THE APPELLATE LAWYER REPRESENTATIVES' GUIDE TO PRACTICE IN THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

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INTRODUCTION

This practice guide was developed by the Ninth Circuit Appellate Lawyer Representatives as an informal guide to practice before the United States Court of Appeals for the Ninth Circuit. It does not represent the views of the judges, nor of any of the employers of the appellate lawyer representatives who participated in putting this guide together.

This guide is a work in progress. We welcome any suggestions for its improvement. Please email any suggestions or comments to ALRPracticeGuide@ca9.uscourts.gov We will do our best to keep the guide up to date, but rules, general orders, and electronic filing systems can and do change. In the event of conflict or possible confusion, follow the rules.

Finally, thank you to those representatives who drafted and commented on sections, as well as those members of the Ninth Circuit clerk's office who commented on the guide. Those individuals include lead editor Anne Voigts, Suzi Alexander, A.J. Kutchins, Syrena Hargrove, Gail Ivens, Karen Landau, Sarah Andre, Micki Brunner, Elizabeth Olson White, Stacey Leyton, Nat Garrett, Brian Matsui, Georgia McMillen, Vangie Abriel, Sue Soong, Cole Benson, Susan Gelmis, Lisa Fitzgerald, and Appellate Commissioner Peter Shaw.

INTRODUCTION TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

I. THE COURT

The U.S. Court of Appeals for the Ninth Circuit handles appeals arising from the federal trial and bankruptcy courts in the 15 judicial districts within the circuit. Judicial districts within the Ninth Circuit include the districts of Alaska, Arizona, Central California, Eastern California, Northern California, Southern California, Hawaii, Idaho, Montana, Nevada, Oregon, Eastern Washington, Western Washington, the U.S. Territory of Guam and the Commonwealth of the Northern Mariana Islands. The Court also has jurisdiction over petitions for review or enforcement of orders by various agencies, such as the Board of Immigration Appeals and the National Labor Relations Board.

II. COURT STRUCTURE AND PROCEDURES

A. PHYSICAL FACILITIES The headquarters of the Court are located at 95 Seventh Street, San Francisco, California 94103. The mailing address is P.O. Box 193939, San Francisco, California 94119-3939, and the telephone number is (415) 355-8000. Divisional clerk's offices are located in Pasadena, Seattle, and Portland. The Court also has three regional administrative units to assist the chief judge of the circuit to discharge his administrative responsibilities. They are the Northern, Middle and Southern units. The senior active judge in each unit is designated the administrative judge of the unit, and serves a non-renewable three-year term, after which the next most senior eligible active judge becomes the administrative judge.

- The Northern Unit includes the districts of Alaska, Idaho, Montana, Oregon, and Eastern and Western Washington.

- The Middle Unit includes the districts of Arizona, Nevada, Hawaii, Guam, Northern and Eastern California, and the Northern Mariana Islands.

- The Southern Unit includes the districts of Central and Southern California.

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. Cases may also be heard in such other places as the Court may designate.

B. JUDGES AND SUPPORTING PERSONNEL

1. Judges The Court has an authorized complement of 29 active judgeships, although there are often some vacancies. After an active judge attains a certain combination of years of service and age, she

or he can take "senior" status. A judge who has taken senior status still hears and decides cases, but can reduce his or her workload. While a senior judge otherwise generally functions just like an active judge, senior judges cannot participate in deciding whether to take cases *en* banc. There are several senior circuit judges who regularly hear cases before the Court. Although San Francisco is the Court's headquarters, most of the active and senior judges maintain their residence chambers in other cities within the circuit. The residences and chambers of the Court's judges, including its senior judges, are indicated in the listing of judges within these Rules.

2. **Appellate Commissioner** The Appellate Commissioner acts as a magistrate judge for the Court of Appeals. The Appellate Commissioner rules on a wide range of motions filed before a case is assigned to a three-judge panel for decision on the merits. The Appellate Commissioner also manages the compensation of appellate counsel appointed under the Criminal Justice Act to represent parties financially unable to retain counsel.

In addition, the Appellate Commissioner conducts hearings in attorney disciplinary matters when the Court contemplates suspending or disbarring an attorney, conducts hearings when a criminal defendant seeks self-representation on appeal, orders awards of attorney fees in civil disputes upon referral by a panel, and conducts case management conferences in complex, multi-party criminal appeals.

3. **Clerk's Office** Clerk's office personnel are authorized to act on certain procedural motions, to handle stipulations for dismissal, and to dismiss cases for failure to prosecute. Inquiries concerning rules and procedures may be directed to the Clerk's office. On matters requiring special handling, counsel may contact the Clerk for information and assistance. No judge nor any member of the Court staff will give legal advice, however. Court information, including Court rules, the general orders, calendars, and opinions are available on the Court's website at www.ca9.uscourts.gov.

4. **Office of Staff Attorneys** The staff attorneys perform a variety of tasks for the Court and work for the entire Court rather than for individual judges.

a. **Inventory** After briefing has been completed, the case management attorneys review the briefs and record in each case to identify the primary issues raised in the case and to assign a numerical weight to the case reflecting the relative amount of judge time that likely will have to be spent on the matter.

b. **Research** The research attorneys 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. (Each judge also has his or her own law clerks who research cases that are calendared.)

c. **Motions** The motions attorneys 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 and urgent motions filed pursuant to Ninth Circuit Rules 27-3 and 27-4, and motions for reconsideration of orders filed by motions panels.

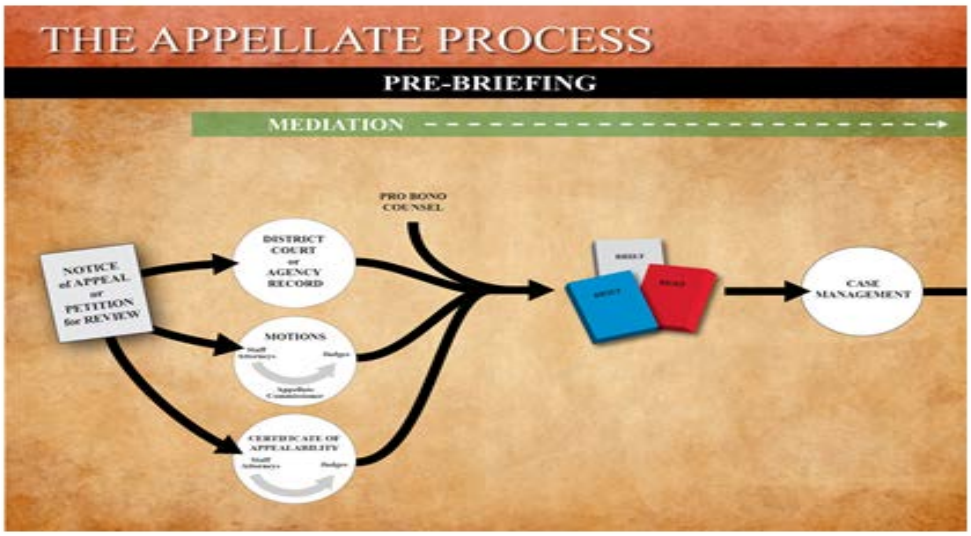
5. **Circuit Court Mediators** Shortly after a new civil case is docketed, the Circuit Court Mediators will review the Mediation Questionnaire to determine if a case appears suitable for the Court's settlement program. *See* Ninth Circuit Rules 3-4 and 15-2. The Circuit Court Mediators are permanent members of the Court staff. They are experienced appellate practitioners who have had extensive mediation and negotiation training.

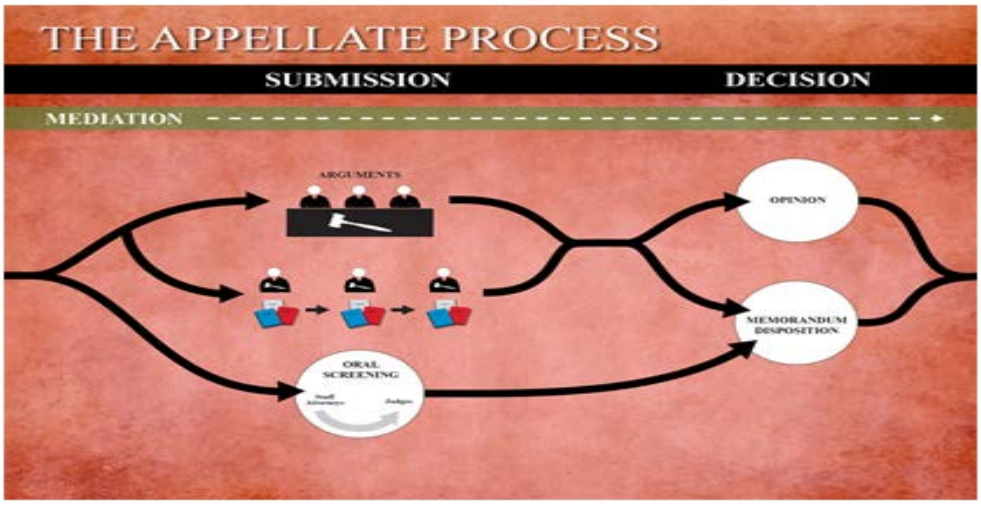
6. **Library** The Ninth Circuit library system, headed by the Circuit Librarian, consists of 21 staffed libraries including the headquarters library and 20 branch libraries located throughout the Circuit. The administrative office and the headquarters library are located in San Francisco. Court libraries may make their collections available to members of the bar and the general public depending on local Court rules.

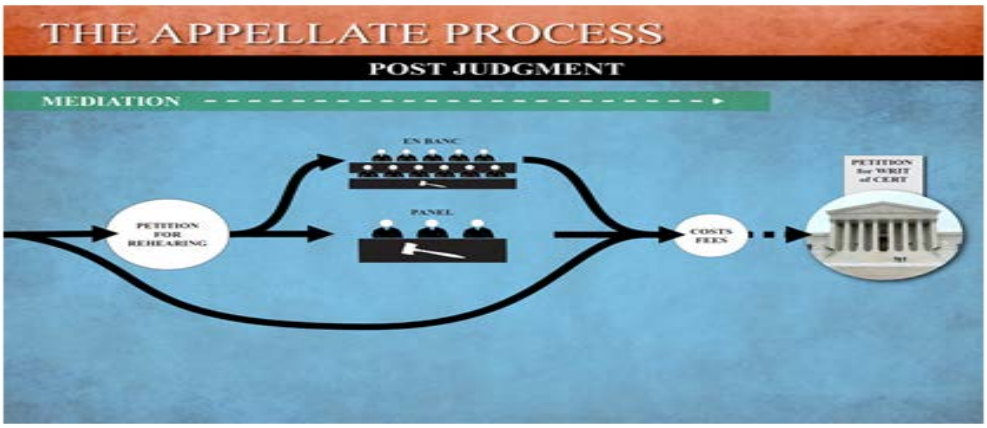
7. **Circuit Executive's Office** The Circuit Executive's office is the arm of the Circuit's Judicial Council that provides administrative support to appellate, district, magistrate, and bankruptcy judges in the circuit.

C. **THE JUDICIAL COUNCIL** The Judicial Council, established pursuant to 28 U.S.C. § 332, is currently composed of the Chief Judge, four circuit judges, and four district judges. The Council convenes regularly to consider and take required action upon any matter affecting the administration of its own work and that of all federal courts within the circuit, including the consideration of some complaints of judicial misconduct.

III. THE LIFESPAN OF A CASE IN THE NINTH CIRCUIT







OVERVIEW OF THE APPELLATE PROCESS

I. COURT PROCEDURES FOR PROCESSING AND HEARING OF CASES

A. HOW DOES THE COURT DETERMINE HOW A CASE WILL BE HANDLED?

After the briefing is completed, the case management attorneys inventory cases to weigh them by type, issue, and difficulty. This process enables the Court to balance judges' workloads and hear unrelated appeals involving similar legal issues at a single sitting. There are four main routes to a decision by the Court: (1) by a three judge panel, after briefing and oral argument; (2) by a three judge panel, after briefing and calendaring, but without oral argument; (3) by an oral or written screening panel, to whom staff attorneys have presented the case; and (4) through motions practice. The majority of cases are decided without oral argument.

B. WHAT HAPPENS WITH CASES ALLOCATED TO A SCREENING PANEL?

1. How are cases assigned to screening calendars? Cases are assigned to the screening calendars based on the numerical weight given to the case by the case management attorneys. Screening cases must be eligible for submission without oral argument under FRAP 34(a). Additionally, they should meet both of 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.

2. What happens after my case is assigned to a screening calendar? After the Clerk assigns a case to the screening calendar, the Clerk's Office forwards the case materials to the staff attorneys. The staff attorneys then place each screening case on either an oral screening calendar or a written screening calendar. (Rev. 7/1/02; 7/1/03)

a. **Oral Screening Panel Presentations**

i. **What happens before the panel?** Staff attorneys prepare proposed memorandum dispositions for the cases they place on the oral screening calendars. An authoring judge is designated for each case presented to the oral screening panel, and the writing assignment rotates among the three panel members.

ii. **What happens during the panel?** The staff attorneys orally present the proposed dispositions to the screening panels at periodically scheduled sessions. After the staff attorneys present 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 designated authoring judge directs the presenting attorney to certify the proposed disposition for filing pursuant to General Order 6.9.

iii. **What happens after the panel?** Disposition of cases presented at the oral screening and motions panel ordinarily will be by unpublished memorandum or order. If, in the judgment of the panel, a decision warrants publication, the resulting order or opinion is included in the daily pre-publication report and specifically flagged as a decision arising from a motions or screening panel.

b. **Written Screening Panels**

i. **How are cases assigned to the written screening panel?** When a written screening panel indicates that it is ready for case assignments, staff send the requested number of cases taken from the cases designated as those eligible for screening. The panel tells the clerk's office which member of the panel will have the writing assignment. The designated authoring judge prepares and circulates an optional bench memorandum and a proposed disposition for comment and approval.

ii. **How does the written screening panel dispose of cases?** Dispositions ordinarily will be by memorandum. If the panel has not issued a separate order submitting the case, a footnote should be included in the disposition indicating that the panel unanimously agrees that the case should be submitted on the briefs pursuant to FRAP 34(a).

3. **Can a case be reassigned from screening?** Yes. All three judges must agree that the case is suitable for the screening program before a case is disposed of by a screening panel. Any one judge may reject a case from screening. Judges reject any case that does not meet the screening criteria, as outlined above. If a case is rejected from screening, it is scheduled on the next available argument calendar.

4. **What can I do if my case was adversely decided by an oral screening panel?** You may file a petition for rehearing. The Clerk enters the receipt or filing of each petition for rehearing in any case disposed of by an oral screening panel, and forwards it to the staff attorney who presented the case to the oral screening panel. That staff attorney then forwards to the panel (1) a copy of the petition for rehearing, and (2) a memorandum discussing the issues raised in the petition for rehearing.

C. WHAT HAPPENS WITH CASES SCHEDULED FOR ORAL ARGUMENT?

1. **How are Court calendars designated?** 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. Judges are randomly assigned by computer to particular days or weeks on the calendars to equalize the workload among the judges. At the time judges are assigned to panels, the Clerk does not know which cases ultimately will be allocated to each of the panels.

2. **How are cases allocated to a specific calendar?** Direct criminal appeals receive preference pursuant to FRAP 45(b)(2) and are placed on the first available calendar after briefing is completed. Many other cases are accorded priority by statute or rule. See Ninth Circuit Rule 34-3. 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. Pursuant to FRAP 2, the Court also may in its discretion order that any individual case receive expedited treatment.

3. **Are all cases randomly assigned?** Nearly all cases are randomly assigned. However, a case heard by the Court on a prior appeal may be set before the same panel upon a later appeal. Capital cases will be set before the same panel upon a later appeal. Ninth Cir. R. 22-2(c). (If the panel that originally heard the matter does not specify its intent to retain jurisdiction over any further appeal, either party may file a motion to have the case heard by the original panel.) Matters on remand from the United States Supreme Court are also referred to the panel that previously heard the matter.

4. **Where are court calendars held?** Normally, court calendars, usually consisting of one week of multiple sittings, are held each year in the following places:

   - 12 in San Francisco (usually the second week of each month),
   - 12 in Pasadena (usually the first week of each month),
   - 12 in Seattle (usually the first week of each month),
   - 6 in Portland,
   - 3 in Honolulu,
   - 2 in Anchorage, and
   - On an ad hoc basis, in other locations throughout the circuit, sometimes at law schools.

Each court calendar usually consists of one week of multiple sittings.

D. SELECTION OF PANELS The Clerk sets the time and place of the calendars. The Clerk uses a matrix composed of all active judges and those senior judges who have indicated their availability. The aim 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. 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 on 32 days of oral argument calendars; one oral screening panel; one motions panel; and one certificate of appealability panel. Senior judges are given a choice as to how many cases they want to hear.

1. Why is there a judge on my panel who is not a Ninth Circuit judge? The Court on occasion calls upon district judges and judges from other Circuits to sit on panels when there are not enough Ninth Circuit judges to constitute a panel. Under Court policy, district judges do not participate in appeals from their own districts. In addition, the Court tries 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 in other districts.

E. WHAT HAPPENS AFTER MY CASE HAS BEEN ASSIGNED TO A PANEL? After the cases have been assigned to the panels, the briefs and excerpts of record in each case are distributed to each of the judges scheduled to hear the case. The documents are usually received in the judges' chambers twelve weeks prior to the scheduled time for hearing, and it is the policy of the Court that each judge read all of the briefs prior to oral argument.

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.

1. How long does it take from the time of the notice of appeal until oral argument? For a civil appeal, approximately 12-20 months from the notice of appeal date. If briefing isn't delayed, approximately 9-12 months from completion of briefing. For a criminal appeal, approximately 4-5 months after briefing is complete.

2. When are the identities of the judges on a panel disclosed? The names of the judges on each panel are released to the general public on the Monday of the week preceding argument.

3. Will my case actually get oral argument? Merits panels often elect to decide appeals "on the briefs" (meaning without oral argument) even after they are placed on an argument calendar. If the panel determines that oral

argument will not enhance their review and decisionmaking, the panel will notify the parties of this determination as soon as possible after the case is calendared.

G. WHAT HAPPENS AFTER ORAL ARGUMENT? 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 the 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.

H. HOW LONG DOES IT TAKE FROM THE TIME OF ARGUMENT TO THE TIME OF DECISION? The Court has no time limit, but most cases are decided within 3 months to a year.

I. HOW LONG DOES IT TAKE TO DECIDE A PETITION FOR PANEL REHEARING OR PETITION FOR REHEARING EN BANC? The Court has no time limit. A decision on a petition for rehearing en banc may take a few months.

FILING AN APPEAL IN THE NINTH CIRCUIT: HOW TO GET STARTED

> ***Practice Tip:*** **Many of the subjects covered in this section are addressed in greater detail in the Ninth Circuit's "Appellate Jurisdiction Outline," which can be accessed at: http://www.ca9.uscourts.gov/guides/appellate_jurisdiction.php.**

I. FILING A NOTICE OF APPEAL

A. WHY FILE? Filing a notice of appeal is the necessary first step to initiating an appeal in the Ninth Circuit. In essence, the filing of a notice of appeal revokes the district court's jurisdiction over the appealed matter, and transfers jurisdiction to the Ninth Circuit. Filing a notice of appeal is the appropriate method for maintaining a direct appeal in the Ninth Circuit. The notice of appeal is the proper vehicle for appealing final judgments and certain interlocutory orders. While there are other avenues for review in the Ninth Circuit, such as on a petition for extraordinary writ, they are not covered in this section.

1. **What is a final judgment?** A final judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). As a general matter, the following orders are final, and thus should be appealed via the filing of a Notice of Appeal:
   - Order dismissing complaint without leave to amend;
   - Order granting summary judgment as to all claims;
   - Order imposing a sentence in a criminal case.

2. **Which interlocutory orders are appealable?** Rulings that decide some issue in the case, but not the whole case, are "interlocutory orders." Certain interlocutory orders, though not final, also are properly appealed by filing a Notice of Appeal. The most common example is an order granting or denying a motion for injunctive relief. Whether the motion seeks preliminary or permanent relief, the losing party may bring a direct appeal of the district court's order pursuant to 28 U.S.C. § 1292(a)(1). Other examples include certain interlocutory orders in admiralty cases (28 U.S.C. § 1292(a)(3)), and certain interlocutory orders involving arbitration proceedings (9 U.S.C. § 16).

B. HOW TO FILE

1. **The Notice of Appeal** Parties must file their Notice of Appeal in the district court, not the Ninth Circuit. A sample Notice of Appeal can be downloaded from the Ninth Circuit's website: http://www.ca9.uscourts.gov/datastore/uploads/forms/form1.pdf. Pursuant to Federal Rule of Appellate Procedure 3(c), the Notice of Appeal must contain the following information:
   - The party or parties taking the appeal;
   - The judgment, order, or part thereof being appealed; and

- The name of the court to which the appeal is taken (*i.e.*, the "United States Court of Appeals for the Ninth Circuit").

In addition, the notice of appeal must be signed by the appealing party or the party's attorney. *See McKinney v. de Bord*, 507 F.2d 501, 503 (9th Cir. 1974).

2. **Representation Statement** In a civil case, a represented party filing a Notice of Appeal contemporaneously must file a Representation Statement, which identifies the parties and includes the names, addresses, and telephone numbers of the parties' respective counsel.

> ***Practice Tip:*** An appellant does not have to file a representation statement in a *criminal* case. *See* Circuit Rule 3-2.

3. **Mediation Questionnaire** After the appellant files a Notice of Appeal, the Clerk of the Court will distribute a Mediation Questionnaire (along with the Court's scheduling order). Within seven days after a civil appeal is docketed, the appellant *must* and the appellee *may* complete and submit the Ninth Circuit Mediation Questionnaire (available at: http://www.ca9.uscourts.gov/datastore/uploads/forms/Mediation_Questionnaire.pdf).

