to the other judges. The judges confer on the phone.[4]

(continued)

TABLE 4 *(Continued)*

Circuit[1]	Review of Staff Recommendations	Reclassification of Cases[2]		Special Panels		Procedure Used to Decide the Case[3]
		Nonargument Cases	Argument Cases	Selection	Composition	
9th	Screening panels review cases recommended for nonargument and dispose of them.	Upon review of the case materials, any judge may send the case to the clerk for placement on the argument calendar. This happens in 15%–20% of the cases.	When a hearing panel reclassifies an argument case as a nonargument one, it disposes of the case.	Eight panels are created by lottery every January.	The active judges and, if necessary, the senior judges	Either the originating judge reviews the case, writes a draft disposition, and forwards the case to the other judges, or all the judges review the material at the same time. In either procedure the judges confer by phone or memoranda.
10th	Rule 34 panels review and decide the nonargument cases.	Any panel member may ask that the case be transferred to the argument calendar. This happens in 10%–15% of cases.	When a hearing panel reclassifies an argument case as a nonargument one, it disposes of the case. This happens occasionally.	Rule 34 panels are selected by rotation as needed—approximately once a month.	Three active and senior judges, excluding the chief judge	The panels may decide the case when they hear other cases, or they may confer by phone. The panels decide who will write the disposition, and it is then circulated.
11th	Screening panels review and decide the nonargument cases.	If any panel member determines the case should be argued, the case is returned to the clerk's office for placement on the argument calendar. This happens infrequently.	If a party requests argument, a hearing panel may, by a unanimous vote, decide the case without argument. If no party requests argument, the panel may decide the case without argument by less than a unanimous vote. In cases identified for argument, disposition without argument occurs in less than 5% of the cases per year.	Panels are selected by lot once a year. Cases are assigned to the panels in rotation.	Active judges	The initial judge reviews the staff attorney's recommendation and the case materials and writes a draft disposition. The draft and the case materials are forwarded to the other judges in turn. They confer by phone or memoranda.

(continued)

TABLE 4 *(Continued)*

Circuit[1]	Review of Staff Recommendations	Reclassification of Cases[2]		Special Panels		Procedure Used to Decide the Case[3]
		Nonargument Cases	Argument Cases	Selection	Composition	
Fed.	Hearing panels review and decide the nonargument cases.	When a panel reclassifies a case as an argument one, it notifies the clerk, who notifies the attorneys. This happens infrequently.	When a panel reclassifies a case as a nonargument one, it decides the case. This happens infrequently.	N/A	N/A	The panels decide the nonargument cases when they convene to hear the argument cases. At this time they decide who will write the disposition.

NOTE: N/A = not applicable.

[1]The D.C. Circuit and the Second Circuit courts of appeals are not included in this table because they decide very few cases without argument. *See* notes 14 and 26 in the text.

[2]In most circuit courts the frequency of reclassification is an estimate provided by the clerk and was not derived from systematically collected data.

[3]This column reports the way in which the judges reach a decision on the merits. In several instances we note which judge is responsible for the disposition. In some of these courts staff draft the dispositions; the judge is then responsible for reviewing and revising it, writing a different disposition, or supervising the drafting of a new disposition.

[4]To enable the judges to convene for more cases, the Eighth Circuit has adopted an appeals expediting program. Cases screened for expedited disposition have a shorter briefing period and shorter argument time than other cases do. Argument panels hear seven of these cases in a day. Thus, more cases can be heard and discussed by the judges.

Selection and Composition of Special Panels

Although the duties of the special panels are similar across the eight courts of appeals that have adopted them, certain aspects of the selection and composition of these panels vary: (1) the duration of membership on the panels, (2) the method of assignment of judges to the panels, and (3) the restrictions on panel membership.

In four courts of appeals (the First, Fifth, Ninth, and Eleventh) screening panels are established once each year. The panels in the First Circuit, although chosen once a year, serve for only a month each. In the Fifth, Ninth, and Eleventh Circuits the panels are standing panels that serve for a year. In three courts the panels are set up more frequently: The Seventh Circuit selects motions panels weekly, the Eighth Circuit chooses screening panels three times a year, and the Tenth Circuit selects rule 34 panels approximately monthly. In the Fourth Circuit the special panels, which represent all possible combinations of judges, are permanent: They change only when a judge leaves the court or a new judge is appointed.

Judges are assigned to the special panels either by random selection (in the Fourth, Fifth, Ninth, and Eleventh Circuits) or by rotation (in the First, Seventh, Eighth, and Tenth Circuits). The Seventh Circuit's selection procedure is an example of the rotation method: The court maintains a list of judges assigned to serve on the motions panels; each week a single judge is designated the motions judge, and the previous motions judge and the next judge on the list round out the panel.