In the past, civil appellants were required to file a Docketing Statement, which required a brief statement of the issues to be raised on appeal. Because the Mediation Questionnaire has superseded the Docketing Statement, appellants no longer need file a Docketing Statement.

4. **Petitions for Review in Agency Cases** The process for reviewing an agency order in the Ninth Circuit is initiated by filing a Petition for Review, rather than a Notice of Appeal. A sample Petition for Review is available on the Court's website, at: http://www.ca9.uscourts.gov/datastore/uploads/forms/form3.pdf.

> ***Practice Tip:*** Unlike a Notice of Appeal, which is filed in the district court, a Petition for Review must be filed in the Ninth Circuit.

C. WHEN TO FILE

1. **30-Day Deadline in Civil Case** In a civil case, the Notice of Appeal must be filed within 30 days of entry of the appealed judgment or order. Fed. R. App. P. 4(a)(1)(A). However, when one of the parties is the United States, a United States agency, or a United States officer or employee sued in an official capacity or in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf, the time to appeal is 60 days. Fed. R. App. P. 4(a)(1)(B).

Practice Tip: Habeas corpus cases are considered civil actions. Accordingly, appeals from the denial of motions under 28 U.S.C. § 2254 are subject to the 30 day appeal deadline. However, appeals from the denial of motions under 28 U.S.C. § 2255 are subject to the 60-day appeal deadline because the United States is the responding party.

2. **14-Day Deadline For Defendants in a Criminal Case** In a criminal case, the defendant must file a Notice of Appeal within 14 days of entry of the appealed judgment or order. Fed. R. App. P. 4(b)(1)(B). When the government is entitled to appeal, its Notice of Appeal must be filed within 30 days. Fed. R. App. P. 4(b)(1)(B). If the government files an appeal, the defendant has 14 days from the government's date of notice to file a notice of appeal.

Practice Tip: The deadline for filing a Notice of Appeal is jurisdictional in civil cases, and the late filing of a Notice of Appeal can doom a case (whether civil or criminal). Act promptly; there is no penalty for filing a Notice of Appeal well before the deadline looms.

3. **Varied Deadlines in Agency Cases** The time limit for filing a Petition for Review varies by agency and will depend on the terms of the statute authorizing judicial review. Typical deadlines range from 30 to 60 days, but vary significantly depending on the statute. One of the most common deadlines is the 30-day deadline to appeal a final order of removal in immigration cases (8 U.S.C. § 1252(b)(1)). Although beyond the scope of this booklet, the process for filing a petition for review in an immigration case is addressed in more detail in this handout: http://www.ca9.uscourts.gov/datastore/uploads/guides/petition/lac_pa_041706.pdf
As in civil cases, the deadline for filing a Petition for Review is jurisdictional, and an untimely Petition will be dismissed.

D. APPEALS BY PERMISSION

Prior to the entry of final judgment, district court rulings generally are not subject to appellate review. In certain instances, however, a party can seek and obtain permission to directly appeal an interlocutory ruling to the Ninth Circuit. Appeals by permission generally fall within two categories:

- Appeals in which the party seeking review first seeks *and* obtains certification from the court being reviewed (*i.e.*, the district court, bankruptcy appellate panel, or bankruptcy court).
- Appeals in which no certification from the district court is required.

Prior to receiving permission to appeal, a would-be appellant must first file a petition for permission to appeal in the Ninth Circuit under Federal Rule of Appellate Procedure 5. If the Ninth Circuit grants permission, the appeal will be docketed.

Practice Tip: Appeals by permission are distinct from interlocutory appeals noted in Part I.A *supra* and mandamus and other extraordinary writs. For example, there is an automatic right to appeal a judgment certified under Federal Rule of Civil Procedure 54(b) and a district court order "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1).

1. <u>Examples of appeals by permission</u>

a. 28 U.S.C. § 1292(b) A district court can certify for appeal an interlocutory ruling that otherwise would not be appealable. For the district court to certify its order for appellate review, the order must involve "a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Immediate appellate review should "materially advance the ultimate termination of the litigation." *Id.*

- A petition for permission to appeal cannot be filed without the district court's certification, and the district court's denial of certification under Section 1292(b) is not subject to review.
- Certification by the district court alone is not enough. If the district court certifies its order, "[t]he Court of Appeals may thereupon, *in its discretion*, permit an appeal to be taken from such order …." *Id.* (emphasis added).

A petition for permission to appeal under 28 U.S.C. § 1292(b) must be filed **within 10 days** of the district court's certification. This requirement is jurisdictional.

b. Class certification A petition for permission to review a district court's order granting or denying class certification can be filed under Federal Rule of Civil Procedure 23(f). A discretionary appeal under Rule 23(f) does not require any certification by the district court.

The petition must be filed **within 14 days** of the district court's class certification order. This requirement is jurisdictional.

c. Interlocutory bankruptcy appeals Certain bankruptcy rulings can be directly reviewed by the court of appeals with permission from *both* the court being reviewed (*i.e.*, the district court, bankruptcy appellate panel, or bankruptcy court) *and* the court of appeals under 28 U.S.C. § 158(d)(2).

d. Review of remand rulings under 28 U.S.C. § 1453(c)
Under the Class Action Fairness Act, "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed…" 28 U.S.C. § 1453(c). A discretionary appeal under 28 U.S.C. § 1453(c) does not require any certification by the district court.

A petition for permission to appeal under 28 U.S.C. § 1453(c) must

> ***Practice Tip:*** Appeals by permission do not automatically stay the district court proceeding. A stay must be obtained from either the district court or the court of appeals.

be filed **within 10 days** of the district court's order granting or denying remand. This requirement is jurisdictional.

2. **<u>Procedure</u>** A petition for permission to appeal is filed in the court of appeals. Federal Rule of Appellate Procedure 5 sets forth the requirements for filing the petition.

- No filing fee is required to file the petition.
- An answer in opposition or cross-petition is due 10 days after the petition is served.
  - Note: Although there is no requirement that an answer to the petition be filed, the court of appeals can grant a petition even in the absence of one.
- If the petition is granted, the appellant must pay the required fees within 14 days.
-

> ***Practice Tip:*** A petition for permission to appeal does not need to be filed electronically. An answer to a petition for permission to appeal should be filed electronically.

E. CROSS-APPEALS

1. **<u>When to file</u>** If one party timely files a notice of appeal, any other party can file their own notice of appeal within 14 days of the first notice's filing, *or* within the time otherwise prescribed under Fed. R. App. P. 4(a), whichever period ends later. The party who files a notice of appeal first is the appellant for the purposes of Fed. R. App. P. 28, 30, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

II. <u>ORDERING THE TRANSCRIPT</u>

In order for the official reporter's transcript of oral proceedings before the district court to be considered by the Ninth Circuit, the parties first must order the transcript. Ninth Circuit Rule 10-3 establishes the rules governing the ordering of the reporter's transcript.

A. CIVIL APPEALS In a civil case, and where the appellant intends to order less than the entire transcript, the first step in the process requires the appellant to serve on the appellee a statement specifying which portions of the transcript the appellant intends to order from the court reporter, as well as a statement of the issues the appellant intends to present on appeal, if any.

> ***Practice Tip:*** If the appellant intends to order the entire transcript, it is not necessary to serve a transcript statement. The rationale is that if the appellant is ordering all transcripts, there is no need for the appellee's input.

The notice and statement must be served on the appellee within 10 days of filing the notice of appeal, or within 10 days of the entry of an order disposing of the last timely filed postjudgment motion of a type specified in Federal Rule of Appellate Procedure 4(a)(4).

> ***Practice Tip:*** The appellant's first obligation is to communicate with the appellee—as opposed to a court or the court reporter—regarding the transcripts the appellant intends to order.

Next, the appellee may respond to the appellant's initial notice by serving on the appellant a list of any additional portions of the transcript that the appellee deems necessary to the appeal. If the appellee elects to respond, the response must be served within 10 days of the service date of the appellant's initial notice.
Within 30 days of filing the notice of appeal, the appellant must file a transcript order form in the district court. Transcript designation ordering forms should be obtained or downloaded from the district court.

> ***Practice Tip:*** Transcript order forms must be obtained from and filed by the appellant in the district court, not the Ninth Circuit.

For civil appeals, the interval between receipt of appellee's cross-designation and the due date to designate the transcripts is intended to provide a period to contact the reporter and ascertain what advance financial arrangements are to be complete on or before the date the transcript is ordered. Per Ninth Circuit Rule 10-3.1, financial arrangements are to be complete on or before the date the transcript is ordered. The transcript is considered ordered only after the designation form has been filed *and* arrangements for payment have been made with the court reporter(s).

B. CRIMINAL APPEALS In a criminal case, the appellant must serve on the appellee a notice listing the portions of the transcript the appellant will order from the court reporter, as well as a statement of the issues the appellant intends to present on appeal. (If, however, the appellant is ordering the entire transcript, a statement of issues is not necessary.) This notice and statement must be served on the appellee within 7 days of the filing of the notice of appeal or within 7 days of

the entry of an order disposing of the last timely filed postjudgment motion of a type specified in federal rule of appellate procedure 4(b).

Within 7 days of the service of the appellant's initial notice, the appellee may serve on the appellant a response specifying what additional portions of the transcript are necessary to the appeal.

Within 21 days from the filing of the Notice of Appeal, the appellant must file a transcript designation form in the district court. Forms should be obtained or downloaded from the district court, and can vary depending on the district and whether counsel is retained or appointed. For cases where the appellant is represented by counsel under the Criminal Justice Act, the procedures for paying for the transcript are covered in the Right to Counsel section.

In practice, these deadlines can be missed or extended, often because of a change in counsel. If a new briefing schedule is not established, allowing a delayed date for designating the transcripts, counsel should file a motion for leave to file a late transcript designation in the Ninth Circuit.

Practice Tips: The deadlines for ordering the reporter's transcript are shorter in criminal appeals. The parties have 7 days from the date of the filing of the Notice of Appeal, as opposed to 10, to file their respective notices. And the appellant must order the transcript within 21 days from the filing of the Notice of Appeal, as compared to 30 days in a civil case.

Attorneys appointed under the Criminal Justice Act are advised that the client's pauper status does not automatically entitle appellant to transcripts of opening and closing argument, jury instructions or jury selection; the district court judge must specifically authorize preparation of those transcripts via a notation on the reporter's payment voucher. If you want those transcripts produced, check with the court reporter supervisor about any special requirements.

When the appellant is represented by retained counsel, the appellant must make arrangements with the court reporter(s) to pay for the transcripts on or before the day the transcript designation form is filed in the district court.

C. LATE TRANSCRIPTS The Clerk of the Court will circulate a scheduling order shortly after the notice of appeal is filed. That order will establish a deadline for the filing of all trial transcripts. If a transcript is not filed within the time established by the scheduling order (or within any extension of time granted by the court), the appellant must file a notice of reporter default within 21 days after the transcript due date, pursuant to ninth circuit rule 11-1.2. The notice must be served on both the court reporter and the reporter's supervisor. A reporter's motion for an extension of time relieves you of the obligation to file a rule 11-1.2 notice unless other reporters are in default.

Ninth Circuit Rule 11-1.2 establishes the requisite contents of a Notice of Reporter Default, and requires notice of when the transcripts were designated, when financial arrangements were made, the dates of hearings for which transcripts have not been prepared, and the name of the reporter assigned to those hearings.

Practice Tips: Before filing a Notice of Reporter Default, the appellant is required to contact the court reporter and the court reporter's supervisor about the uncompleted transcripts.

THE RIGHT TO COUNSEL ON APPEAL

I. WHAT IS THE RIGHT TO COUNSEL ON APPEAL? The Constitution guarantees defendants in federal criminal cases the right to be represented by counsel on a direct appeal from a federal criminal conviction, which includes the right to have an attorney appointed if the defendant cannot afford to retain one. While the Constitution does not require that counsel always be provided to petitioners in habeas corpus appeals, the Ninth Circuit has observed that, in some situations, counsel should be appointed to ensure due process. The procedures, along with additional statutory guarantees of appointed counsel for both criminal and habeas corpus cases, are set out in the Criminal Justice Act of 1962 ("CJA," found at 18 U.S.C. §3006A) and Ninth Circuit Rule 4-1.

> ***Practice Tip:*** There is no constitutional or general statutory right to the appointment of counsel in civil cases. In particular, counsel cannot be appointed under the provisions of the CJA in prisoner and other civil rights cases arising under 42 U.S.C. § 1983 ("1983 actions"). The Court does, however, have a pro bono program for civil and agency appeals. If you are a pro se litigant and would like to have an attorney appointed to represent you, you must first have a pending appeal filed in this Court. You can then file a motion for appointment of counsel with the Clerk of the Court. For more information, see http://www.ca9.uscourts.gov/probono/

A. THE CRIMINAL JUSTICE ACT AND RULE 4-1 The CJA provides for the appointment and payment of counsel and for payment of ancillary services (interpreters, experts, paralegals, transcripts, *etc*.) necessary for adequate representation, including on appeal. The CJA also provides that the Court, in its discretion, may appoint attorneys to represent habeas corpus petitioners or others seeking collateral relief, "when the interests of justice require."

If counsel is appointed to represent an eligible individual under the CJA, that individual continues to be entitled to representation in "every stage of the proceedings . . . through appeal." Whether counsel continues from the district court, or is appointed in the first instance on appeal (as happens in some habeas cases, and in criminal cases in which the defendants represented themselves in the District Court), the representation continues through the filing of a petition for writ of *certiorari* and all "ancillary matters appropriate to the proceedings."

In habeas corpus cases arising under 28 U.S.C. § 2254, the Ninth Circuit generally appoints counsel when the circuit court has granted a certificate of appealability ("COA") or when a writ has been granted by the district court and the respondent initiates the appeal.

When the Ninth Circuit issues an order granting a COA, the order usually contains language providing for the appointment of counsel, but giving the habeas corpus appellant the option of retaining his or her pro se status. This option is not generally available to appellants in direct criminal appeals.

Ninth Circuit Rule 4-1 addresses most of the important questions on the duties of counsel, the withdrawal or appointment of counsel, and self-representation on appeal. It provides that counsel appointed in the district court pursuant to the CJA shall continue as counsel on appeal unless and until relieved by the Ninth Circuit. Unless appointed counsel moves to withdraw, they will generally be appointed to handle the appeal and provided with a voucher for seeking payment with no further action required to accomplish the appointment.

Although Rule 4-1 is entitled "Counsel in Criminal Cases" the provisions apply to any case where the client is entitled to the appointment of counsel under the CJA, including habeas matters.

B. WHO DECIDES WHETHER OR NOT TO APPEAL? Criminal defense counsel must consult with his or her client in order to determine if the client desires to pursue an appeal. If the client does wish to pursue an appeal, Rule 4-1 and governing professional standards *require* that counsel file the notice of appeal. This is true even when the criminal case was resolved through a plea agreement that included an appellate waiver, or when the attorney believes there are no non-frivolous appellate issues.

> ***Practice Tip:*** If there is any doubt at all as to the criminal defendant's wishes, file the Notice of Appeal. The appeal can be withdrawn later if the defendant/appellant wishes by filing a motion for voluntary dismissal.

C. WHO IS COUNSEL ON APPEAL? The Ninth Circuit follows a policy of continuity of counsel from district court to appellate court proceedings. The attorney listed as counsel of record in the district court proceedings – whether retained, appointed, or pro bono – continues as counsel for purposes of appeal unless and until relieved by the Ninth Circuit. Ninth Cir. R. 4-1.

If the client was represented by CJA counsel in the district court, the finding that the client qualified for appointment of counsel under the CJA continues to apply for purposes of the appeal – it is not necessary to file a new financial affidavit – and the appeal can be filed without the prepayment of fees and costs or security.

If the client had retained or pro bono counsel or proceeded pro se and was never found by a court to qualify for representation or services under the CJA, then an application for indigent status on appeal must be filed. Retained counsel, or the appellant (if he or she was *pro se* in the district court), should file a CJA Form 23 (available at this link).

Each district has a panel of attorneys qualified to handle appeals, and orders from the Ninth Circuit directing the selection of counsel are sent to the appointing

authority for that district. This process helps to ensure that an attorney with relevant appellate court experience is assigned to handle the appeal.

D. WHAT IF COUNSEL AT THE DISTRICT COURT LEVEL WISHES TO WITHDRAW FROM THE APPEAL? Rule 4-1 (c) provides that either retained or appointed counsel who desires to withdraw from the appeal should file a motion so stating with the Clerk of the Court "within 21 days after the filing of the notice of appeal and shall be accompanied by a statement of reasons" along with:

1. A substitution of counsel which indicates that new counsel has been retained to represent defendant; or

2. A motion by retained counsel [on behalf of the client] for leave to proceed in forma pauperis and for appointment of counsel under the Criminal Justice Act, supported by a completed financial affidavit (CJA Form 23); or

3. A motion by appointed counsel to be relieved and for the appointment of substitute [appointed] counsel; or

4. A motion by defendant to proceed pro se; or

5. An affidavit or signed statement from the defendant showing that the defendant has been advised of his or her rights with regard to the appeal and expressly stating that the defendant wishes to dismiss the appeal voluntarily.

The motion must be served on the client and the proof of service must include the client's current address.

Practice Tip: Motions for leave to withdraw are freely granted to trial attorneys who wish to withdraw from appellate representation. The attorney need not assert a breakdown in communication or potential ineffective assistance of counsel as the basis for the motion. A representation that counsel does primarily trial level work or that the case would benefit from new counsel is sufficient, and has the added benefit of preserving the option that trial counsel may return to the case if the appeal is successful and remanded to the district court.

Although the Rule states that the motion is to be filed within 21 days of the filing of the notice of appeal, later-filed motions are generally entertained. Counsel should plan ahead and get the motion on file as soon as possible. Most attorneys file it as soon as a case number has been assigned to the appeal, or indeed file it concurrently with filing the notice of appeal.

Practice Tips: A common mistake made by retained counsel is failing to file the notice of appeal under their name as counsel of record, and instead filing it under the client's own name and address. It can take quite a while for the Court to catch this error, and then issue the inevitable order to counsel, referencing Rule 4-1(a), entering counsel as counsel of record on appeal, and directing counsel that they must comply with Rule 4-1(c) by filing the pertinent motion if they desire to be relieved as counsel.

Unlike criminal appeals, if a pro se litigant files the notice of appeal in a civil case, the court assumes the appellant is pro se even if the litigant had counsel in the district court.

E. WHAT ABOUT SELF-REPRESENTATION ON APPEAL?

While criminal defendants have a constitutional right to represent themselves in the trial court, this is not the case on appeal. If an individual appellant wants to proceed pro se, a motion requesting this relief must be filed. The motion will be referred to the Appellate Commissioner for consideration. Ninth Circuit Rule 4-1(d) provides as follows:

The Court will permit defendants in direct criminal appeals to represent themselves if: (1) the defendant's request to proceed pro se and the waiver of the right to counsel are knowing, intelligent and unequivocal; (2) the defendant is apprised of the dangers and disadvantages of self-representation on appeal; and (3) self-representation would not undermine a just and orderly resolution of the appeal. If, after granting leave to proceed pro se, the Court finds that appointment of counsel is essential to a just and orderly resolution of the appeal, leave to proceed pro se may be modified or withdrawn.

Permission to proceed pro se on appeal is granted only in rare cases, after a hearing at which the defendant appears in person or by videoconference. Counsel may be required to appear at this hearing.

F. POST-APPEAL DUTIES AND PROCEEDINGS If the appeal is successful, the matter will either conclude at that stage or be remanded to the district court for further proceedings. Any change of counsel after that time will be handled in the district court.

If the appeal is not successful, either in whole or in part, Rule 4-1(e) directs counsel, whether retained or appointed, to advise the client within 14 days after the entry of judgment or denial of a petition for rehearing of the right to initiate further review by filing a petition for writ of certiorari with the Supreme Court. If the client wants to pursue certiorari, but in counsel's considered judgment there are no non-frivolous grounds consistent with the standards for the filing of a petition (*see* Supreme Court Rule 10), the Court

directs that counsel notify the client that counsel intends to move the Court for leave to withdraw as counsel of record if the client insists on filing the petition. The rule additionally requires that any motion to withdraw as counsel must be made within 21 days of the judgment or denial of rehearing and shall state what efforts have been made to notify the client. If counsel is unable to notify the client, the Court must be informed.

If counsel does not move to be relieved of his or her appointment, counsel's representation continues through filing a petition for certiorari or providing representation when an opposing party files a petition for certiorari.

If a defendant with retained counsel or a defendant who has been pro se during the appeal is financially eligible for appointed counsel and wants the assistance of counsel for the filing of the writ, a motion for appointment of counsel with the required CJA Form 23 can be filed at this point in the proceedings.

No matter what state of the proceedings, the Court expects counsel to communicate with the client and provide information and updates on the status of the litigation, the possible issues to be included and addressed on appeal, and substantive and procedural choices.

G. GETTING PAID Payment vouchers should be issued to appointed counsel within 2 weeks after (1) the notice of appeal is filed or (2) the date of an order appointing new or substitute counsel. Practitioners should contact the clerk's office if the voucher hasn't been received within 30 days after the filing of the notice of appeal or the date of the new or substituted counsel order.

Claims are to be submitted no later than 45 days after the final disposition of the case in this Court or after the filing of a petition for a writ of certiorari. Although the deadline is not mandatory and jurisdictional, late submission may delay payment.

The Court has recently implemented a eVoucher system. Instructions for utilizing the on-line voucher system may be found on the attorney page of the court's website. Each voucher must be accompanied by an Information Summary. This form is available as a fillable pdf on the Court's website, available at this link.

The Guide to Judiciary Policies, Volume 7, has detailed information about what is and is not reimbursable under the Criminal Justice Act. Any attorney seeking compensation under the CJA would be well-advised to review the Guide before submitting a voucher seeking payment for services. The Guide is available here. In addition to the Guide, the Administrative Office developed an on-line reference manual; the manual may be accessed via the court's website.

MEDIATION IN THE NINTH CIRCUIT

I. OVERVIEW OF THE PROGRAM

For more than twenty years, the U.S. Court of Appeals for the Ninth Circuit has operated a mediation and settlement program. http://www.ca9.uscourts.gov/mediation/. Circuit mediators work with attorneys and their clients to resolve a variety of disputes. The Court offers this service, at no cost, because it helps resolve disputes quickly and efficiently and can often provide a more satisfactory result than can be achieved through continued litigation. Each year the mediation program facilitates the resolution of hundreds of appeals.

Although the mediators are Court employees, they are shielded from the rest of the Court's operations. The Court has enacted strict confidentiality rules and practices; all who participate in one of the Court's mediations may be assured that what goes on in mediation stays in mediation.

II. THE MEDIATION PROGRAM

The Court established the Ninth Circuit Mediation Program pursuant to Federal Rule of Appellate Procedure 33 and Ninth Circuit Rule 33-1 to facilitate settlement of cases on appeal.

A. INCLUSION IN THE MEDIATION PROGRAM Almost all civil cases in which the parties are represented by counsel are eligible for the Circuit Mediation Program ("Program"). The program is not open to cases involving a *pro* se litigant. *See* Ninth Circuit Rules 3-4 and 15-2 for a description of other cases excluded from the Program. Cases come to the Program in a variety of ways. Most often, cases come to the Program after the parties complete a mediation questionnaire and participate in the Settlement Assessment Conference. On occasion, cases are referred by panels of judges or by the Appellate Commissioner. Even if your appeal is not selected initially for inclusion in the Program, your case may still be eligible.

1. The Settlement Assessment Conference The mediators look to a document called the *Mediation Questionnaire* to help determine whether a case might be an appropriate candidate for inclusion in the Program. The *Mediation Questionnaire* is filed in the Ninth Circuit within seven (7) days of the docketing of an appeal or a petition for review. A fillable version of the Mediation Questionnaire is available on the Court's website, www.ca9.uscourts.gov, under *Forms.*

Following a review of the *Mediation Questionnaire*, the Court will, in most cases, order counsel to participate in a telephone conference with a circuit mediator to exchange information about the case, discuss the options the mediation program offers, and look at whether the case might benefit from inclusion in the Program. This initial assessment conference typically lasts between thirty (30) minutes and an 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. If it is agreed that further settlement discussions are not warranted, then the mediator will discuss with counsel any procedural or case management issues that may require attention, such as moving the briefing schedule, or consolidating cases. If there is a consensus to proceed to mediation, the appeal will be selected for inclusion in the Program.

2. **Panel Referrals** Approximately ten percent (10%) of the mediation program's cases come from referrals from panels of judges and from the Appellate Commissioner. Judges often refer cases after oral argument, but before they submit the matter for decision. Sometimes the panel will inquire whether counsel believe such a referral would be beneficial; at other times the panel will simply refer the case. The Appellate Commissioner typically refers attorneys' fees matters.

3. **Requests From Counsel** In any counseled case, counsel may send a request to be included in the Program to the Chief Circuit Mediator.

> ***Practice Tip:*** A request for mediation can be made confidentially.

B. WHAT MAKES A CASE A GOOD CANDIDATE FOR APPELLATE MEDIATION? In determining whether a particular case is appropriate for mediation, counsel, the parties, and the mediator will consider many factors, including the following:

- the parties' interest in participation;
- the likelihood that a Ninth Circuit decision will not end the dispute;
- a desire to make or avoid legal precedent;
- the existence of other appeals that raise the same legal issue;
- the desire to preserve a business or personal relationship;
- the existence of non-monetary issues;
- the possibility that a creative resolution might provide better relief than a Court could fashion;
- a history of strong feelings that may have prevented effective negotiations;
- the possibility that one or all parties could benefit from a fresh look at the dispute;
- a desire to open and improve communications between or among the parties;

- the possibility that settlement efforts include more than the issue on appeal (*e.g.*, interlocutory appeals or cases in which portions have been remanded to state court).

> ***Practice Tip:*** The Program is not limited to the case that is on appeal in the Ninth Circuit as long as all parties are in agreement. Discussions with the mediator may include additional parties and related cases in other courts, as well as issues that are not part of any litigation.

C. THE MEDIATION PROCESS In each case selected for inclusion in the Program, the mediator will work with counsel to construct an effective, cost-sensitive settlement process. After the initial conference, 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.

Working with the mediator, the parties will determine what issues will be discussed in the mediation and how those discussions will proceed. In some cases, the focus of the mediation will be on the legal issues and possible outcomes of the appellate process. In other cases, it may be on rebuilding relationships or joint problem solving. Sometimes the mediator will facilitate direct discussions between the parties; at others he or she will act as an intermediary, shuttling back and forth between them. The mediator will try to resolve these various process issues in a manner that best serves the interests of the mediation participants.

The mediator will ask questions, reframe problems, facilitate communication, and help the parties to understand each other, and to identify creative solutions. The mediator will not take sides, render decisions, offer legal advice, or reveal confidences.

Settlement occurs when the parties find a resolution that is preferable to continued litigation. Factors that frequently favor settlement over litigation include speed, cost, certainty, control, creativity, and flexibility.

> ***Practice Tip:*** When an in-person mediation is scheduled, the mediator will make every effort to hold the session in a venue that is as convenient as possible for the greatest number of participants. Mediators will travel to locations throughout the Ninth Circuit when warranted.

Mediators have the authority to provide certain procedural relief and much can be accomplished without resorting to the motions process. For example, a mediator can, with agreement from counsel, vacate or extend the briefing schedule. If counsel cannot agree, a motion must be filed. Typically if a case is

mediated, the mediator will vacate the briefing schedule. If the case does not settle, the mediator will establish a new briefing schedule.

> ***Practice Tip:*** Should a case fail to be resolved through mediation, the disposition of the appeal will not be delayed as the Court schedules oral argument based on the date the Notice of Appeal is filed, not on the dates the briefs are filed.

In most cases, oral argument is scheduled later than twelve (12) months after the filing of a notice of appeal, which usually allows enough time to mediate without delaying disposition of the case.

D. **THE IN-PERSON MEDIATION** When all counsel and the mediator are in agreement, the mediator will schedule an in-person mediation. It may be held at the Court or, in appropriate cases, in other locations.

E. **PREPARING FOR MEDIATION** The most effective and efficient mediations are those in which counsel and their clients are fully prepared. First, counsel will want to make sure they know the standard of review on appeal, understand the relevant law and facts, and have a good sense of both how the appeal fits into their client's litigation strategy and how the litigation itself serves the client's larger goals.

F. **CONFIDENTIALITY** To encourage efficient and frank settlement discussions, the Court exercises great care to ensure strict confidentiality of the settlement process. Ninth Circuit Rule 33-1 provides that settlement-related information disclosed to a Court mediator will be kept confidential and will not be disclosed to the judges deciding the appeal or to any other person outside 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 unit are maintained separately from the Court's electronic filing and case management system. However, written settlement agreements are not confidential except as agreed by the parties. Ninth Circuit Rule 33-1.

> ***Practice Tip:*** Should the mediator confer separately with the participants, those discussions will also be maintained in confidence from the other participants in the settlement discussions to the extent that the communicating parties request.

G. IMMIGRATION CASES The Court has used mediation to help process the large number of immigration cases. Although immigration cases are often seen as all-or-nothing legal disputes, experience has shown that some immigration cases are very good candidates for settlement discussions. The cases which most readily lend themselves to mediation are those counseled cases in which the mediator can help the parties negotiate a procedural resolution, which is usually a stipulated remand to the Board of Immigration Appeals ("BIA") for more proceedings.

III. THE NINTH CIRCUIT MEDIATORS The Program is staffed by a chief circuit mediator and eight circuit mediators who all work exclusively for the Court. Eight are resident in the Court's San Francisco headquarters; one is resident in the Court's Seattle office. The mediators are all licensed attorneys who have an average of twenty-five (25) years of combined private-law and mediation practice. They are all experienced and highly trained in appellate mediation, negotiation, and Ninth Circuit practice and procedure. Please visit the Court's mediation webpage (http://www.ca9.uscourts.gov/mediation/) for additional information, answers to frequently asked questions, and the mediators' names and contact information.

MOTIONS PRACTICE

I. IN GENERAL

A. WHEN IS A MOTION REQUIRED? Pursuant to Fed. R. App. P. 27, an application for an order or other relief must be generally made by motion. That motion must be in writing unless the court permits otherwise. Motions generally fall into one of two categories: substantive and procedural. Substantive motions include, for example, motions for summary affirmance. Procedural motions include motions for an extension of time, or for leave to file an overlength brief. A non-exhaustive list of types of motions appears at the end of this section.

B. WHEN SHOULD I FILE A MOTION? Although there are specific rules for specific types of motions, generally, you should file as soon as possible. Some of the specific time limits are as follows:

1. Unless you are filing a streamlined request for an extension of time, motions to extend the time for filing a brief are due at least seven days before the brief's current due date.

2. If a district court stays an order or judgment to permit application to the Court of Appeals for a stay pending appeal, an application for a stay must be filed in the Court of Appeals within 7 days after issuance of the district court's stay.

> ***Practice Tip:*** For emergency motions that require relief within 21 days, you must call the Motions Unit at (415) 355-8020 prior to filing.

C. HOW DO I FILE MY MOTION? Motions are typically filed using the Court's e-filing system. (However, the Clerk may direct a party to submit additional paper copies of a motion, response and/or reply when paper copies would aid the Court's review of the motion. Ninth Cir. R. 27-1.

> ***Practice Tip:*** The Court will only permit filing via e-mail and/or facsimile with specific advance permission. Ninth Cir. R. 25-3. Pay attention to this rule: Unauthorized fax filings are likely to languish.

D. WHAT SHOULD I INCLUDE IN MY MOTION?

1. Grounds and relief sought Federal Rule of Appellate Procedure 27 requires that a motion state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it. The motion may not exceed twenty pages in length, not counting the corporate

disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. In criminal and immigration cases, you must state if you have previously applied for the relief sought and provide the bail/detention status of defendant/petitioner. Ninth Cir. R. 27-8. Although not required by the rules, providing a criminal defendant's projected release date is helpful to the Court.

2. Accompanying documents

i. Any declaration or other papers necessary to support a motion must be served and filed with the motion. An affidavit must contain only factual information, not legal argument.

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

> ***Practice Tip:*** Do not refer the reader to separately filed excerpts of record because the reader may not have access to those. Either attach the pertinent documents as exhibits or refer the reader to the district court docket.

3. The opposing party's position Per Advisory Note to Rule 27-1, you should include opposing counsel's position when possible, and if not, explain what steps you took to find out that position.

4. The identity of the merits panel, if known If the case has been assigned to a merits panel, you should include the information listed at Ninth Cir. R. 25-4.

E. WHAT SHOULD I *NOT* INCLUDE IN MY MOTION?

1. A notice of motion

2. A proposed order

3. Irrelevant or unnecessary documents Remember that the clerks and the Court have access to the district court docket.

F. WHAT RULES GOVERN THE FORMATTING OF MY MOTION?

See Fed. R. App. P. 27(d)(1)-(3) and 32(c). This is also covered in the motions checklists *infra*.

> ***Practice Tip:*** If, in addition to the primary relief you seek, you are also asking to modify the briefing schedule in your motion, the request to modify the briefing schedule should be included in the heading as well as the body of the motion for other relief.

G. HOW AND WHEN DO I RESPOND TO A MOTION? A response must be filed within 10 days after service of the motion unless the court shortens or extends the time. Like the motion, it may not exceed twenty pages in length. Please note that a response may include a motion for affirmative relief, but the title of your response must alert the court to the request for relief.

> ***Practice Tip:*** Under FRAP 27(b), procedural motions may be decided before your time to file an opposition expires, although the Court can defer action in order to allow the response time to run. As a result, if you intend to oppose a motion, call the clerk's office to let them know that you will be filing an opposition.

H. MAY I FILE A REPLY IN SUPPORT OF MY MOTION? Any reply to a response must be filed within 7 days after service of the response. The reply is limited to ten pages in length. A reply must not present matters that do not relate to the response.

I. WHAT IS THE EFFECT OF FILING MY MOTION? Some motions will toll the briefing schedule and/or record preparation. Those include motions for dismissal, transfer to another tribunal; full remand; in forma pauperis status in this Court; production of transcripts at government expense; and appointment or withdrawal of counsel. Ninth Cir. R. 27-11. *Motions for reconsideration do not by themselves toll the schedule for record preparation and briefing.*

J. WILL THERE BE ORAL ARGUMENT ON MY MOTION? No, unless the panel orders otherwise. Fed. R. App. P. 27(e).

K. WHO RULES ON MY MOTION? Depending on the issues raised and the relief sought, motions may be decided by the clerk's office, by the Appellate Commissioner, by a single judge, or by a panel of judges.

1. Court staff and the Appellate Commissioner Most non-dispositive procedural motions in appeals or other proceedings that have not yet been calendared are acted on by court staff under the supervision of the clerk, the Appellate Commissioner, or the chief circuit mediator. Court staff may act on procedural motions whether opposed or unopposed, but if there is any question under the guidelines as to what action should be taken on the motion, it is referred to the Appellate Commissioner or the chief circuit mediator. The Appellate Commissioner reviews a wide variety of motions, *e.g.*, appointment, substitution, and withdrawal of counsel and

motions for reinstatement. The Appellate Commissioner may deny a motion for dispositive relief, but may not grant such a request other than those filed under Fed. R. App. P. 42(b) pursuant to the parties' signed dismissal agreement.

2. **A single judge** Similarly, a single judge may grant or deny any motion not specifically excluded by Court order or rule, but may not dismiss or otherwise effectively determine an appeal or other proceeding. Thus, a single judge may not grant motions for summary disposition, dismissal, or remand. A single judge may, however, grant or deny temporary relief in emergency situations pending full consideration of the motion by a motions panel. In addition, some types of motions may be ruled on by a single judge by virtue of a particular rule or statute.

3. **Motions Panels** The motions panel rules on substantive motions, including motions to dismiss, for summary affirmance, and similar motions. The panel also considers motions for bail.

   a. **Selection of Motions Panels** A single motions panel is appointed for the entire circuit. That panel sits in San Francisco for several days each month. If necessary, emergency motions are acted on by telephone. Judges are ordinarily assigned to the panel on a rotating basis by the Clerk for a term of one month. To find out who is on the current month's panel, go to http://www.ca9.uscourts.gov/content/motionspanel.php. In the event of recusal or unavailability, the Court will draw another judge at random to consider the matter(s) in question.

   b. **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 in agreement, they ordinarily decide the motion. The third judge participates only if (i) one of the other members of the panel is disqualified or is otherwise unavailable; or (ii) the other members of the panel disagree on the disposition of a motion or he or she is requested to participate by the other members of the panel.

Practice Tip: Once a case has been assigned to a merits panel, all motions go to that panel under General Order 6.3b. (Rulings by the panel prior to oral argument will be in the form of a responsive order signed by the clerk to avoid prematurely disclosing the identity of the judges.)

L. WHAT IF I DISAGREE WITH THE RULING ON MY MOTION? You can file a motion for reconsideration. However, the Court disfavors the filing of a motion for reconsideration of a motions panel order, and they are rarely granted. You should only file a motion for reconsideration if you believe that the Court has overlooked or misunderstood a point of law or fact, or if there is a change in legal or factual circumstances after the order which would entitle the movant to relief. Such motions are due within 14 days of the order being challenged. Ninth Cir. R. 27-10. Please note that you should follow the procedures set out in Ninth Cir. Rule 27-10, *not* the procedures applicable for rehearing of merits panel opinions, memorandum dispositions, and dispositive orders.

II. RULES PERTAINING TO SPECIFIC TYPES OF MOTIONS

A. CRIMINAL APPEALS Motions filed in criminal appeals must include the defendant's bail status under Ninth Cir. R. 27-8.1

B. IMMIGRATION PETITIONS Motions in immigration cases must include the petitioner's custody status under Ninth Cir. R. 27-8.2

C. MOTIONS TO FILE OVERSIZE BRIEFS Per Ninth Cir. R. 32-2, the proposed brief *must* accompany the motion – no exceptions. However, be aware that Cir. R. 28-4, provides for a routine enlargement of brief size under limited circumstances.

> ***Practice Tip:*** The Advisory Note to Rule 32-2 states that if a proposed oversize brief is filed, the responsive order will provide a new due date for the brief in the event that the motion is denied or granted only in part. The order will also amend the schedule for responsive briefs. As a result, you don't need to file a motion for an extension of time to file the responsive brief during the pendency of your opponent's motion for leave to file an overlength brief. Doing so only burdens the Court with a superfluous filing.

D. MOTION TO EXPEDITE (Ninth Cir. R. 27-12) Motions to expedite briefing and hearing may be filed and will be granted upon a showing of good cause. "Good cause" includes, but is not limited to, situations in which: (1) an incarcerated criminal defendant contends that the valid term of confinement does not extend beyond 12 months from the filing of the notice of appeal; (2) the projected release date for an incarcerated criminal defendant is within 12 months from the filing of the notice of appeal; or (3) in the absence of expedited treatment, irreparable harm may occur or the appeal may become moot. (Monetary loss does not generally amount to irreparable harm.) In criminal cases, the age or infirmity of a defendant may also be advanced as cause. The motion should set forth the status of transcript preparation and opposing counsel's

position or reason why moving counsel has been unable to determine that position. The motion may also include a proposed briefing schedule and date for argument or submission. A significant benefit of expedition is that it precludes extensions of time by the court reporter to prepare the transcript.

> ***Practice Tip:*** File any motion to expedite early! Calendars are prepared months in advance of hearing date. Accordingly, the need for expedition should be on counsel's check list when filing a notice of appeal, particularly in criminal appeals. When filing such a motion, propose a briefing schedule, taking into account the fact that, once expedited, you will likely not be able to get an extension of time, barring truly exceptional circumstances.

E. **MOTIONS TO SEAL** (Ninth Cir. R. 27-13). A motion to seal must indicate whether the moving party wishes to withhold from public disclosure any specific information, such as the names of the parties, and should state whether the motion itself as well as the referenced materials should be maintained under seal. The document will remain sealed on a provisional basis until the Court rules on the motion.

> ***Practice Tip:*** If you are simply seeking to preserve a document's sealed status under a statute or an existing district court order, you must file a motion to seal if there is no protective order. If there is a protective order, file the notice set forth at Ninth Cir. R. 27-13(b), and append the protective order to that notice. You do not need to file a motion for presentence reports ("PSRs") and related information routinely filed under seal per Ninth Cir. R. 30-1.10. Please note that unlike other sealed documents, the PSR can be filed electronically. *See* Ninth Circuit Rule 30-1.10. Do not include the PSR in the excerpts and then request that those excerpts be filed under seal.

1. If you do need to file a motion to seal, make sure to file the material proposed to be sealed in hard copy, as well as the motion itself. *Do not e-file them.*

2. The Court does not automatically close oral argument to the public when briefs or the record have been filed under seal. Pursuant to the Advisory Note to Rule 27-13, a party seeking a closed hearing must move for such relief.

F. **MOTIONS TO STRIKE BRIEFS AND/OR EXCERPTS** If a motion to strike is intertwined with the merits of the underlying appeal – *e.g.*, the motion seeks to strike the brief for raising issues not raised below, it is likely to be referred to the merits panel for resolution. If based on procedural grounds – *e.g.*, the motion contends that the brief does not cite to the record or that the opposing party

managed to sneak in an oversize brief in under the radar, the court will address it. Do not use such a motion as a vehicle for arguments best advanced in your responsive brief.

G. MOTIONS TO REINSTATE Per General Order 2.4, motions to reinstate an appeal should be accompanied by correction of the defect that caused the dismissal, *e.g.*., the opening brief or payment of the fee.

H. MOTIONS FOR VOLUNTARY DISMISSAL In a criminal case, motions or stipulations for voluntary dismissals of criminal appeals made by or joined in by defendant's counsel must be accompanied by the defendant's written consent, or counsel's explanation of why that consent was not obtained.

I. MOTION FOR INVOLUNTARY DISMISSAL

1. In criminal cases, government motions for the dismissal of criminal appeals, must be served on both defendant *and* his/her counsel, if any. If the motion is based on a claim of failure to prosecute the appeal, appellant's counsel, if any, must respond within 10 days. If appellant's counsel does not, the clerk will notify the appellant of the Court's proposed action. If the appeal is dismissed for failure to prosecute, the Court may impose sanctions on appellant's counsel. Counsel will be provided with 14 days' notice and an opportunity to respond before sanctions are imposed.

2. In civil cases, such a motion is more likely to be granted if there is a pattern of delay. However, filing a motion for involuntary dismissal may result in the appellant being given one final opportunity to prosecute his or her appeal. If you do file such a motion, focus on any prejudice caused by delay.

J. MOTION FOR A STAY OF APPELLATE PROCEEDINGS If possible, do note the position of the opposing party with respect to the stay. Per the Advisory Note to Ninth Cir. R. 27-1, it is possible to ask in the alternative for an extension of time to file your brief.

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K. MOTION FOR A LIMITED REMAND These are governed by Federal Rule of Appellate Procedure 12.1. It is possible to request a stay of appellate proceedings while the district court is considering whether to provide an indicative ruling. It is generally not fruitful to oppose remand on the basis of the merits of the motion – if the district court is inclined to consider the issue, the appellate court will generally remand to allow it to do so.