In four courts of appeals (the Fourth, Seventh, Eighth and Tenth) both the active and senior judges are assigned to the special panels. In contrast, in the Ninth Circuit senior judges are assigned only when they are needed to round out the screening panels, and in three courts of appeals (the First, Fifth, and Eleventh) senior judges are not assigned to special panels at all. The chief judge serves on the special panels in all but three of the courts of appeals (the Fourth, Eighth, and Tenth).

Procedures Used to Review and Decide the Nonargument Cases

Generally, in courts where hearing panels rather than special panels review and dispose of the nonargument cases (the Third, Sixth, and Federal Circuits), the panels decide these cases when

they convene to hear the argument cases, whereas in courts where special panels review and dispose of the nonargument cases (the First, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits), the panels decide these cases through an exchange of telephone calls and memoranda.[26] The Seventh and Tenth Circuits, however, do not fit this pattern. In the Seventh Circuit the special screening panels convene specifically to review and decide the cases designated for nonargument. In the Tenth Circuit special panels sometimes review and decide the nonargument cases by discussion through memoranda and telephone calls and sometimes convene to decide these cases.

In the six courts of appeals in which the panels exchange their views and decisions through memoranda and telephone calls, the panels may use either a parallel decision-making process or a serial process. In the parallel process all the judges simultaneously receive the briefs and staff memoranda or draft opinions. This method is not used in many courts. In the Ninth Circuit, in which each panel selects its own decision-making method, some choose the parallel process. The special panels in the First and Fourth Circuits also use this method.

In the serial process, the clerk's office sends the case materials and staff memorandum or draft opinion to one of the three judges on the special panel. This judge reviews the case and either agrees with the nonargument designation or returns the case to the clerk's office for assignment to an argument calendar. If the judge concurs with the designation, he or she prepares (or supervises preparation of) a draft opinion, which is sent to the second judge on the panel. This judge reviews the case and may return it to the clerk or may pass it on to the third judge, who has the same options. If all three judges have approved the nonargument designation and accepted the draft disposition, the third judge sends the opinion to the clerk's office. The special panels in the Fifth, Eighth, and Eleventh Circuits and some panels in the Ninth Circuit use the serial process to review and decide the nonargument cases.

The serial method can save a considerable amount of the time that would be spent coordinating consultation among the panel members. However, the procedure can also consume time: For the few cases in which the second or third judge rejects the nonargument designation or the draft opinion, the time the first judge has spent preparing the disposition is lost. The parallel method also has both advantages and disadvantages, and these are

26. In the Second and D.C. Circuits, which do not screen cases for nonargument but occasionally do decide some cases on the briefs alone, the panels also decide these cases at the time they convene.

the reverse of those for the serial method: Although consultation among the judges can result in the elimination of cases inappropriate for nonargument before the judges have devoted much time to them, the consultation itself is time-consuming. The parallel process also places a greater burden on the clerk's office because three sets of briefs must be distributed and monitored. Whether these features of the decision-making process in fact affect either the time the judges spend on the nonargument cases or the total time to disposition for these cases is not known.[27]

One final difference between the serial and parallel processes should be noted. In the courts in which the panels use the serial process, the staff does not prepare draft opinions before sending the nonargument cases to the panels (although a staff attorney may be asked later to draft a disposition). In contrast, in courts that use the parallel method or in which the panels convene, staff attorneys usually prepare draft dispositions. The panels—and particularly the initial judges—that use the serial method, then, appear to carry a greater burden in formulating the disposition of a nonargument case than do the panels that use the parallel process.

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27. A comparison of panels using the serial process and panels using the parallel process in the Ninth Circuit found few differences in performance; cases submitted to screening panels using the serial procedure remained under submission for a mean time of forty-eight days, compared with a mean of forty-four days for cases submitted to screening panels using the parallel procedure. *See* J. S. Cecil, Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project (Federal Judicial Center 1985).

V. CONCLUSION

This report has described the screening procedures currently in use in the federal courts of appeals. These procedures have become refined and elaborated over time and now appear to be firmly in place in most courts. The courts use a variety of procedures, some of which are designed to accommodate local circumstances.

In describing the mechanics of the appellate courts' practices, this report provides some of the information necessary for an understanding of the screening processes, but additional data are required to better understand the relative merits of these procedures. A number of questions remain unanswered. For example, how does reliance on court staff for identification of cases suitable for disposition without argument affect the number and types of cases decided without argument? Does the use of more explicit screening criteria reduce the number of cases rejected by the screening panels and returned to the argument calendar? How do the litigants assess the fairness and usefulness of the screening procedures? Answers to such questions will require the collection of additional information on the functioning of the screening programs.

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