L. MOTIONS TO SUPPLEMENT/CORRECT RECORD It is important to distinguish between motions types. Motions to supplement ask the Ninth Circuit to consider material not before the district court/agency. By contrast, a motion to

correct notes omissions or inaccuracies in the existing district court/agency record. If, however, the district court record is incomplete, you should move the district court to correct the record. The standard for supplementing the record in civil cases is quite high, and you should cite authority to support a specific exception. Consider whether it would be better to file a Fed. R. Civ. P. 60(b) motion in the district court, based on the additional evidence.

M. MOTIONS TO WITHDRAW AS COUNSEL There are very specific procedures outlined in Ninth Cir. R. 4-1 for criminal/habeas appeals. *See supra.* In civil cases, provide the address of the client. If the client is a corporation, include the name/address of the CEO. The motion should confirm that you have informed a corporate client that it may not proceed pro se.

N. REQUESTS FOR JUDICIAL NOTICE Requests for judicial notice and responses thereto are reviewed by the panel that will consider the merits of a case. The parties may refer to the materials the request addresses with the understanding that the Court may strike such references and related arguments if it denies the request.

O. MOTIONS FOR AN EXTENSION OF TIME Parties now have two options when seeking an extension of time: a streamlined request for an extension of time, and a written motion for an extension of time.

1. The streamlined process applies to due dates for opening, answering, reply, and cross-appeal briefs except where a Notice of Oral Argument has issued or the Court has otherwise directed. It does not apply to any other deadlines, including deadlines for petitions for rehearing, amicus briefs, and supplemental briefs ordered by the Court; to any brief in Preliminary Injunction Appeals (Ninth Circuit Rule 3-3), Incarcerated Recalcitrant Witness Appeals (28 U.S.C. § 1826) (Ninth Circuit Rule 3-5), or Class Action Fairness Act appeals (28 U.S.C.§ 1453(c)). You may only seek a streamlined extension of time if: (1) you have not previously sought an extension of time to file that particular brief; and (2) you are seeking an extension of 30 days or less. You do not need to notify opposing counsel or obtain their position before filing a streamlined request.

2. A written motion should be filed 7 days before the brief is due, although that limit is not jurisdictional. It must demonstrate diligence and substantial need, and it must be accompanied by a written declaration that states
    - when the brief is due;
    - when the brief was first due;
    - the length of the requested extension;
    - the reason an extension is necessary;
    - movant's representation that movant has exercised diligence and that the brief will be filed within the time requested;

- whether any other party separately represented objects to the request, or why the moving party has been unable to find out whether there is any objection;
- and that the court reporter is not in default with regard to any designated transcripts.

Ninth Cir. R. 31-2.2(b).

P. MOTIONS FOR RECONSIDERATION OF ORDERS ISSUED BY A MOTIONS PANEL Ninth Cir. R. 27-10 and General Order 6.11. Motions for reconsideration of non-dispositive orders must be filed within 14 days in all cases. Motions for reconsideration of dispositive orders must also be filed within 14 days, except that in civil matters in which there is a federal party, the motion must be filed within 45 days. Motions for reconsideration en banc may be denied on behalf of the full court by the motions panel without being circulated unless the challenged order was published.

APPENDIX: TYPES OF MOTIONS

(see the last chapter of the ECF User Guide for complete list of filing types http://cdn.ca9.uscourts.gov/datastore/uploads/cmecf/ecf-user-guide.pdf)

1. Threshold Motions to Establish or Defeat Appellate Jurisdiction

    a. Motion to Dismiss the Case (including for mootness)
    b. Motion to Dismiss for Lack of Jurisdiction
    c. Motion to Dismiss Case for Failure to Prosecute under Ninth Cir. Rule 42-1
    d. Motion to Remand Case (including limited remand)
    e. Motion to Transfer Appeal to Other Circuit
    f. Motion for Certification to State Supreme Court

2. Motions to Preserve Status Quo Pending Appeal (for example, Motion for injunction pending appeal, Motions to stay)

3. Motions to Determine What Parties Are Before the Appellate Court and Which Non-parties May Participate as Amicus

    a. Motions to Intervene (including in agency proceeding)
    b. Motions to Substitute Party
    c. Motions to become amicus
    d. Motions to Hear Case with Other Case
    e. Motions to Consolidate Cases
    f. (delete as duplicative of Hear Case with Other Case)

4. Motions to Speed Up, Shorten, Suspend, Terminate or Reinstate Appeal

    a. Motions to Expedite Case
    b. Motions to Shorten Appeal by Obtaining Summary Ruling
        i. Motion for Summary Disposition
        ii. Motion for Summary Affirmance
        iii. Motion for Summary Reversal
        iv. Motion to Submit Case on Briefs
    c. Motions to Stay Proceedings
    d. Motions to Stay Proceedings Pending Settlement
    e. Motions to Dismiss the Case Voluntarily Pursuant to Rule 42(b)
    f. Motions to Reinstate Case After FRAP 42-1 Dismissal

5. Motions Pertaining to Counsel

    a. Motions for Appointment of Counsel
    b. Motions for Appointment of Pro Bono Counsel
    c. Motions to Withdraw as Counsel
    d. Motions to Substitute Counsel

6. Motions Regarding Oral Argument (although these are discouraged especially close to oral argument date)
   Motion to Reschedule Oral Argument
   Motion to Present Oral Argument by Video

7. Motions to Extend Time to Comply With Court Requirements

8. Motions to Waive / Enforce Court Requirements

   a. Motions to File Oversized Brief

9. Motions Pertaining to the Content of the Record on Appeal

   a. Motions to Supplement Record on Appeal
   b. Motion to Take Judicial Notice
   c. Motions to Unseal Document
   d. Motion to Seal (must be done in paper filing, not via ECF)

10. Motions for Sanctions

11. Motions Regarding Fees and Costs

   a. Motions on Proceed In Forma Pauperis
   b. Motions to Complete Production of Reporters Transcript at Government Expense
   c. Motion for Attorney Fees
   d. File a Bill of Costs

12. Post-Judgment Motions

   a. Motion to Request Publication of Memorandum Disposition
   b. Request to Depublish Decision
   c. Motions to Stay the Mandate
   d. Motions to Recall Mandate

TOP TECHNICAL FLAWS IN MOTIONS

1 **NO CERTIFICATE OF SERVICE.** The motion does not include a signed (*see* NINTH CIR. R. 25-5(e)) certificate of service at the end of the document. FED. R. APP. P. 25(d).

2 **NO RECITAL OF BAIL OR DETENTION STATUS.** The motion does not state the defendant's current bail status or the immigrant's current detention status. NINTH CIR. R. 27-8.1 and 8.2.

3 **OFFICIAL CAPTION OR ABBREVIATED CAPTION.** The official caption or abbreviated caption is incorrect. FED. R. APP. P. 32(a)(2)(A-D).

4 **NO REQUIRED DECLARATION OR AFFIDAVIT.** The movant does not include a required declaration or affidavit. FED. R. APP. P. 27(a)(2)(B).

5 **NO GROUNDS STATED FOR ENLARGMENT OF TIME.** The motion does not state the grounds for an enlargement of time. FED. R. APP. P. 27(a)(2)(A); NINTH Cir. R. 31-2.2(b).

6 **FONT SIZE.** Font size is less than 14-point. FED. R. APP. P. 32(a)(5)(A).

7 **NO RECITAL OF PREVIOUS APPLICATIONS FOR THE RELIEF SOUGHT.** The motion does not state previous applications for the relief sought. *See* FED. R. APP. P. 8; NINTH CIR. R. 32(B)

8 **SPACING.** The text is not double spaced. FED. R. APP. P. 27(d)(1)(D).

9 **NO STATEMENT OF OPPOSING PARTY'S POSITION.** The motion does not state whether opposing party (or any other separately-represented party) objects to the request, or why moving party has been unable to determine any such party's position. Ninth CIR. R. 27-2, 31-2.2(b)(6).

10 **NOT SEARCHABLE.** The reader must be able to search the text of the document.

11 **INCORRECT CASE NUMBERS.**

Rules on the Ninth Circuit website: http://www.ca9.uscourts.gov/rules/

EMERGENCY PROCEEDINGS

I. OVERVIEW Except as otherwise indicated in the Federal Rules of Appellate Procedure or Circuit Rules, Ninth Circuit Rule 27-3 governs all types of civil and criminal emergency motions.

II. EMERGENCY, URGENT, OR NOT?

A. HOW TO CLASSIFY How a motion is classified depends on what the movant tells the Court about when it needs to be decided. Under Ninth Circuit Rule 27-3, emergency motions are those that a movant says must be decided within 21 days to avoid irreparable harm. (Counsel must certify to the Court that all such representations are true.) The date by which relief is needed should be specified in the caption. Motions may be classified as urgent if decision is needed by a date that is more than 21 days but less than 8 weeks from the filing of the motion. However, as a practical matter, such a motion may be filed as a regular motion so long as the motion's caption sets forth the date by which relief is required.

B. REQUIREMENT OF SIGNIFICANT AND IRREPARABLE HARM Circuit Advisory Committee Notes to Ninth Circuit Rule 27-3 specifies that emergency motions should be filed only when significant and irreparable harm to a party will result if relief is not obtained by the specified date. For example, the imminent removal of an immigrant or knocking down of a building would justify the filing of an emergency motion.

> ***Practice Tips:*** Motions seeking procedural relief (for example, for an extension of time) should not be filed as emergency motions. Advisory Note to Ninth Cir. Rule 27-3.
>
> If the district court has stayed an order or judgment to permit application to the Circuit for a stay pending appeal, the movant must file an application for such a stay within 7 days. Ninth Cir. Rule 27-2.

III. PREREQUISITES, NOTICE, CONTENTS AND HOW TO FILE

A. HAS RELIEF BEEN SOUGHT BELOW? Many motions, including emergency motions, are denied without prejudice when relief was not sought below. Most motions (for example, an emergency motion for a stay of a preliminary injunction) must be filed *first* in the federal district court (or Bankruptcy Appellate Panel or agency, if relief was available). FRAP 8(a). If relief was available, Ninth Circuit Rule 27-3 requires the motion to specify what relief was sought and, if none was sought, why the motion should not be filed in the district court first.

B. **HAS AN APPEAL OR PETITION BEEN FILED?** An emergency motion may be filed *only* if an appeal or petition is pending in the Court of Appeals. If the appeal or petition has been recently filed, and so counsel does not yet have a Ninth Circuit case number or access to the e-filing system, counsel should call the motions unit, 415-355-8020.

C. **HAS NOTICE BEEN PROVIDED?** Before filing an emergency motion, a movant must "make every practicable effort" to contact the Ninth Circuit Clerk (the motions unit) and opposing counsel, and to serve the motion, at the earliest possible time. (The number for the motions unit is (415) 355-8020.) The earliest possible time may be as soon as counsel knows that an emergency motion will be filed. If the emergency motion will require particularly quick turnaround (for example, less than 48 hours), counsel may want to call even while the request for relief is still pending in district court. When contacting counsel for other parties, it may be useful to explore whether the parties can reach an agreement that will make the matter less urgent (for example, if a party will delay enforcement or implementation of an injunction for a week to permit the Court of Appeals to rule on an emergency stay application).

1. **<u>After Hours Notice</u>** *Only* if a matter requires attention before the next business day, a message may be left on the main number, (415) 355-8000, after hours. That message should explain why the matter is so urgent that it cannot wait until the next business day, and messages are regularly monitored by the motions attorneys. A *true* after-hours emergency is something like an imminent execution or immigration removal.

D. **CONTENTS OF FILING** Ninth Circuit Rule 27-3(a) outlines the required cover page and certificate of counsel that must follow the cover page. The required contents of the certificate of counsel include contact information for the attorneys for the parties, the "[f]acts showing the existence and nature of the claimed emergency," and information regarding the movant's notice to and service on those attorneys. Otherwise, the general rules regarding contents of a motion, outlined in Federal Rule of Appellate Procedure 27, apply. Any portions of the record (or, in the limited circumstances where permissible, any other evidence) that is essential to disposition of the motion should be attached to the motion as exhibits.

E. **HOW TO FILE** Motions should be filed electronically, unless the appeal or petition has not yet been docketed. Any motions submitted on paper should be filed in the San Francisco Clerk's office, not with a regional circuit office and not with an individual judge. Emergency motions should not be faxed unless doing so has been previously authorized by a motions attorney.

III. WHAT HAPPENS ONCE THE MOTION IS FILED

A. INITIAL PROCESSING AND NOTICE TO JUDGES Ninth Circuit motions attorneys process emergency motions. When an emergency motion is filed, the motions attorney will contact one or more judges on the motions panel (see discussion below).

B. MOTIONS BRIEFING SCHEDULE The briefing schedule for the motion will be dictated by the date that the movant requests relief. If the briefing schedule is something other than the schedule set forth in Federal Rule of Appellate Procedure 27(a), the motions attorney will notify counsel for the parties, sometimes by phone and sometimes in a written order, of a briefing schedule that will permit the judges to decide the emergency motion by the requested date. Judges may occasionally act on motions without requesting further briefing. Ordinarily there is no oral argument on motions. Fed. R. App. P. 27(e).

C. WHO DECIDES

> ***Practice Tip:*** The rules for capital cases are different. See Section 6 below.

1. Monthly Motions Panel Ninth Circuit judges (both active and senior) serve on the motions panel on a rotating basis. Each month there is a single motions panel. The identity of the judges on the motions panel is posted on the Ninth Circuit website on the first day of each month. The panel that will decide a motion is not necessarily the panel that sits during the month that the motion is filed; it may instead be the panel that sits during the month that the motion is ready for decision. If necessary, emergency motions may be acted on by telephone, videoconference, or written submission.

2. How Many Judges Motions requesting final disposition of an appeal (for example, a motion to dismiss for lack of jurisdiction, for summary affirmance or reversal, or a petition for writ of mandamus) must be heard by three judges. Most motions are decided by two judges, who rotate from among the three judges for that month, unless those two judges disagree regarding the disposition of the motion or request the participation of the third judge. A single judge may grant temporary relief in emergency situations when necessary to allow the court sufficient time to consider the motion on the merits, pending full consideration of the motion by a motions panel.

> ***Practice Tip:*** Counsel should always file the motion with the Clerk, and not attempt to send it to an individual judge.

3. **Calendared and Comeback Cases** If an appeal has already been assigned to a merits panel, motions in that appeal will be directed immediately to the merits panel. When a motion relates to a previously resolved and no longer pending appeal, counsel should mention this in the motion or the Rule 27-3 certificate, and the motions attorney will ask the original panel whether the motion should be directed to it or to the monthly motions panel.

IV. SPECIAL CONSIDERATIONS FOR BAIL MOTIONS

[See Ninth Cir. Rules 9-1, 9-2]

A. APPEALS OF ORDERS REGARDING RELEASE OR DETENTION BEFORE JUDGMENT

Appeals of district court release or detention rulings under Federal Rule of Appellate Procedure 9(a) are processed on an expedited basis, and the merits of the appeal are decided by the motions panel. Because the motions panel's ruling will be dispositive of the appeal, three judges will be on the panel. The required caption for a notice of such an appeal, the briefing schedule, and documents required to accompany the memorandum in support of the motion are set forth in Ninth Circuit Rule 9-1.1. When a notice of appeal is filed, counsel should contact the motions unit.

Ninth Circuit Rule 9-1.1 provides for a standard briefing schedule for pretrial bail appeals and for motions for bail pending appeal, with the opposition required to be filed within ten days after the filing of the motion. While the rules allow seven days to file a reply, it is best to contact the Motions Attorney if a reply will be filed. Otherwise, the bail motion may be submitted to a panel for decision immediately.

B. APPEALS OF ORDERS REGARDING RELEASE AFTER JUDGMENT

When an appeal is already pending from an underlying criminal judgment or sentence, a party may file a motion for bail pending appeal (or for revocation thereof) under Federal Rule of Appellate Procedure 9(b). However, such a motion *must* first have been made (orally or in writing) in the district court. The filing of a motion for bail pending appeal in the Ninth Circuit automatically stays any reporting date set by the district court. Two judges may decide the motion, which will be processed on an expedited basis. The documents required to accompany the motion and the briefing schedule are set forth in Ninth Circuit Rule 9-1.2.

V. SPECIAL CONSIDERATIONS FOR CAPITAL MOTIONS (MOTIONS FOR STAYS OF EXECUTION)

[See Ninth Cir. Rules 22-2, 22-4, 22-6]

A. SUBMISSION TO LOWER COURT A motion for a stay of execution should ordinarily be filed in district court before filing in the Court of Appeals. The motion must state whether relief was sought in the district court and on which grounds, and if it was not, why the motion should not be remanded.

B. WHEN TO NOTIFY THE COURT Counsel should notify the Clerk by telephone as soon as counsel is aware that emergency relief will be sought from the Court of Appeals.

C. WHO DECIDES The panel that is selected to hear a direct appeal or appeal of denial of a habeas petition will hear all emergency motions in the case, including motions for stays of execution.

D. HAS AN APPEAL OR PETITION BEEN FILED? An emergency motion may be filed only if an appeal or petition is pending in the Court of Appeals. If the appeal or petition has been recently filed, and so counsel does not yet have a Ninth Circuit case number or access to the e-filing system, counsel should call the motions unit, 415-355-8020.

VI. SPECIAL CONSIDERATIONS FOR IMMIGRATION MOTIONS

Under General Order 6.4(c), the filing of an initial motion for a stay of removal automatically invokes a temporary stay until the Court can rule on the motion, and so the motion for a stay need not be filed on an emergency basis. However, if a motion for a stay has previously been denied, any subsequent motions for stay or for reconsideration must be filed as emergency motions. If it is necessary to file a petition for review and/or for a stay of removal on an emergency basis (*i.e.,* if removal is imminent), counsel should contact the motions unit to request authorization for a facsimile filing.

DRAFTING THE BRIEF

I. CONTENT OF THE BRIEF

A. WHAT TO INCLUDE IN THE BRIEF (Fed. R. App. P. 28 and Ninth Cir. Rules 28-1 and 28-2). The appellant's opening brief must include the following, with appropriate headings, in this order:

1. **Corporate Disclosure Statement** Any nongovernmental corporate party to a proceeding in the Ninth Circuit must file a statement identifying any parent corporation and any publicly held corporation that owns 10% or more of its stock or stating that there is no such corporation before the table of contents in the principal brief.

2. **Table of Contents** This must include page references.

> ***Practice Tip:*** Use full sentences for your table of contents headings so that your table of contents reads as an outline of your case. Some judges read the table of contents first, and you should take advantage of the opportunity to lay out your case in a concise, logical roadmap. For example, rather than using a heading like "Argument," take the opportunity to preview your argument.

3. **Table of Authorities** This must list all the cases (alphabetically arranged), statutes, and other authorities cited, with appropriate page references.

> ***Practice Tip:*** Although neither FRAP nor the Ninth Circuit rules require an introduction, both allow one. Writing an introduction allows you to succinctly introduce the basic facts and law the Court needs to understand to rule your way.

4. **Jurisdictional Statement** This must set forth the bases for subject matter jurisdiction for both the district court (or agency) *and* the court of appeals. It should include citations to the applicable statutory provisions and state the facts establishing jurisdiction. The statement must also include the filing dates establishing the timeliness of the appeal or petition for review; and an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis.

5. **Statement of the Issues Presented for Review** Tell the Court what the issue is in a succinct way – preferably one that suggests the answer you want without being too argumentative.

6. **Statement of the Case** This should briefly indicate the nature of the case, the course of proceedings, and the disposition below;

7. **Statement of Facts** This section should set forth the facts relevant to the issues on appeal. A citation to the excerpts of record should follow ***every*** factual statement. That generally means a citation following every sentence in the statement of facts.

> ***Practice Tips:*** The statement of facts is your first real opportunity to draw the reader in, explain what the case is about, and convince the reader to care about it. It should read like a story of what happened, not like a minute order summarizing the proceedings below. Tell a story that is interesting, compelling, and makes the reader want to side with your client. As a general matter, if you are going to rely on a fact in your argument section, make sure that it appears in the statement of facts.
>
> Don't avoid inconvenient facts. If you leave out an important fact that seems to benefit your opponent, the judges will notice the omission, and they will start to wonder if you are omitting other relevant information as well. If the judges start doubting your credibility as they read your statement of facts, you will be in trouble by the time they get to your legal argument. Conversely, including all relevant facts – even those that work against your case – shows candor, honesty, and integrity.

8. **Summary of Argument** The summary must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and must not merely repeat the argument headings. This is a good time to make the relationship between your various arguments clear. Thus, for example, if the Court need not reach argument B, if they find for you on argument A, say so.

9. <u>Argument</u>

a. Standard of review For each issue, the brief must include a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues).

b. Objection raised below The appellant must state where in the record on appeal the issue was raised and ruled upon. If a ruling complained of on appeal is one to which a party must have objected at trial in order to preserve it, (*e.g.*, a failure to admit or to exclude evidence or the giving of or refusal to give a jury instruction), state where in the record on appeal the objection and ruling are set forth.

c. Argument Begin the argument section of your brief with your strongest argument. If you are the appellee, it can be helpful for the Court to have your brief follow the same approximate order as the appellant's brief. Nevertheless, you may wish to use a different structure than the opening brief to make your main point first or to address a threshold issue (such as standing) that your opponent has not raised. Omit implausible or weak arguments.

Practice Tips: Be candid and honest. Be straightforward about the case's strengths and weaknesses. You must disclose controlling adverse authority even if the other side has not raised it. In fact, doing so allows you to frame the relevant question and explain in the first instance why that authority does not in fact control here.

Do address case or statutory authority relied on by the lower court.

Do highlight a situation where your case presents a novel issue with no Ninth Circuit law on point.

Don't waste time arguing obvious or undisputed points.

Don't use boilerplate, especially regarding well-established standards, but if there is a controlling standard, include it.

10. <u>Conclusion</u> The rules require a short conclusion stating the precise relief sought. Generally, the conclusion should contain *one sentence* that tells the Court *exactly* what you want it to do. Sometimes this will be very straightforward (*e.g.*, "For the reasons stated above, the defendant respectfully requests that this Court affirm the district court's order.").

Other times it may be more complex (*e.g.*, "For the reasons stated above, the plaintiff respectfully requests that this Court vacate the judgment and remand to the district court with instructions to dismiss Counts 2, 3, and 6, and to resentence defendant on an open record on Counts 1, 4, and 5"). When crafting your conclusion, imagine that your brief and argument have carried the day and the judge is drafting an opinion to give you everything you have asked for. Then ask yourself: what precisely are you asking for? The answer is your one-sentence conclusion.

11. **Bail/Detention Status** The opening brief in a criminal appeal must address the bail status of the defendant. If the defendant is in custody, the projected release date should be included. Similarly, the opening brief in a petition for review of a decision of the Board of Immigration Appeals should state whether petitioner (1) is detained in the custody of the Department of Homeland Security or at liberty and/or (2) has moved the Board of Immigration Appeals to reopen or applied to the district director for an adjustment of status.

12. **Statement of Related Cases** Each party must identify in a statement on the last page of its initial brief any known related case pending in the Ninth Circuit. That statement should include the name and Court of Appeals docket number of the related case and describe its relationship to the case being briefed. If you don't know of any other related cases in this Court, say so. If you are the appellee, you don't need to include any case already identified as related by appellant.

a. **What is a related case?** Cases are deemed related if they: (a) arise out of the same or consolidated cases in the district court or agency; (b) are cases previously heard in this Court which concern the case being briefed; (c) raise the same or closely related issues; or (d) involve the same transaction or event.

13. **Addendum**

a. **Pertinent constitutional provisions, treaties, statutes, ordinances, regulations or rules** These must be set forth verbatim and with appropriate citation either (1) following the statement of issues presented for review or (2) in an addendum introduced by a table of contents and bound with the brief or separately. If you include them in an addendum, a statement must appear referencing the addendum after the statement of issues. If the addendum is bound with the brief, it must be separated from the body of the brief (and from any other addendum) by a distinctively colored page. A party need not resubmit material included with a previous brief or addendum; if it is not repeated, a statement must appear under this heading as follows: "[e]xcept for the following, all applicable statutes, etc., are contained in the brief or addendum of _____."

b. **Orders challenged in immigration cases** All opening briefs filed in counseled petitions for review of immigration cases must include an addendum with the orders being challenged, including any orders of the immigration court and Board of Immigration Appeals. The addendum should be bound with the brief but separated from the brief by a distinctively colored page.

14. Certificate of Compliance. *See filing the brief.*

> ***Practice Tip:*** Appellants proceeding without assistance of counsel may file the form brief provided by the Clerk in lieu of the brief described in the preceding paragraph. If an appellant uses the informal brief form, the optional reply brief need not comply with the technical requirements of FRAP 28(c) or 32(a).
> http://www.ca9.uscourts.gov/open_case_prose/

The **appellee's answering brief** must include the same elements, although the appellee *may* omit the statement of the issues, the statement of the case, the statement of the facts and the statement of the standard of review, if the appellee agrees with the appellant's formulation of them.
The **reply brief** must contain tables of contents and authorities.

> ***Practice Tips:*** Although a reply brief is optional, it is almost always a good idea to file one. Why give your opponent the last word if you don't have to?
>
> If you file a reply brief, do not rehash the same headings and arguments as in your opening brief. Instead, they should respond directly to the answering brief's contentions or you risk losing the Court's attention. You don't want a judge to open your reply brief, look at the table of contents, and conclude that there is nothing new there.

B. WHAT NOT TO INCLUDE IN THE BRIEF (OR TO INCLUDE SPARINGLY)

1. **Unnecessary words** Be concise. Do not use 20 words to say what you can say in 10. One easy way to do this is to omit "throat-clearing" phrases (*e.g.*, "Needless to say…"; "It should also be noted that…"; "It is interesting to note that…").

2. **Excessive string cites** For an established proposition, one case is often sufficient; if not, consider providing the lead case establishing the rule and the most recent case applying it. If an issue is less settled, cite Ninth Circuit law first and then law from other circuits for support. Thus, for example, for the standard of review, a single case citation is usually enough. Unless the standard of review is confusing, contested, or novel, make it short and sweet.

3. **Disrespect** To quote the late Chief Judge Browning, you can disagree without being disagreeable. Argue the merits of your case rather than attacking the integrity of your opponent.

4. **Incorporating by reference** Parties must not append or incorporate by reference briefs submitted to the district court or agency or the Ninth Circuit in a prior appeal, or refer the Court to such briefs for the arguments. Ninth Cir. R. 28-1(b). (However, in a case involving more than one appellant or appellee, including consolidated cases, any party may adopt by reference a part of another's brief.)

C. WRITING THE BRIEF – SOME ADDITIONAL PRACTICE POINTERS

1. **Proofread for misspellings, grammatical mistakes, and other errors** Don't assume that spellcheck will catch every error.

2. **Be clear** An effective brief has: (1) concise, direct, and persuasive substance; (2) logical, systematic organization; and (3) an inviting, readable style.

   a. Be careful with acronyms. Judges may jump into your brief in the middle because of their interest in a particular issue and they need to be able to understand your argument without flipping back to the beginning for definitions. Descriptive phrases are better than acronyms.

   b. Avoid referring to the parties as "appellant" and "appellee"; instead, use descriptive terms such as "employer" or "the bank". Fed. R. App. P. 28(d).

3. **Be accurate** Never misstate the facts or the law**.**

4. Be readable

a. Use the active voice. For example, instead of writing "The properties were marketed by defendants," write "Defendants marketed the properties."

b. Use block quotes and footnotes sparingly. Footnotes should generally be used only for tangential points.

c. Use emphasis sparingly**.**

II. LOGISTICS OF FILING THE BRIEF

A. WHEN IS THE BRIEF DUE? The Court will normally issue an order setting a briefing schedule for the appeal. Please note that specific due dates set by Court order are not subject to the additional 3-day allowance for service of previous papers by mail set forth in FRAP 26(c) or Ninth Circuit Rule 26-2. The filing of the appellant's brief before the due date does not advance the due date for the appellee's brief.

B. WHAT IF I NEED AN EXTENSION OF TIME? There are two options: an initial streamlined request for an extension of time and a written motion for an extension of time. Note that these procedures may be subject to change, so always check the most current version of the rules before seeking an extension. (*See also deadlines and extensions of time.*)

1. Initial Streamlined extensions Please note that this is a provisional measure and the Court's procedures are subject to change. The clerk's office may grant an initial streamlined request for a single extension of time of no more than 30 days to file an opening, answering or reply brief, except where a Notice of Oral Argument has issued or the Court has otherwise directed. It does not apply to any other deadlines, including deadlines for petitions for rehearing, amicus briefs, and supplemental briefs ordered by the Court; to any brief in Preliminary Injunction Appeals (Ninth Cir. R. 3-3), Incarcerated Recalcitrant Witness Appeals (28 U.S.C. § 1826) (Ninth Cir. R. 3-5), or Class Action Fairness Act appeals (28 U.S.C.§ 1453(c)). You do not need to give notice to the opposing party before filing the request. If you have already received an extension of time, you may not use this procedure. This can be filed up to the day the brief is due, and replaces the earlier telephonic extension system.

2. Motions for extensions of time *(See also, Motions.)* If you are not eligible for a streamlined initial request (for example, if you are seeking an extension for more than thirty days, or an additional extension of time), you must file a written motion for an extension of time. A motion for an extension of time is deemed untimely if not filed 7 days before the brief in question is due. The deadline is not mandatory and jurisdictional, but a late filing will result in a corresponding delayed response from the Court.

Do not file a motion to shorten time to alleviate the late filing. It must demonstrate diligence and substantial need, and it must be accompanied by a written declaration that states:

- when the brief is due;
- when the brief was first due; the length of the requested extension;
- the reason an extension is necessary;
- movant's representation that movant has exercised diligence and that the brief will be filed within the time requested;
- whether any other party separately represented objects to the request, or why the moving party has been unable to determine any such party's position;
- and that the court reporter is not in default with regard to any designated transcripts.

> ***Practice Tip:*** Although a motion for an extension of time is deemed untimely if not filed 7 days before the brief is due, the deadline is not mandatory and jurisdictional. However, a late filing will result in a corresponding delayed response from the Court. Do not file a motion to shorten time to alleviate the late filing.

C. HOW DO I FORMAT THE BRIEF? The rules addressing the formatting of the briefs (length, typeface, cover pages, etc.) are set forth at FRAP 32 and Ninth Circuit Rules 32-1 through 32-5. You should familiarize yourself with the rules well before the date of filing. (*See infra*, Drafter's Checklist for Appellate Briefs)

D. HOW DO I FILE THE BRIEF? (*See infra*, Drafter's Checklist for Appellate Briefs, and Filer's Checklist for Appellate Briefs)

TOP TECHNICAL FLAWS IN BRIEFS

1 **NOT SEARCHABLE.** The brief is not a searchable document. NINTH CIR. R. 25-5(d).

2 **NO CERTIFICATE OF SERVICE.** The motion does not include a certificate of service at the end of the document. FED. R. APP. P. 25(d).

3 **NO RECITAL OF DETENTION OR BAIL STATUS.** The motion does not state the immigrant's/defendant's current bail/detention status. NINTH CIR. R. 28-2.4 and 2.4(b).

4 **OFFICIAL CAPTION OR ABBREVIATED CAPTION.** The official caption or abbreviated caption is incorrect. FED. R. APP. P. 32(a)(2)(A-D).

5 **NO STATEMENT OF RELATED CASES.** The brief does not contain a statement of related cases. NINTH CIR. R. 28-2.6.

6 **FONT SIZE.** The brief, including footnotes, has a font size less than 14-point font. FED. R. APP. P. 32(a)(5)(A).

7 **NO TABLE OF CONTENTS AND/OR AUTHORITIES.** The brief does not contain a table of contents and/or table of authorities. FED. R. APP. P. 28(b).

8 **SPACING.** The brief is not double spaced. FED. R. APP. P. 32(a)(4).

9 **NO SIGNATURE.** The brief does not have an "s/" for each signature line followed by the typed name of counsel. NINTH CIR. R. 25-5(e).

10 **WRONG BRIEF TYPE SELECTED AT FILING.** The Appellant's blue brief is the Opening Brief. The Appellee's red brief is the Answering Brief. The Appellant's gray brief is the Reply Brief. *See* FED. R. APP. P. 32(a)(2).

11 **NO ADDENDUM .** Parties must include pertinent constitutional provisions, treaties, statutes, ordinances, regulations or rules in an addendum to their briefs. In immigration cases, an addendum with the BIA decision is required.

Rules on the Ninth Circuit website: http://www.ca9.uscourts.gov/rules/

EXCERPTS OF RECORD

In contrast to other circuits, no Appendix of Record is used in the Ninth Circuit. Instead, the Ninth Circuit Rules prescribe an Excerpts of Record.

I. PURPOSE OF THE EXCERPTS OF RECORD AND THE SUPPLEMENTAL EXCERPTS OF RECORD The Excerpts should be a well-organized and accessible collection of all the un-sealed documents in the record that are necessary to understand and decide the issues on appeal. With the required documents at their fingertips, Judges and their staff can spend more time considering the issues instead of trying to find relevant documents.

> ***Practice Tip:*** To create a useful Excerpts of Record, the person compiling the Excerpts must know the record *and* the legal issues on appeal. The biggest mistake lawyers make with Excerpts of Record is turning their creation over to someone without this knowledge.

II. CONTENT OF THE EXCERPTS OF RECORD

A. WHAT TO INCLUDE IN THE EXCERPTS OF RECORD (Ninth Cir. R. 30-1.4-1.6; *see also* Ninth Cir. R. 13-2, 17-1, 22-6, and 32-4). The Excerpts of Record should include, in this order:

1. **A Cover** The cover should be identical to the cover of the brief (*see* Federal Rule of Appellate Procedure 32(a), except that it should be white and it should say "Excerpts of Record" instead of "Brief of Appellant." If the Excerpts are in multiple volumes, the cover should include the volume number and the number of total volumes (i.e., Volume I of IV, etc.).

2. **Table of Contents** This is a list of each document included and the page on which it begins. If the Excerpts are in multiple volumes, a complete table of contents (listing the contents of all the volumes) should appear at the beginning of every volume, not just the first volume.

3. **The notice of appeal** This is necessary to establish that the appeal is timely.

4. **The underlying decision on review** Include the relevant decision and the court's reasoning for every issue on appeal. If the district court explained its reasoning orally, include relevant portions of the transcript.

> ***Practice Tip:*** Compile what you can of the Excerpts of Record before you write your brief. Then, as you write your brief, mark all pages in the record that you reference in your brief. You can then easily add them to the Excerpts of Record. Do not include briefs or motions filed below, unless essential to resolution of the appeal (most commonly to demonstrate preservation of the issue).

5. **Parts of the record relevant to your particular appeal** Different documents will be relevant depending on the issues raised. In criminal cases, include the indictment or information. In cases challenging a jury instruction, include the jury instruction offered and the instruction requested. Note that rules governing particular kinds of cases include instruction regarding the contents of the Excerpts. *See* Ninth Cir. R. 13-2 (tax court cases); 17-1 (agency review); 22-6 and 32-4 (capital cases).

6. **All pages of the record, including any transcripts, relied on in the brief** Be sure to include enough material to place the cited point in context. For example, when citing a point in a transcript, include several pages before and after that point. It is not necessary or appropriate, however, to include the entire trial transcript.

> ***Practice Tip:*** Although the rules do not require that the materials in the Excerpts be in reverse chronological order, that is the order many judges prefer.

7. **Copies of all exhibits or affidavits relied on in the brief** These documents are often not accessible to the Court via the electronic record, so if you do not include them, the Court may waste considerable time trying to find them and may have no way of viewing them. *See* Ninth Circuit Rule 27-14.

8. **A complete copy of the docket sheet in the district court**

9. **Proof of service on all parties of record** This should be in the same form as at the end of the brief.

B. ONE OR MULTIPLE VOLUME EXCERPTS

1. **One Volume Excerpts.** If the Excerpts are less than 75 pages, one volume may be used.

2. **Multiple Volume Excerpts.** If the Excerpts are 75 pages or more, use multiple volumes. Multiple volume excerpts are governed by Ninth Circuit Rule 30-1.6. The first volume must contain only documents containing the reasoning of the court (or agency) whose decision is on review. Subsequent volumes, which should not exceed 300 pages, should include the remaining materials. Each volume should include a complete version of the Table of Contents. The pages of all the volumes should be numbered sequentially. For example, if Volume I ends with page 74, Volume II should begin with page 75.

C. THINGS *NOT* TO INCLUDE IN THE EXCERPTS OF RECORD

1. Unless necessary to show that an issue was raised or waived, do not include briefing filed before the district court.

2. In criminal cases, do not include the Pre-Sentence Report in the Excerpts of Record. This is a sealed document and must be filed separately, pursuant to Ninth Circuit Rule 30-1.10.

III. CONTENTS OF THE SUPPLEMENTAL EXCERPTS (Ninth Circuit Rule 30-1.7).

The Supplemental Excerpts are a compilation of documents from the record that were not included in the Excerpts of Record that the Appellee believes are necessary to decide the issues on appeal. If the Excerpts are complete, there is no need to file Supplemental Excerpts.

The same formatting rules that govern the Excerpts of Record govern Supplemental Excerpts.

Special rule for Supplemental Excerpts when a pro se appellant has not filed Excerpts of Record. If the Appellant did not file an Excerpts of Record, the rules give the appellee the option of filing a very complete Supplemental Excerpts of Record or of filing merely: the district court docket sheet, the notice of appeal, the judgment or order appealed from, and any specific portion of the record cited in appellee's brief.

IV. WHEN TO FILE FURTHER EXCERPTS OF RECORD (Ninth Cir. Rule 30-1.8)

Occasionally, a reply brief will refer to portions of the transcript or the record not previously cited or included in the Excerpts or Supplemental Excerpts. In this circumstance, a Further Excerpts of Record may be filed with the reply brief.

V. WHEN THE EXCERPTS OF RECORD AND SUPPLEMENTAL EXCERPTS OF RECORD ARE DUE (Ninth Cir. Rule 30-1.3, 30-1.7, and 30-1.8)

Pursuant to a pilot project, an electronic version of the excerpts must be transmitted to the Court on the same day that the brief is transmitted. After the clerk confirms the absence of any technical deficiencies, the party will be directed to submit four copies of the excerpts. If the excerpts do not conform to Ninth Circuit Rule 30-1, the party will be instructed to submit a corrected electronic version. The same procedure should be followed for the Supplemental Excerpts the day the answering brief is filed. *See* Ninth Cir. Rule 30-1.7. In rare instances in which Further Excerpts are filed, the same procedure should be followed the day the reply brief is filed. *See* Ninth Cir. R. 30-1.8.

ORAL ARGUMENT

I. LOGISTICS

A. HOW ARE CASES SET FOR ORAL ARGUMENT? Not all or even most cases get set for oral argument. For those that are set for argument, notices of the oral hearing calendars are distributed approximately 4 to 5 weeks before the hearing date. Enclosed with the notice of hearing date is a form to acknowledge the notice. Complete this as soon as possible and file it with the court. One week before argument the Court will release an updated calendar listing the names of the judges who will be presiding. Having a case calendared does not mean that there will necessarily be an oral argument. If all three judges on the panel agree that the decisional process would not be significantly aided by oral argument, the case can be submitted without argument. Fed. R. App. 34.

B. WHEN WILL MY CASE BE SET FOR ORAL ARGUMENT? The timing of oral argument generally depends on when the notice of appeal was filed, not when briefing was completed. However, when a case is set for oral argument also depends on a number of other factors, including the type of case it is, whether there are other related cases, etc. In general, criminal cases get first priority. Civil appeals involving (1) Recalcitrant witness appeals brought under 28 U.S.C. § 1826; (2) Habeas corpus petitions brought under Chapter 153 of Title 28; (3) Applications for temporary or permanent injunctions; (4) Appeals alleging deprivation of medical care to the incarcerated or other cruel or unusual punishment; and (5) Appeals entitled to priority on the basis of good cause under 28 U.S.C. § 1657 will also be accorded priority. If you believe that your case should get priority in scheduling the date of hearing or submission solely on the basis of good cause under 28 U.S.C. § 1657, you should file a motion for expedition with the clerk at the earliest opportunity.

C. WHERE WILL MY CASE BE SET FOR ORAL ARGUMENT? The Court sits monthly in San Francisco, Pasadena and Seattle. The Court sits in Portland every other month, depending on caseload. The Court also hears cases 3 times a year in Honolulu and at least two times a year in Alaska. The Court also occasionally conducts hearings at other locations. Typically, cases are generally heard in the administrative units where they arise. Petitions to enforce or review orders or decisions of boards, commissions or other administrative bodies are generally heard in the administrative unit in which the person affected by the order or decision is a resident, unless another place of hearing is ordered by the Court.

D. WHAT IF I DON'T WANT ORAL ARGUMENT? Any party to a case may request, or all parties may agree to request, a case be submitted without oral argument. However, this request or stipulation requires the approval of the panel.

E. WHAT HAPPENS IF I'M NOT AVAILABLE FOR A PARTICULAR CALENDAR? If you know that you will be unavailable to argue your case during a particular period of time, send a letter to the clerk's office as early as possible to alert them. Once a case has been calendared, however, it is extremely difficult to change the date or location of a case. The Court will change the date or location of an oral hearing only for good cause, and requests to continue a hearing filed within 14 days of the hearing will be granted only upon a showing of exceptional circumstances. Ninth Cir. R. 34-2.

> ***Practice Tip:*** If it is necessary to move to continue the oral argument date, make that request as soon as possible. The closer the date of oral argument, the more time and energy the panel will have spent in becoming conversant with the case through reviewing the briefs and preparing bench memoranda; panels are generally loath to see that time squandered without excellent reasons – and prompt notice of the problem. If practicable, consider requesting leave to appear telephonically or by video as an alternative. Please note, however, that if you move to continue the oral argument date, the panel may decide to submit the case without oral argument and you may lose your opportunity to argue the case.

II. PRIOR TO ORAL ARGUMENT

A. FILE YOUR ACKNOWLEDGEMENT OF HEARING NOTICE http://www.ca9.uscourts.gov/forms/ This is also your opportunity to let the clerk's office know of any special needs you may have in the courtroom (e.g., a listening assistance device, or a table-height podium designed to accommodate persons in wheelchairs).

B. CHECK FOR NEW AUTHORITY If you find additional case law, you may file a letter pursuant to Fed. R. App. 28(j). That letter should be filed as early as possible, and if at all possible, no later than 7 days before the date of argument.

C. CHECK THE AMOUNT OF TIME ALLOTTED TO EACH SIDE This is included on the oral hearing calendar. Please note that the time allotted to each side must be divided between counsel for separately represented parties on the same side. Accordingly, it is important to confer with aligned counsel before argument in order to agree on the division of issues and time.

III. THE DAY OF ARGUMENT

A. CHECK IN WITH THE COURT CLERK ONE HALF HOUR BEFORE THE START OF THE CALENDAR

B. PLAN TO BE AT THE SESSION FROM THE TIME IT STARTS Do not assume that cases will be argued in the order in which they appear on the calendar. Also, eleventh hour voluntary dismissals can also contribute to a shorter than anticipated calendar. Moreover, the presiding judge frequently announces the panel's ground rules at the start of the session.

C. TIPS ON WHAT TO DO AND NOT TO DO

1. **Answer the judges' questions** If the question is a yes or no question, answer yes or no before explaining.

> ***Practice Tip:*** If a judge asks you a hypothetical question, don't respond by telling them that that is not this case. Answer the question and *then* explain why that scenario does or does not differ from the one presented by this case.

2. **Know the record** However, if you don't know the answer, say so. It's better to not know the answer than to guess at it – and guess wrongly. You may also offer to supplement missing citations in a post-hearing letter.

3. **Don't repeat at length the arguments made in the briefs**

4. **Keep track of time** If you are the appellant and wish to reserve time for rebuttal, do it yourself. Do not expect the panel or the clerk to keep track of your time for you.

5. **Avoid the use of visual aids** Visual aids are generally disfavored. If, however, you must use one, let the clerks' office know in advance. Also, check with your opponent to see if he or she has any objection to the use of a proposed visual aid. If opposing counsel is not amenable to it, a dispute may not be worth your efforts.

6. **Make sure that your cellphone or other portable electronic device is silenced** The Court's policy on use of portable electronic devices is posted outside of the courtroom.

7. **Don't try to be funny** Jokes will generally fall flat and just annoy the panel.

8. **Be sure to say everything you think the Court *must* hear in the first 30-60 seconds** Once questions start, you may not get another chance.

IV. AFTER ARGUMENT

A. WHAT IF I MISSTATED SOMETHING AT ARGUMENT? You may file a letter with the court correcting your misstatement as soon as possible.

B. WHAT IF THE COURT ISSUES AN OPINION RELEVANT TO THE ISSUES IN MY CASE AFTER ARGUMENT? You can submit a letter pursuant to Fed. R. App. P. 28(j).

C. HOW CAN I LISTEN TO THE RECORDING OF MY ARGUMENT? Audio recordings of oral arguments are generally available by the day after argument on the Ninth Circuit's website. It is also possible to request that the Court prepare a tape recording of the argument.

POST-DECISIONAL PROCESSES

I. OVERVIEW An appeal does not end when the court issues its opinion. Instead, a number of post-decision actions may need to be taken. What those actions are depend upon whether the Ninth Circuit has ruled in favor of your client or against your client. This section of the practice guide discusses what those actions are, the timelines for taking those actions, and the considerations involved.

II. PREPARE THE CLIENT WITH GOOD COMMUNICATION.

A. DESCRIBE THE APPELLATE PROCESS TO THE CLIENT From the outset of the case, prepare the client for the appellate process, including the possibility of an adverse result. Discuss with your client(s): why they want to appeal; the error they believe occurred in their case; and their expectations for the appeal. Describe to the client(s) the appellate process, including the fact that the appeal is based on the record already laid in the lower court (and not, for example, a place where the client can introduce new testimony showing that they are innocent), and provide the upcoming appellate schedule, including the fact that the court holds oral argument in fewer than one quarter of the appeals filed.

> ***Practice Tip:*** Gently but firmly provide the client with a "legal reality check." It can be helpful to recite the statistic that in the federal court system roughly one in every 10 appeals results in some form of reversal. For some clients this is a negative and difficult reality to accept; other clients have stated that the chances of one in 10 are better than they had thought. Regardless, it is important to mention this reality to help prepare the client for the possibility of an adverse decision later on.

B. MAINTAIN COMMUNICATION After providing the client with an overview of the appellate process, maintain communication throughout that process so that he/she knows what is going on with the appeal process, the briefing process, and has an understanding of issues that he/she will see argued in the opening brief. If the record and the law support issues the client wants argued in the opening brief, they are to be included in the brief. But if the record and the law do not support those issues, explain to the client that frivolous issues with no merit whatsoever cannot be a part of the brief. Moreover, such issues harm the credibility of meritorious issues. If good communication has been maintained and the Ninth Circuit's decision ends up being adverse, the risk of the decision surprising, shocking or overwhelming the client is minimized. The client has been prepared.

C. LET THE CLIENT KNOW ABOUT THE DECISION IMMEDIATELY Once the Ninth Circuit issues its decision, immediately communicate the decision to the client. This is important because the timelines for responding to the

decision are short. In addition, if the appeal is one which is likely to receive media attention, the client needs to be prepared for contact from the media.

Practice Tip: The Ninth Circuit typically provides a copy of a decision to the lawyers in the appeal via the electronic filing system several hours before the decision is posted publicly on the Ninth Circuit's website.

Practice Tip: It can be difficult to promptly communicate with incarcerated clients. A lawyer for an incarcerated client should consider sending a copy of the decision to the client via express mail, given the short timelines for post-decisional action and the delays in processing mail (even legal mail) in prisons. For clients that are incarcerated in the federal Bureau of Prisons (BOP), if the client has set up an e-mail account through CorrLinks, which is an e-mail system for BOP inmates, you can communicate the nature of the decision and relevant language to the client, however CorrLinks does not permit sending attachments. Be aware, however, that CorrLinks is not a secure system, and communications sent through it will not be protected by attorney-client privilege.

Practice Tip: If the appeal is successful, counsel of an incarcerated client should consider making extra efforts to contact the client right away by, for example, contacting the client's counselor or case manager to arrange for a telephone conversation, either by direct or collect call. This is not simply because the client is entitled to get the good news as soon as possible. Unfortunately, good fortune can arouse jealousy and ill-will in other prisoners for which the client should be prepared. In addition, a client can become so excited by good news that he or she stops managing his or her own behavior in the careful manner demanded by life inside. Thus, when conveying news of a positive outcome, counsel should advise the client to remain calm and circumspect and remind the client that it could be several weeks or even months before the client can actually enjoy the effects of victory.

III. STEPS TO TAKE IF THE DECISION IS ADVERSE

A. IDENTIFY THE APPLICABLE RULES AND ORDERS RELATING TO THE POST-DECISIONAL PROCESS

The rules pertinent to the rehearing/rehearing *en banc*/*certiorari* process are:

- Fed. R. App. P. 35 (*en banc* rehearing);
- Fed. R. App. P. 40 (panel rehearing);
- Fed. R. App. P. 41 (mandate);
- Ninth Circuit Rules 35-1 through 35-4 (*en banc* rehearing);
- Ninth Circuit Rule 40-1 (panel rehearing);
- Ninth Circuit Rules 41-1 and 41-2 (mandate);
- Ninth Circuit General Orders Chapter V (*en banc* procedures);
- Supreme Court Rules 10-16 (*certiorari*).

B. COMPUTE AND DOCKET THE RELEVANT DUE DATES IN THE POST-DECISIONAL PROCESS

- In general, the due date for a petition for rehearing/rehearing *en banc* is 14 days from the date of decision. (Fed. Rule App. P. 35 & 40).
- For a civil case in which one of the parties is the United States, a United States agency, a United States officer/employee sued in an official capacity, or a United States officer/employee sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States, the due date for a petition for rehearing/rehearing *en banc* is 45 days from the date of the decision.
- A motion to extend the time for filing a petition for rehearing/rehearing en *banc* should be filed no later than 7 days before the due date for the petition.
- A petition for *certiorari* is due 90 days from the date of the decision or 90 days from the order denying a petition for rehearing/rehearing *en banc* (whichever is later).
- The mandate will issue 7 days after the deadline to file a petition for rehearing expires. If a petition for rehearing/rehearing *en banc* is filed, then the mandate

will issue seven days after the order denying the petition for rehearing/rehearing en *banc* is filed.

C. DECIDE WHETHER TO SEEK AN EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR REHEARING/REHEARING *EN BANC* If you need more than 14 days to decide whether to seek rehearing/rehearing *en banc* and/or to draft any petition, promptly seek an extension of time for filing that petition. The Court often grants extensions of 21-35 days to file a petition for rehearing. Although the court's rules permit the clerk to grant an extension of time for a petition for rehearing/rehearing *en banc*, court practice is to require a written motion; the motion is forwarded to the panel for decision.

D. POST-DECISIONAL OBLIGATIONS FOR LEGAL COUNSEL IN CRIMINAL APPEALS Ninth Circuit Rule 4-1(e) addresses the unique considerations for post-appeal proceedings for legal counsel in criminal appeals where a decision is adverse to the client.

Within 14 days after entry of the Ninth Circuit's judgment, or denial of the petition for rehearing, counsel must advise the client of the right to initiate further review by filing a petition for a writ of *certiorari* in the Supreme Court. Although the client often believes that his/her case is either Supreme Court-worthy, or that legal counsel must pursue every possible remedy no matter how lacking in merit, Ninth Circuit Rule 4-1 (e) clearly states:

> "[i]f in counsel's considered judgment there are no grounds for seeking Supreme Court review that are non-frivolous and consistent with the standards for filing a petition, see Sup. Ct. R. 10, counsel shall further notify the client that counsel intends to move this Court for leave to withdraw as counsel of record if the client insists on filing a petition in violation of Sup. Ct. R. 10. * * * If requested to do so by the client, appointed or retained counsel shall petition the Supreme Court for *certiorari* only if in counsel's considered judgment sufficient grounds exist for seeking Supreme Court review. See Sup. Ct. R. 10."

Any motion to withdraw must be made within 21 days of the judgment, or denial of rehearing, setting forth efforts made by counsel to notify the client. The motion must be served upon the client. Unless counsel is relieved of his or her appointment, the appointment continues through resolution of *certiorari* proceedings.

Practice Tip: When counsel for a defendant in a criminal appeal determines that no sufficient grounds exist for seeking Supreme Court review, but the client insists that the same be filed, send the client written correspondence notifying him/her of that determination and the application of Ninth Circuit Rule 4-1 (e), and advising that counsel will have to file a motion to withdraw. Counsel should inform the client that he or she will need to file a petition for writ of *certiorari* on a pro se basis – if he/she insists on going forward. Also, provide the client the relevant provisions of the Supreme Court rules concerning filing a petition for *certiorari* (Sup. Ct. R. 10-16), including emphasis that under Rule 13 the petition must be filed within 90 days of entry of the Ninth Circuit's judgment.

Practice Tip: In winding down representation of a client in a criminal appeal where an appellate court decision is adverse to the client, and the client has exhausted his/her federal appellate remedies, advise the client regarding the possibility of seeking further relief under 28 U.S.C. § 2255. Provide the client with a form copy of the § 2255 motion, as well as district court applications to proceed without payment of court fees. In addition, inform the client that while he/she was entitled to court-appointed counsel for the direct appeal, he/she is not automatically entitled to court-appointed counsel under § 2255 and, therefore, current counsel cannot pursue that motion for him/her (unless counsel is willing to do so on a pro bono basis). Moreover, the § 2255 motion is often the vehicle by which a client will claim ineffective assistance of legal counsel at both the trial and appellate levels. Therefore, continuing representation is inappropriate. Alert the client that he/she may petition the court for appointment of counsel. The Court has discretion to appoint counsel where "the interests of justice so require". 18 U.S.C. § 3006A(a)(2)(B).

E. EVALUATE WHETHER TO PETITION FOR REHEARING/ REHEARING *EN BANC* The next step is to decide whether to seek a panel rehearing or a rehearing en banc. You may request both in the same petition if you determine that your case is an appropriate candidate for both. Fed. R. App. P. 35(b)(3).

A request for a panel rehearing is appropriate if it appears that the panel may have overlooked or misunderstood a point of fact or law, and that the error affected how the panel resolved the case. *See* Fed. R. App. P. 40(a)(2).

A petition for rehearing *en banc* is appropriate when the panel's decision generates significant legal issues that warrant the attention of a larger number of members of the court. A case that is in conflict with decisions of the Supreme Court or other panel decisions of the Ninth Circuit, a case that creates a circuit split among the federal courts of appeal, or a case that is otherwise of "exceptional importance" may warrant *en banc* reconsideration by the court. *See* Fed R. App. P. 40. Examples of recent cases that the court has determined warranted *en banc* rehearing can be found in the court's regularly-updated report on the status of pending *en banc* cases: http://www.ca9.uscourts.gov/enbanc/

> ***Practice Tip:*** In general, if the court resolved your case by memorandum disposition, it is probably not a strong candidate for *en banc* reconsideration. However, if it appears that the reason that the panel resolved the case in a memorandum disposition was because the significant legal issue presented has already been resolved by controlling Ninth Circuit precedent (and the court therefore had no need to write another opinion on the issue), then the case may still be a candidate for *en banc* reconsideration if the circuit precedent on which the panel relied conflicts with the decisions of other circuits on the same significant legal issue, or if there are other reasons that the legal issue is of exceptional importance.

> ***Practice Tip:*** The criteria for *en banc* reconsideration are similar to the criteria for a grant of *certiorari* by the Supreme Court. As a result, if a case truly meets the criteria for a grant of certiorari, seeking the *en banc* process may provide a faster, more economical way than certiorari to seek to reverse a panel's decision. In addition, the process of drafting a petition for *en banc* reconsideration can help with the formulation of arguments in favor of *certiorari*, should that step become necessary.

> ***Practice Tip:*** Once a decision is reached on the next course of action, it needs to be confirmed in writing to the client. Mail this letter immediately after having discussed the merits with the client. If there is no opportunity to speak with the client, send a letter setting forth your decision with respect to the next course of action no later than 48 hours from receipt of the Ninth Circuit's decision. The point is to provide the client an opportunity to respond.

F. **EVALUATE WHETHER TO PETITION FOR *CERTIORARI*** A case could be a good candidate if it creates or exacerbates a circuit split on an issue of law of substantial importance, if it creates a split of authority among state courts of last resort and federal courts on an important federal question, or if, in reaching the decision, the court deviated so far from the normal procedure followed by courts that Supreme Court intervention is warranted. For a detailed discussion of what the Court considers in determining whether to grant *certiorari* (and discussions of all other practical aspects of Supreme Court practice), *see* Eugene Gressman, *et al.*, Supreme Court Practice (9th ed. 2007).

G. **DETERMINE WHETHER YOU NEED TO STAY THE MANDATE** The mandate officially causes the Ninth Circuit's decision to take effect, and transfers jurisdiction back to the district court. If you were the winning party in the district court, but the losing party on appeal, then you may need to obtain a stay of the mandate in order to maintain the status quo. The filing of a petition for rehearing/rehearing en banc automatically stays the mandate until the Ninth Circuit has ruled on the petition. However, the filing of a petition for *certiorari* does not stay the mandate. As a result, if you intend to seek *certiorari* and do not want the case returned to district court before the Supreme Court has ruled on the petition for *certiorari*, you must move to stay the mandate.

H. **FILING THE PETITION FOR REHEARING AND WAITING** If you opt to file a petition for rehearing/rehearing *en banc*, it generally must comply with the form requirements for briefs. It cannot exceed 15 pages or 4200 words. Fed. R. App. P. 35 and 40; Ninth Circuit Rule 40-1.

> ***Practice Tip:*** A party to an appeal is not permitted to file a response to a petition for rehearing/rehearing *en banc* unless the court orders a response. The court generally does not grant a petition for rehearing without ordering a response.

> ***Practice Tip:*** Examples of petitions for rehearing *en banc* and opposing documents in cases in which the court has granted *en banc* rehearing are available on the court's website, in the regularly-updated *en banc* status report: http://www.ca9.uscourts.gov/enbanc/

Once a petition for rehearing/rehearing *en banc* is filed, there is no set date by which the court will act on the petition; the process often takes three to seven months. For a description of the court's internal practices when a petition for rehearing *en banc* is filed, see General Orders Chapter V.

I. WHEN REHEARING IS GRANTED If panel rehearing is granted, there generally will not be further argument or briefing. Instead, the panel usually issues an order and amended opinion or memorandum disposition in which it grants rehearing and revises the prior disposition in response to the request for rehearing -- all at the same time.

If *en banc* rehearing is granted, the court will issue an order granting the petition for rehearing *en banc* and vacating the panel decision. The case generally will be calendared for oral argument before an 11-judge panel during one of the court's quarterly *en banc* sittings in March, June, September, and December. The court generally does not order an additional briefing. Instead, the case usually will be submitted to the *en banc* court on the original briefs.

> ***Practice Tip:*** When a case is argued before the *en banc* court, the parties' roles remain the same as they were during the initial argument. That is, the appellant argues first before the *en banc* court and the appellee argues second, even if it is the appellee who lost before the three-judge panel and petitioned for rehearing *en banc.*

> ***Practice Tip:*** If you will be arguing a case before the *en banc* court, it can be helpful to review the videos of prior *en banc* arguments, which are available under the "audio and video" tab on the Court's website.

Once a case has been argued before the *en banc* panel, there is no set date by which the Court must issue an opinion. However, the court's internal guidelines specify that the majority opinion should be drafted and circulated within 45 days of argument, and that any dissenting or other separate opinion should be circulated within 30 days of the circulation of the draft majority opinion. General Orders 5.7.

J. IF YOU LOSE AN *EN BANC* CASE If you lose an *en banc* case, you can follow the same process outlined above either to seek reconsideration before the

11-judge panel, if the panel made a legal or factual mistake, or to seek full court *en banc* reconsideration. However, as a practical matter, these avenues of relief are unlikely to be fruitful. The best course usually is to evaluate whether to petition for *certiorari* (the petition will be due 90 days from the date of the *en banc* decision), and to request that the Ninth Circuit stay the mandate if you need to maintain the status quo pending the *certiorari* process.

IV. <u>STEPS TO TAKE IF THE DECISION IS FAVORABLE</u> If the decision is favorable, the primary things to consider are: (1) seeking attorney fees and costs; and (2) if you represent a defendant in a criminal case or the petitioner in a habeas corpus case, whether and how to effectuate the decision in your client's favor, including expeditiously obtaining your client's release, if that is the inevitable consequence of the decision.

A. ATTORNEY FEES AND COSTS ON APPEAL

1. <u>Costs on appeal</u>

a. Applicable statutes, rules and orders

The applicable statutes, rules and order are:

28 U.S.C. §§ 1920 and 2412;

Fed. R. App. P. 39;

Ninth Cir. R. 39-1.1 - 1.5;

General Order 4.5e.

For legal counsel appointed under the Criminal Justice Act, please see subparagraph 2, below.

b. Entitlement to costs A prevailing party is presumptively entitled to costs. Costs are taxed in favor of appellee/respondent when a case is dismissed or a district court/agency affirmed. Costs are taxed in favor of the appellant/petitioner when a district court/agency reversed. Note that costs are taxed as ordered by the court when the district court/agency order is affirmed in part, reversed in part, modified or vacated. Per General Order 4.5e, such dispositions are to include statement regarding the allocation of costs. If the statement is absent and a party wishes to request costs, a cost bill may be filed along with a letter to the panel requesting a cost statement.

There are several common exceptions to the presumption of entitlement to costs by a prevailing party:

- Unsuccessful party of modest means raises close public policy issues. *Stanley v. University of Southern California*, 178 F.3d 1069, 1079 (9th Cir. 1999).

- Certain statutes may bar the taxation of costs against an unsuccessful litigant in some cases, absent a showing of frivolity in some types of appeals. *See e.g., Brown v. Lucky Stores, Inc*., 246 F.3d 1182 (9th Cir. 2001) (Americans with Disabilities Act cases); *Ocean Conservancy v. National Marine Fisheries Services*, 382 F.3d 1159 (9th Cir. 2004) (Endangered Species Act cases).

- Costs unlikely to be assessed where indigent petitioner unsuccessfully appeals denial of habeas corpus petition. *Sengenberger v. Townsend*, 473 F.3d 914 (9th Cir. 2006).

c. **Timelines for submitting cost bill** A party eligible for costs must submit the cost bill on Form 10 14 days after entry of judgment (*i.e.*, the court's decision). Fed. R. App. P. 39(d)(1). The deadline is strictly enforced. *Mollura v. Miller*, 621 F.2d 334 (9th Cir. 1980). The 3-day service allowance for mailing does not apply to the calculation of the deadline. Advisory Note to Ninth Circuit Rule 39-1. A party wishing to respond to the cost bill must file a response within 14 days after service of cost bill. Fed. R. App. P. 39(d)(2).

Practice Tip: Filing a petition for rehearing or rehearing *en banc* **does not** toll the time for filing a cost bill. However, the panel may not act on the cost bill until the completion of the rehearing stage of the case.

d. **What can be claimed as costs and where to claim them** In the appellate court, the following costs can be claimed: cost of copying briefs and excerpts only (actual copying costs not to exceed .10 per page); fee for petitions for review. Ninth Cir. R. 39-1.1and 1.3; Fed. R. App. P. 39(e). These costs can be claimed using Form 10, Appendix to Circuit Rules.

In the district court, the following costs can be claimed: Reporter's transcripts; docketing/filing fee; premiums for bond; preparation and transmission of record. Fed. R. App. P. 39(e).

These costs must be claimed pursuant to the applicable district's procedures.

2. Attorney fees on appeal

a. Civil Appeals. Ninth Circuit Rule 39-1.6 governs requests for attorneys' fees on appeal. In general, a request for attorneys' fees on appeal must be submitted no later than 14 days after the deadline for filing a petition for rehearing. If a timely petition for rehearing is filed, then a request for attorneys' fees must be submitted no later than 14 days of the court's decision on the petition for rehearing. The fee request must be supported by (a) a memorandum explaining why the party seeking fees is legally entitled to recover fees on appeal; and (b) the court's Form 9 (available at http://www.ca9.uscourts.gov/datastore/uploads/forms/Application%20for%20Attorneys%20Fees.pdf), or a document providing substantially similar information, detailing the work performed, explaining why the rates charged are legally justified, and an affidavit attesting that the information is accurate. All applications for fees must contain a statement that the request is timely. Fee requests must be filed separately from any cost bill.

Under Ninth Circuit Rule 39-1.7, any response to a request for fees must be filed within 10 days of service of the fee request; a reply to a response must be filed within 7 days of the date of service of the response.

If the court awards fees on appeal, and a party objects to the amount of fees claimed, the court may refer the fee request to the Appellate Commissioner to determine the appropriate amount of fees. The Appellate Commissioner's determination is subject to reconsideration by the court. *See* Ninth Circuit Rule 39-1.9.

Additionally, Ninth Circuit Rule 39-1.8 authorizes any party to an appeal who is or may be entitled to attorney fees on appeal to request that the consideration of fees on appeal be transferred to the district court or administrative agency from which the appeal originated. Such a request must be filed within the time limits for filing a request for attorney fees with the Ninth Circuit.

> ***Practice Tip:*** Counsel appointed through the Ninth Circuit *Pro Bono Program* are not precluded from seeking attorney fees against the non-prevailing party if a statute provides for recovery of attorney fees by the prevailing party.

b. **Criminal Appeals**. For counsel appointed under the Criminal Justice Act (18 U.S.C. §3006A) to represent a defendant on direct appeal, or a petitioner in a habeas corpus appeal, counsel should submit the completed voucher for fees and costs within 45 days after the final disposition of the case in this Court, or after filing a petition for *certiorari*, whichever is later. CJA counsel are referred to "National CJA Voucher Reference Tool," available at http://www.uscourts.gov/uscourts/cjaort/index.html

C. EFFECTUATING FAVORABLE APPELLATE DECISIONS

1. **Effectuating a favorable decision** The decision will become effective when the mandate is issued. If there is a need to immediately effectuate the decision, a party can request that the court immediately issue the mandate.

2. **Steps to take to effectuate a favorable decision in criminal and habeas cases** How to effectuate a favorable decision in a criminal appeal depends upon the specific issue the appellate court ruled on. Therefore, effectuating a favorable decision from the Ninth Circuit on your client's path is case specific. For example, often criminal direct appeals concern sentencing issues. A favorable sentencing decision by the Ninth Circuit often results in a reversal or vacating of the sentence imposed, and remand to the district court for further hearings consistent with the Ninth Circuit's decision. Assuming the government does not seek rehearing in the Ninth Circuit, or review by the Supreme Court, your case will return to the district court for further sentencing proceedings.

A favorable decision in a habeas corpus appeal generally means that the Ninth Circuit has reversed the district court's denial of the defendant/petitioner's habeas corpus petition under 28 U.S.C. § 2254 or § 2255. This results in a remand of the case to the district court for proceedings consistent with that reversal, which could include an evidentiary hearing under the applicable section of the statute, i.e., § 2254 or § 2255, concerning the issues raised, or simply a direction to issue the writ and order the state or the government to either release or retry the petitioner within a designated period of time. It may be necessary to follow up on an order to retry or release a petitioner in the state courts.

REVIEW OF IMMIGRATION DECISIONS BEFORE THE NINTH CIRCUIT

I. INTRODUCTION

Immigration cases have made up a significant percentage of the Ninth Circuit's docket in recent years. These cases arise in two procedural contexts. First, the alien may petition for review of Board of Immigration Appeals removal decisions, and, in limited circumstances, may seek review of ICE removal orders. Such cases require special procedures, reviewed *infra*. Second, either the alien or the government may appeal from district court decisions involving immigration, such as decisions concerning relative visa petitions or habeas corpus actions filed by detained aliens. Appeals from these district court decisions follow the same procedure as appeals in other civil areas of law.

This section will focus on petitions for review of BIA removal decisions. Its purpose is to inform practitioners of some of the special provisions relating to handling these petitions for review.

The petition for review, rather than a notice of appeal, is the initial document for commencing review of Board of Immigration Appeals removal decisions. The requirements for petitions for review are set out in section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252. Rule 15 of the Federal Rules of Appellate Procedure, the corresponding Ninth Circuit rules, and Ninth Circuit General Order 6.4 contain additional requirements for petitions for review. Outside of these rules, the remaining Federal Rules of Appellate Procedure and accompanying Circuit Rules apply to review of BIA decisions, except Rules 3-14, 22, and 23 and the accompanying Circuit rules. For this purpose, the term "appellant" includes the term "petitioner," the term "appellee" includes the term "respondent," and the term "appeal" includes the term "petition." FRAP 20; Ninth Circuit Rule 20-1.

Practice Tip: The Ninth Circuit's website contains very helpful immigration resources, which counsel are strongly encouraged to consult. These include:

- A practice advisory from the American Immigration Council entitled *How to File a Petition for Review*, at http://www.ca9.uscourts.gov//datasore/uploads/guides/petition/lac_pa_041706.pdf. This practice advisory describes the procedure for evaluating BIA decisions for purposes of filing petitions for review and gives an excellent overview of the entire review process. It also provides cites to other practice advisories on more detailed questions of judicial review in immigration cases.
- The Ninth Circuit Immigration Law Outline, available at http://www.ca9.uscourts.gov/guides/immigration_outline.php. This extensive outline of substantive and procedural immigration law is an invaluable overview and springboard for legal research.
- *Frequently-Asked Questions after Opening a Case – Counseled Immigration Cases*, at http://www.ca9.uscourts.gov/datastore/uploads/file_an_appeal/case_opening-csl_imm11-11.htm.

II. THE PETITION FOR REVIEW.

A. TIMING AND PROCESS FOR FILING PETITIONS FOR REVIEW

The petition for review in an immigration case is filed with the circuit court of appeals, rather than with the Board of Immigration Appeals. FRAP 15(a)(1). It must be received by the Circuit Court no more than thirty days from the date of the final administrative decision in the case. 8 U.S.C. § 1252(b)(1). This requirement is jurisdictional, meaning that the Court has no ability to extend the filing deadline. *Stone v. INS*, 514 U.S. 386, 405 (1995) (the deadline for filing a petition for review is mandatory and jurisdictional and not subject to equitable tolling). *See also* Advisory Committee Note to Circuit Rule 25-2 (reminding litigants that a commercial carrier's failure to deliver a document within the anticipated interval does not excuse the failure to meet a mandatory and jurisdictional deadline).

In some cases, aliens have not received the Board's decision within the thirty days for filing the petition for review. If this happens, the alien may ask the Board to rescind and reissue its decision, thereby starting a new thirty-day period for filing the petition for review. To support such a motion, the alien must submit evidence demonstrating that the Board's decision was not timely received. If the failure to timely file was based upon ineffective assistance of counsel, the alien may also consider filing a motion to reopen with the Board, based upon ineffective assistance. *See* American Immigration Council Practice Advisory, *Suggested Strategies for Remedying Missed Petition for Review Deadlines or Filings in the Wrong Court* (April 20, 2005), at http://www.legalactioncenter.org/sites/default/files/lac_pa_042005.pdf.

Petitions for review of a BIA decision may either be filed electronically or in hard copy. Ninth Circuit Rule 15-4.

Practice Tip: The Board of Immigration Appeals sometimes provide notice of decisions to ICE before the alien or counsel receives the decision. Since there is no automatic stay of removal once the Board issues its decision, ICE may remove the alien before the alien or counsel receives notice of the decision. For this reason, it is a good precautionary measure to advise the alien of this possibility and provide him or her with a draft petition for review and request for stay of removal, so that the alien can file it immediately should ICE take steps to remove him or her. Counsel or the alien may also call the BIA automated case information line, at 1-800-898-7180. Upon entering the individual's A number, option 3 gives the date of all Immigration Judge and Board decisions.

B. CONTENTS OF THE PETITION FOR REVIEW A petition for review of an agency order must:

- name each party seeking review either in the caption or the body of the petition, Fed. R. App. Proc. 15(a)(2);
- specify the order or part thereof to be reviewed, *id*.;
- name the Attorney General as respondent, INA § 242(b)(3), 8 U.S.C. § 1252(b)(3);
- state whether any court has upheld the validity of the order and, if so, the date of the court's ruling and the type of proceeding, § 242(c), § 1252(c);
- include a copy of the final administrative order, *id*., Ninth Circuit Rule 15-4;
- include the petitioner's alien registration number in the caption, Ninth Circuit Rule 15-4;
- state whether the petitioner is detained in DHS custody or at liberty, *id*.;
- state whether the petitioner has moved the BIA to reopen, *id*.; and
- state whether the petitioner has applied for adjustment of status, *id*.

If their interests make joinder practicable, two or more persons may join in the petition for review. FRAP 15(a)(1). Thus, for example, a family whose cases were consolidated in the removal proceedings may file a single petition for review. The petition for review must list each petitioner by name, rather than listing only the principal respondent before the agency or using "et al." *Id.*

The Federal Rules of Appellate Procedure provide Form 3 in the Appendix of Rules as a suggested format for the petition for review. http://www.ca9.uscourts.gov/rules/. Sample petitions for review are also included in the American Immigration Council's Practice Advisory *How to File a Petition for Review*, a link to which is provided above.

C. FILING AND SERVICE OF THE PETITION FOR REVIEW The respondent in a petition for review is the Attorney General. INA § 242(b)(3)(A), 8 U.S.C. § 1252(b)(3)(A). The petition must be served on the Attorney General and on the ICE officer or employee in charge of the district in which the final order of removal was entered. *Id*. This will generally be the District Director.

The address for service on the Attorney General is:

Name of Attorney General
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530-0001.

To find the name and address of the officer in charge of the ICE district where the removal order was issued, go to the list of ICE field offices, at http://www.ice.gov/contact/ero/. It is a good idea to call the field office to get the

name of the District Director and to confirm that the listed address is the correct one for the district director.

The Attorney General is represented in petitions for review by the Office of Immigration Litigation, and it is recommended that counsel send a copy of the petition to review to that Office, as well. The mailing address is:

Office of Immigration Litigation
U.S. Department of Justice/Civil Division
P.O Box 878
Ben Franklin Station
Washington, D.C. 20004.

(The physical address is 450 5th Street, Washington D.C. 20001)

The petition for review must have a certificate of service showing service upon the Attorney General and the ICE officer in charge. Fed. R. App. Proc. 25(d); Ninth Circuit Rule 25-5(f).

Petitions for review may be filed in paper copy or through the Ninth Circuit's Electronic Case Filing (ECF) system. Ninth Circuit Rule 25-5(b)(1). For counseled cases, pleadings after the petition for review must be filed through the ECF system. Ninth Circuit Rule 25-5(a). Under that system, service upon parties registered under ECF occurs upon filing. Ninth Circuit Rule 25-5(f).

> ***Practice Tip:*** Paper petitions for review may be filed by fax, with permission of court staff, if removal is imminent or the deadline is about to expire. Ninth Circuit Rule 25-3. In such a case, counsel should contact the court staff at phone number (415) 355-8000.

D. FILING FEE AND IN FORMA PAUPERIS The filing fee for a petition for review is currently $ 450.00 and is paid to the Circuit court directly. The petitioner may ask leave to proceed in forma pauperis under 28 U.S.C. § 1915, by filing a motion and supporting affidavit with the Court under the provisions in Federal Rule of Appellate Procedure 24. Fed. R. App. Proc. 24(b).

E. VENUE FOR THE PETITION FOR REVIEW The petition for review must be filed in the judicial circuit in which the Immigration Judge completed the removal proceedings. INA § 242(b)(2), 8 U.S.C. § 1252(b)(2).

III. JURISDICTIONAL CONSIDERATIONS

As in all appeals, counsel must evaluate whether the Court has jurisdiction over the petition for review. FRAP 28(a)(4); Circuit Rule 28-2.2. There are particular jurisdictional considerations applying to petitions for review of BIA decisions, however, and these requirements are often major issues in petitions for review. While an exhaustive discussion of these considerations is beyond

the scope of this manual, the following is an overview of the jurisdictional aspects of which counsel must be aware. The *Ninth Circuit Immigration Outline*, a link to which appears above, provides a much more extensive explanation of these considerations.

> ***Practice Tip:*** Jurisdictional questions may be raised by the Court itself, through an order to show cause, General Order 6.4(c)(5), or through a dispositive motion from the Government. The Court regularly dismisses petitions for review for lack of jurisdiction summarily, prior to the briefing schedule. Thus, counsel must be prepared to respond fully to the jurisdictional issues raised in the order to show cause or dispositive motion, since, if the case is summarily dismissed, no appellate briefs will be filed and there will be no further opportunity to make the arguments.

A. FINAL ORDER OF REMOVAL The Circuit Courts only have jurisdiction over final administrative decisions. INA § 242(a)(1), 8 U.S.C. § 1252(a)(1). Final administrative decisions are defined as administrative orders concluding that an alien is removable or ordering removal. 8 U.S.C. § 1101(a)(47)(A). They include an actual order of removal, as well as decisions denying relief from removal. They also include BIA denials of motions to reopen. *Meza-Vallejos v. Holder*, 669 F.3d 920, 923 (9th Cir. 2012). In addition, ICE decisions to reinstate removal orders under § 241(a)(5), 8 U.S.C. 1231(a)(5), are reviewable directly in the Circuit Court. *Castro-Cordova v. INS*, 239 F.3d 1037, 1043-44 (9th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzalez*, 548 U.S. 30 (2006). The BIA's denial of asylum in "asylum-only" proceedings for alien crewmembers also constitutes a final order of removal. *Nian v. Holder*, 683 F.3d 1227, 1230 (9th Cir. 2012). The Immigration and Nationality Act provides only limited review of expedited removal orders under § 235(b)(1), § 1252(b)(1).

A motion to reopen is a form of discretionary administrative review. INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7); 8 C.F.R. §§ 1003.2, 1003.23. Motions to reopen request that the last administrative body hearing the case (either the Board of Immigration Appeals, if the case was appealed, or the Immigration Judge, if it was not appealed) reopen the case to consider new facts or new evidence that could change the outcome in the case.

The BIA's denial of a motion to reopen is a final order of removal for purposes of a petition for review. *Meza-Vallejo v. Holder*, 669 F.3d at 923. On the other hand, a grant of a motion to reopen is not a final administrative order permitting review in the Circuit Court because the administrative agency is again considering the case. If a motion to reopen or reconsider is granted while a matter is pending on petition for review, the advocate is required to notify the Court. *Timbreza v. Gonzalez*, 410 F.3d 1082, 1083 (9th Cir. 2005) (order). The Court will then dismiss the case. *Id*. Review can be sought, of course, from the BIA's final decision following the grant of the motion to reopen. *See Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (If the BIA decides to reinstate the

order of removal, the petitioner will be able to appeal that final removal decision on *any* ground which he has raised before the BIA before the final order of removal, not just the one that caused reopening).

It may happen that an alien may file a motion to reopen with the BIA while he or she has a petition for review pending before the Circuit court. The mere filing of the motion to reopen does not affect the Circuit Court's jurisdiction. If the motion is granted, then, as mentioned above, counsel must notify the Court, and the Court will dismiss the petition for review. If the motion to reopen is denied, the petitioner may file a separate petition seeking review of the denial. (Note that a separate petition for review must be filed from each Board decision, whether it is a final order of removal or a decision denying a motion for reopening or reconsideration.) In such a case, the petitioner must notify the Court that the new petition concerns a case already pending before the Court, and the Court will consolidate the two cases. INA § 242(b)(6), 8 U.S.C. § 1252(b)(6).

B. LIMITATIONS ON JUDICIAL REVIEW OF CERTAIN TYPES OF ISSUES The Circuit Courts are prohibited from reviewing decisions raising certain types of issues. These prohibited types of decisions include discretionary decisions, INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B), and cases involving criminal inadmissibility grounds under INA § 212(a)(2), 8 U.S.C.§ 1182(a)(2) or certain criminal deportation grounds under INA § 237(a)(2), 8 U.S.C. § 1227(a)(2). Asylum decisions are excepted from the bar on reviewing discretionary decisions, INA § 242(a)(2)(B)(ii), 8 U.S.C.§ 1252(a)(2)(B)(ii). Even in cases of asylum, however, the Circuit Courts lack jurisdiction over claims that the individual established changed circumstances or extraordinary circumstances regarding a delay in filing for asylum. INA § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2)(A).

Discretionary decisions raise particular questions. First, the determination of which decisions are discretionary is not always simple, and counsel must research the issue in each case. Second, the Supreme Court has recently determined that not all discretionary decisions are non-reviewable; instead, only those decisions committed by Congress to the discretion of the agency are non-reviewable. *Kucana v. Holder*, 558 U.S. 233 (2010); *Delgado v. Holder*, 648 F.3d 1095, 1099-1100 (9th Cir. 2011) (en banc). Other types of discretionary decisions may be subject to a deferential standard of review, but are not precluded from review.

However, despite these jurisdiction-limiting provisions, Congress has determined that the prohibition on review of discretionary and certain criminal decisions does not preclude judicial review of constitutional claims or questions of law. 8 U.S.C. § 1252(a)(2)(D); *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001 (9th Cir. 2000). These questions may arise in regard to removability or in regard to an application for relief from removal. Thus, although adjudication of an application for relief from removal, such as cancellation of removal, requires the exercise of discretion and thus would not be reviewable, legal errors made in the denial, such as application of an incorrect standard of law, would be reviewable. Under Ninth Circuit jurisprudence, questions of law extend to questions involving the

application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law. *Taslimi v. Holder*, 590 F.3d 981, 985 (9th Cir. 2010); *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007).

C. EXHAUSTION OF ADMINISTRATIVE REMEDIES The Circuit Courts have jurisdiction to review orders of removal only if the petitioner has exhausted all administrative remedies available as of right. 8 U.S.C. § 1252(d)(1). Particularly where the petitioner was not represented in administrative proceedings, he or she may not have raised clearly all of the issues presented in his or her case. For aliens appearing *pro se* in removal proceedings, the Ninth Circuit does not require precise legal language and construes the exhaustion requirement liberally in the petitioner's favor. *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 873 (9th Cir. 2008).

Issues may be exhausted other than by the petitioner. For example, where the BIA has addressed an issue, the issue has been exhausted. *Kin v. Holder*, 595 F.3d 1050, 1055 (9th Cir. 2010). In addition, where an issue was presented to the IJ, and the BIA affirms the IJ's decision citing *Matter of Burbano*, 20 I & N Dec. 872 (BIA 1994), the issue is deemed exhausted. *Mutuku v. Holder*, 600 F.3d 1210, 1213 (9th Cir. 2010). A *Burbano* affirmance signifies that the BIA has conducted an independent review of the record and has determined that its conclusions are the same as those articulated by the IJ.

If the petitioner files no brief and relies entirely on his or her notice of appeal to the BIA for exhaustion of his or her claims, then the notice of appeal serves in lieu of a brief for purposes of exhaustion. *Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009). If the petitioner does file a brief with the BIA, however, the brief must raise all issues for which the petitioner seeks review.

There are certain exceptions to the exhaustion requirement. These include constitutional challenges to the immigration laws, regulations, and procedures, and claims made under international law, since the BIA lacks jurisdiction to hear those claims. *Padilla-Padilla v. Gonzalez*, 463 F.3d 972 (9th Cir. 2006). They also include nationality claims brought under § 242(b)(5), § 1252(b)(5). *Theagene v. Gonzalez*, 411 F.3d 1107, 1111 (9th Cir. 2005).

D. JURISDICTIONAL CONSIDERATIONS: PHYSICAL LOCATION OF THE PETITIONER Prior to the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546 (Sept. 30, 1996), federal circuit courts lacked jurisdiction to review administrative deportation orders of aliens who had left the United States. Former 8 U.S.C. § 1105a(c). To protect the Court's ability to review administrative decisions, an automatic stay of removal took place upon the service of a petition for review. *Id.* IIRIRA changed this scheme, however, by removing the jurisdictional bar to claims of aliens who had departed the United States. IIRIRA § 306(b), 110 Stat. 309-612 (repealing 8 U.S.C. § 1105a(c)); *see Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1172 (9th Cir. 2003) (recognizing that aliens, whether

removed or departing under voluntary departure, may continue their cases from abroad).

Thus, an alien may seek review of a BIA decision even after his departure or removal from the United States. Because the Court does not lose jurisdiction when the petitioner leaves, there is no longer an automatic stay of removal upon filing the petition for review. As explained below, however, the petitioner may move for a stay of removal.

IV. <u>MOTIONS FOR STAY OF REMOVAL</u> No automatic stay arises either within the thirty day period to file the petition for review or upon filing the petition for review. INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B). Indeed, ICE can remove the petitioner immediately upon the Board's final order of removal. Because, as noted earlier, removal or departure does not end the Circuit Court's jurisdiction to review, it is not generally necessary for jurisdictional purposes that the petitioner request a stay. However, if the removal would work hardship or place the respondent in danger, then the petitioner will want to request a stay. In most cases, petitioners for review desire a stay of removal. Because there is no restriction on removal immediately following the BIA decision, any motion for stay of removal should be made with the petition for review.

In the Ninth Circuit, filing an initial motion for a stay of removal automatically invokes a temporary stay until the Court can rule on the motion. Ninth Circuit General Order 6.4(c)(1). This temporary stay is in effect whether or not the Court issues an order confirming the stay. *DeLeon v. INS*, 115 F.3d 643 (9th Cir. 1997).

Any response to the motion to stay is due 84 days from the filing of the motion. General Order 6.4(c)(3). During this time, the petitioner is covered by the temporary stay described above. The petitioner may file a reply seven days from service of the response. *Id.* The government's failure to respond within the time set is deemed a statement of non-opposition. General Order 6.4(c)(6). The grant of a stay, or the continuation of the temporary stay pursuant to government non-opposition, continues in effect until the issuance of the Court's mandate, unless the Court orders otherwise. General Order 6.4(c)(1).

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. General Order 6.4(c)(1). A later-filed motion to stay vacates the existing briefing schedule. *Id.*

Stays of removal are not granted as a matter of course. When adjudicating a motion for stay of removal, Courts of Appeals apply the traditional criteria governing stays. These are (1) whether the stay applicant has made a strong showing that he or she is likely to succeed on the merits; (2) whether the applicant would be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418 (2009); *Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011).

For this reason, the motion for a stay requires a detailed analysis of the facts of the petitioner's case, the legal issues raised in the case, and the specific hardships that the petitioner would suffer if removed. This can be challenging for counsel who did not represent the petitioner before the agency, as the motion for stay will be made prior to receipt of the administrative record. In this regard, counsel should note that the Ninth Circuit allows fourteen days from the filing of the initial motion for stay in which to

supplement the motion regarding the merits of the petition and the potential hardships removal would cause the petitioner. General Order 6.4(c)(2).

V. **THE RECORD ON REVIEW** The petitioner in a petition for review of a BIA decision does not prepare excerpts of record. Ninth Circuit Rule 17-1.2(b). Instead, the BIA prepares a Certified Record of Proceedings and files it with the Circuit Court, within 56 days of service of the petition for review, Ninth Circuit Rule 6.4(c)(7), or, if the petitioner has filed a motion for stay, within 56 days from the filing of the motion for stay, Ninth Circuit Rule 6.4(c)(3). The record is then available on the Ninth Circuit's ECF docket report for the case.

> ***Practice Tip:*** Under its General Order 6.4, the Ninth Circuit has modified the time periods set out in the Federal Rules of Appellate Procedure for filing the administrative record and for certain pleadings. The time periods given in this section are those set forth in the General Orders.

The certified record of proceedings consists of (1) the order involved; (2) any findings or report on which it is based; and (3) the pleadings, evidence, and other parts of the proceedings before the agency. Fed. R. App. Proc. 16(a). The parties may by stipulation supply any omission from the record or correct a misstatement. Fed. R. App. Proc. 16(b). If necessary, the Court may direct that a supplemental record be prepared and filed. *Id.*

VI. **MOTIONS IN PETITIONS FOR REVIEW** A number of motions may be appropriate in petitions for review. These range from a motion for stay of removal, discussed above, to motions to dismiss for lack of jurisdiction. In general, motions in petitions for review must comply with all requirements under Federal Rule of Appellate Procedure 27 and the accompanying Ninth Circuit Rules. These require that every motion in a petition for review of a BIA decision must recite any previous application for the relief sought and inform the Court whether the petitioner is detained in DHS custody or at liberty. Ninth Circuit Rule 27-8.2. Certain motions, for example, a motion to dismiss, a request to proceed in forma pauperis, and a request for appointment of counsel, automatically stay the briefing schedule. Ninth Circuit Rule 27-11. The Government generally files any dispositive motions at the time its response to any motion for stay is due. General Order 6.4(c)(3).

VII. **BRIEFS IN PETITIONS FOR REVIEW** The required components of a brief are set out at Federal Rules of Appellate Procedure 28 and 32 and accompanying Circuit Rules. *See also* supra, Writing the Brief. The Ninth Circuit requires certain additional information in briefs on petitions for review. These are:

- whether the petitioner is in DHS custody, Ninth Circuit Rule 28-2.4(b);
- whether the petitioner has filed a motion to reopen, *id.*;

- whether the petitioner has filed an application for adjustment of status, *id*.; and
- how the petitioner has exhausted the administrative remedies.

In addition, the petitioner's opening brief must include an addendum, bound with the brief containing all orders of the Immigration Court and BIA that are being challenged. Ninth Circuit Rule 28-2.7.

> ***Practice Tip:*** While the final administrative order is that of the Board of Immigration Appeals, if the Board has deferred in some way to the Immigration Judge's decision, the Court may actually review the Immigration Judge's decision instead of or in addition to the Board's decision.

The Court provides a briefing schedule upon the filing of a petition for review if no stay motion is filed, or upon the resolution of the stay motion, if one is filed. Generally, the petitioner's brief will be due ninety days after the filing of the record or resolution of the stay motion. The Government's answering brief is generally due sixty days after the petitioner's opening brief, and the petitioner's optional reply brief is due fourteen days after service of the Government's brief.

> ***Practice Tip:*** It is sometimes possible to resolve immigration cases through mediation, particularly where there is some form of relief for which the petitioner is eligible (such as adjustment of status). Under Ninth Circuit Advisory Committee Note to Rule 15-2, petitions for review of BIA decisions are not subject to the requirement of filing a mediation questionnaire. However, in the Circuit Advisory Committee Note, the Circuit Mediator invites parties in petition for review cases to contact the Court Mediation Unit if there is a potential for mediation. Petitioners will normally be required to demonstrate eligibility for any requested relief. The Advisory Committee Note recognizes that a resolution by mediation may take into account remedies and information not present in the record.

HABEAS CORPUS PROCEEDINGS

I. TYPES OF HABEAS CASES Generally speaking, there are three kinds of habeas corpus cases that may involve appellate proceedings in the Ninth Circuit:

- Challenges by state prisoners to state court criminal judgments, brought on federal constitutional grounds (known as "2254 petitions," because they are governed by 28 U.S.C. § 2254).

- Challenges to criminal judgments by persons in federal custody. (These arise under 28 U.S.C. § 2255, and are referred to as "2255 motions"). As a general matter, these must be limited to claims that could not have been raised on direct appeal.

- Various other sorts of cases brought by prisoners under the "general habeas statute" (28 U.S.C. § 2241) – including, for instance, challenges to detention orders in immigration cases; mental health commitments; claims by federal prisoners regarding how their sentences are being computed; and some suits by federal and state prisoners regarding the circumstances of their imprisonment. Section 2241 is also available, under very limited circumstances, to federal prisoners with claims that would normally be brought in a 2255 motion, if 2255 could not provide an "adequate" remedy – such as when the prisoner makes a claim of actual innocence but did not have an "unobstructed procedural shot" at presenting that claim before the time for filing a 2255 motion ran out.

In addition to these habeas corpus procedures – each of which is specifically governed by federal statute, and all of which require that the petitioner or movant be in custody at the time the case is first filed – the federal courts permit the use of the traditional, non-statutory post-conviction procedure known as coram nobis. It can only be used to remedy the most fundamental errors, and only when other procedures are not available – usually because the petitioner is no longer in federal custody.

While these are all governed by the same general framework of laws and rules, there are specific rules and limitations that apply to each type of habeas case.

II. WHEN THE APPEAL MUST BE FILED Habeas proceedings are considered "civil" cases for purposes of Federal Rule of Appellate Procedure 4. This means that a party wishing to appeal the District Court's final determination of a habeas case must file a notice of appeal within 30 days if the petitioner is in state custody, and within 60 days if the petitioner is in federal custody.

III. CERTIFICATES OF APPEALABILITY To appeal a district court's final decision in almost all cases involving 2254 petitions or 2255 motions, the petitioner must obtain a "Certificate of Appealability," or "COA." (The COA requirement does not apply in section 2241 or coram nobis cases). The COA may be granted as to all claims, or as to some, or denied entirely. In order to obtain a COA, the petitioner must make "a substantial showing of a constitutional right." *See* 28 U.S.C. § 2253(c). This is said to be

a "modest standard" – requiring only that "the issues are debatable among jurists of reason." *Lambright v. Stewart*, 220 F.3d 1022, 1024–25 (9th Cir. 2000). Nonetheless, COAs are denied in their entirety in the great majority of cases.

> ***Practice Tip:*** Even if the district court dismissed the petition or motion on procedural grounds, and the issues on appeal will be limited to those procedural questions, the petitioner must also show that one or more of the underlying claims in the petition or motion meets the standard for issuing a COA.

The determination as to whether or not to grant a COA is first made by the district court, at the time it issues its final decision. If the district court denies the COA, the petitioner can file a motion in the Court of Appeal, requesting that a COA be granted.

> ***Practice Tip:*** Filing a request for a COA is not a substitute for filing a Notice of Appeal. Even if a petitioner files a motion in the Court of Appeals requesting a COA, she or he should also be sure to file the Notice of Appeal within the required time period. Similarly, even if the district court grants a COA (making it unnecessary for the petitioner to file a COA request in the Court of Appeals), she or he must still file a Notice of Appeal. The Court does, however, make an exception for pro se habeas petitioners, and routinely treats their COA requests, filed in the district court, as also being Notices of Appeal.

In the Ninth Circuit, such COA requests are heard by a panel of two judges; the panel usually meets once or twice a month, and it is composed of different judges each month. Because of the high volume of COA requests, the Court has a staff of specially trained attorneys to prepare the requests for presentation to the panel, which can decide as many as 100 to 150 COA requests in a single session. If either one or both of the two judges on the panel vote to grant the request, the COA is issued.

> ***Practice Tip:*** Although the Court will treat a Notice of Appeal as also being an implied motion for a COA (see FRAP 22(b)(2)), the petitioner is well advised to make a separate motion setting out his or her best arguments as to why a COA should be granted.

If a petitioner's request is denied in the Ninth Circuit (as, again, most are), the petitioner may file a motion for reconsideration asking that it be considered one more time. The motion for reconsideration will be heard by a two-judge panel composed of different judges than the ones who previously denied the COA request.

> ***Practice Tip:*** A reconsideration motion should not just be composed of the same arguments made in the initial COA request, but instead should focus on what the petitioner believes that the panel missed when it denied that initial request.

As noted, either the district court or the Court of Appeals may grant a COA, but limit it to only one or a few of the claims presented in the habeas petition. If the district court grants a COA limited in that way, the appellant/petitioner can file a motion in the Ninth Circuit requesting that the COA be expanded to include some or all of the "uncertified" claims. (Alternatively, under Ninth Cir. R. 22-1(e), inclusion of uncertified issues in the brief is deemed a motion.) And regardless of whether the COA is ultimately limited to less than all of the claims, the appellant/petitioner may still include the other, "uncertified" claims in her or his appellate brief – but she or he must do so in a separate section under the heading "Uncertified Issues" that follows the part of the brief setting out and arguing the "certified" claims. Uncertified issues will be construed as a motion to expand the COA and will be addressed by the merits panel to the extent the panel deems appropriate. However, the respondent/appellee is not required to address "uncertified" claims unless directed to do so by the Court, and the Court will not grant exceptions to the word/volume limits in the rules to allow additional space for briefing "uncertified issues." *See* Ninth Cir. Rule 22-1(e) & (f).

IV. **APPOINTMENT OF COUNSEL** Most appeals in habeas cases are brought by prisoners proceeding pro se – that is, without an attorney. Although the Court is not required to appoint counsel in such cases, the Criminal Justice Act provides the Court with discretion to do so. If a COA is granted by the Ninth Circuit, and the petitioner/appellant qualifies as indigent under the CJA, the Court often will appoint an attorney to represent him or her. The procedures governing appointment of counsel – including whether and when the appointment of counsel in the district court continues into the appellate process – are addressed in the section of this Guide on the Right to Counsel.

> ***Practice Tip:*** Indigent Section 2254 appellants are entitled to the production of transcripts at the government's expense. 28 U.S.C. § 753(f). However, indigent Section 2255 appellants are not; instead, they must move for the production of transcripts at government expense. *Id.* The Court prefers that the request be made initially before the district court; if the district court denies the motion, appellant may renew the motion in this Court.

V. **SPECIAL LIMITATIONS ON THE COURT'S CONSIDERATION OF HABEAS APPEALS ("AEDPA")** The federal habeas corpus statutes, and particularly the amendments to those statutes known as the "Antiterrorism and Effective Death Penalty Act of 1996," or "AEDPA," place unique restrictions on the federal courts' consideration of 2254 petitions – cases brought by state prisoners challenging their convictions and

sentences on federal constitutional grounds – and, to a lesser extent, 2255 motions brought by federal prisoners. (AEDPA does not apply to 2241 cases).

In addition to the COA requirements (discussed above) and the restrictions on "second or successive petitions" (which will be described, below) AEDPA also contains stringent statute of limitations requirements and severe limits on the extent to which federal courts can interfere with state court criminal judgments – even when a federal constitutional violation has occurred.

While even a summary of those restrictions and limitations would be beyond the scope of this guide, it is important for parties in habeas appeals to remember that they must be understood and addressed. Simply arguing that a constitutional wrong has been done does not really assist the Court and is not enough to win an appeal.

> ***Practice Tip:*** The leading treatise, and an invaluable resource in navigating the minefield of federal habeas corpus, is R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure, 6th Ed. (Lexis Nexis).

VI. **"SECOND OR SUCCESSIVE PETITIONS"** If a habeas petitioner, challenging a state or federal criminal judgment, has previously challenged that same judgment in an earlier 2254 petition or 2255 motion, the new habeas case (with very few exceptions) will be considered a "second or successive petition" and must satisfy the extremely stringent requirements that are set out in 28 U.S.C. § 2244.

> ***Practice Tip:*** The "second or successive petition" requirements do not apply to 2254 petitions that were previously dismissed without prejudice for failure to exhaust state remedies.

As a practical matter, this means that a prisoner seeking to bring a second habeas challenge to her or his conviction must first get permission from the Court of Appeal, before he or she can even begin litigating the new petition in the federal District Court. That permission is rarely given. In order to get it, the habeas petitioner must file an application demonstrating that the new petition is either (a) based on new rule of constitutional law that was made retroactive by the Supreme Court, or (b) is based on facts that were not known to the petitioner and could not have been discovered "through the exercise of due diligence" and that the new facts, if proven, "would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty . . . ."

There is a unique procedure for considering motions for leave to file "second or successive petitions": They are considered by a three-judge motions panel, and if they are denied, no petition for rehearing may be filed. No filing fee is required.

> ***Practice Tip:*** Because of the strict time limits on bringing 2254 petitions, the petitioner may think it wise to submit the petition to the district court while the motion for leave to file the petition is still pending in the Court of Appeals.

DRAFTER'S CHECKLIST FOR APPELLATE MOTIONS

CAPTION (FED. R. APP. P. 27(d)(1)(B))

- ☐ Case number
- ☐ Name of the court
- ☐ Name of the case
- ☐ Brief descriptive title indicating the motion's nature and by whom it is filed (i.e., "Appellant's Motion Voluntarily to Dismiss Appeal")

FORMAT (FED. R. APP. P. 27(d)(1))

- ☐ Motions and responses not to exceed 20 pages; replies not to exceed 10.
- ☐ Text (except block quotes) must be double-spaced; headings and footnotes may be single-spaced
- ☐ Typeface requirements are identical to briefs (Fed. R. App. P. 32(a)(5)) (proportionally-spaced font at 14-point or monospaced font with not more than 10½ characters per inch)
- ☐ Single-sided documents only
- ☐ Margins: at least 1" on all sides. To account for page number, bottom margin can be set at .5 inch

CONTENTS (FED. R. APP. P. 27(a)(2))**:**

- ☐ Must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it. FED. R. APP. P. 27(a)(2)(A).
- ☐ If unopposed, must say so. ADVISORY NOTE TO NINTH CIR. R. 27-1(2).
- ☐ Must be accompanied by affidavits (containing only factual information) or other papers necessary to support the motion. FED. R. APP. P. 27(a)(2)(B).
- ☐ In criminal appeals and in immigration cases, the motion must recite any previous application for relief and the bail/detention status of the defendant/petitioner. NINTH CIR. R. 27-8.

RESPONSE AND REPLY (FED. R. APP. P. 27(a)(3)

- ☐ Response must be filed within 10 days after service of motion; reply, within 7 days of service of response. Procedural motions may be acted on before any response is filed.

- ☐ If response or reply requests affirmative relief, the document's title must say so. FED. R. APP. P. 27(a)(3)(B).

MOTIONS WITH SPECIAL RULES

Motions to stay a district court or agency order: Must confirm that the motion was initially filed in the agency or explain why doing so would be impracticable. Fed. R. App. P. 8(a)(2)(A) and 18(a)(1) and (2).

Motions for extensions of time to file briefs: Must provide the position of all opposing parties, or explain why this information cannot be supplied; must confirm completion of transcripts; and must include other recitals in the rule. Ninth Cir. R. 31-2.2(b).

Motions to expedite: Must provide the position of all opposing parties, or explain why this information cannot be supplied; must confirm completion of transcripts; and must include other recitals in the rule. Ninth Cir. R. 27-12.

Motions for limited remand: Must state that the district court has expressed willingness to consider the post-judgment motion. Fed. R. App. P. 12.1.

Motions for a certificate of appealability: Must be filed initially with the district court. Ninth Cir. R. 22-1. A notice of appeal acts as a request for a certificate of appealability if no separate document is filed.

Motions for bail: Must be filed initially with the district court. Fed. R. App. P. 9.

Rules on the Ninth Circuit website: http://www.ca9.uscourts.gov/rules/

FILER'S CHECKLIST FOR STANDARD APPELLATE MOTIONS[1]

CM/ECF FUNDAMENTALS:

- ☐ Motions must be filed via CM/ECF
- ☐ All documents must be in PDF format; native PDF format is strongly preferred
- ☐ All PDF documents must be searchable

BEFORE FILING:

- ☐ Have attorney username and password
- ☐ Motion, declaration, and certificate of service must have "s/" followed by typed name of the attorney on signature lines
- ☐ Certificate of service must be included at the end of the motion
- ☐ Convert motion, declaration, certificate of service, and any other attachments to PDF documents by publishing to PDF from the original word processing file to permit the electronic version of the document to be searched. Refer to Ninth Circuit Rule 25-5(d) for specifics.
- ☐ Make sure each PDF document is searchable
- ☐ Make sure attachments do not exceed the permitted size. (Once logged into ECF, click the Court Information link. In the page that opens, the Maximum PDF File Size shows you what the current limit is.) If they do, they must be divided into sub-volumes. *See* NINTH CIR. R. 25-5(d).

FIILING:

- ☐ Open 9th Circuit – Appellate ECF Login webpage at https://ecf.ca9.uscourts.gov/cmecf/servlet/TransportRoom?servlet=Login
- ☐ Click to check box next to "I understand that, if I file, I must comply with the redaction rules. I have read this notice." This certifies that all personal information has been redacted. *See* FED. R. APP. P. 25(a)(5).

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[1] For urgent, emergency, or sealed motions, see Ninth Cir. R. 27-3 and 27-13.

- [ ] Type attorney's username and password and click LOGIN
- [ ] Click FILING and then click FILE A DOCUMENT
- [ ] Type case number in CASE box and press the TAB key
- [ ] Select MOTIONS/RESPONSE/REPLIES from the category list
- [ ] In the SELECT ONE box, click "File a Motion" or the appropriate option that best fits the type of document being filed
- [ ] Click the case name to highlight in the CASE SELECTION box at the bottom.
- [ ] Click CONTINUE
- [ ] Click CONTINUE in the new gray box and then click OK
- [ ] Select the correct filing party
- [ ] In the ADDITIONAL INFORMATION section, select the appropriate type of modifier, if any, for the motion you are filing from the OPTIONAL MODIFIER FOR MOTION dropdown box
- [ ] In the RELIEF section, select "Motions/Responses/Replies" from the CATEGORY dropdown box and select the appropriate motion description from the DESCRIPTION dropdown box. Repeat as needed for each relief
- [ ] Click APPLY
- [ ] You should now see the type of motion and case number appear in the SELECTED RELIEFS SECTION
- [ ] Scroll down to the bottom of the page and click CONTINUE
- [ ] In the SERVICE DATE box, type today's date in as MM/DD/YY
- [ ] In the PDF DOCUMENT section, click BROWSE and locate the PDF version of the motion, then select OPEN
- [ ] The DESCRIPTION box defaults to "Main Document"; however, you may change this to be the title of your motion if you wish
- [ ] Click ADD ANOTHER
- [ ] Click on BROWSE and locate the PDF version of the declaration, then select OPEN

- [ ] In the DESCRIPTION box type the title of the declaration
- [ ] Repeat the above three steps for each attachment of your motion
- [ ] Click CONTINUE

- [ ] If the description in the pop-up dialog box is correct, click CONTINUE (if the description is incorrect, click BACK to go back one screen and make corrections or, to start over completely, click CANCEL)
- [ ] If the description in second pop-up dialog box is correct, click CONTINUE (if the description is incorrect, click BACK to go back one screen and make corrections or, to start over completely, click CANCEL)

Your motion has been filed!

NOW WHAT?

Other party(s) may file a response to the motion within 10 days from the date of service of the motion, unless the Court shortens or extends the time. *See* FED. R. APP. P. 27(a)(3). Any reply to a response must be filed within 7 days after service of the response. *See* FED. R. APP. P. 27(a)(4). Once fully briefed, the Court will issue its order.

Rules on the Ninth Circuit website: http://www.ca9.uscourts.gov/rules/

DRAFTER'S CHECKLIST FOR APPELLATE BRIEFS[2]

COVER OF BRIEF (FED. R. APP. P. 32(a)(2)):

- ☐ Ninth Circuit case number
- ☐ Heading: "United States Court of Appeals for the Ninth Circuit"
- ☐ Title of case
- ☐ Nature of proceeding and name of court below
- ☐ Title of brief (example "Government's Answering Brief")
- ☐ Name(s) and address(es) of counsel filing the brief

CONTENTS (FED. R. APP. P. 28, Ninth CIR. R. 28-2):

- ☐ Table of Contents
- ☐ Table of Authorities with page references (cases alphabetically arranged, statutes and other authorities numerically arranged)
- ☐ [Optional: Introduction]
- ☐ Jurisdiction, Timeliness, and
  - For criminal cases, Bail Status
  - For immigration cases, Detention and Post-Petition Filings
- ☐ Issue(s) Presented
- ☐ [Optional: Statutory and Regulatory Framework]
- ☐ Statement of Case
- ☐ Statement of the Facts **with references to the excerpts of record**
- ☐ Summary of Argument
- ☐ Standard(s) of Review [*if not included within each argument section*]

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[2] Note that briefs in Cross-Appeals are governed by Ninth Cir. R. 28.1(e)(1); capital appeals, by Ninth Cir. R. 32-4.

- [ ] Argument with references to record and citations to case law, statutes, and other authorities
- [ ] Conclusion
- [ ] Signature block including date
- [ ] Statement of Related Cases
- [ ] Certificate of Compliance
- [ ] Certificate of Service
- [ ] Other Addendum contents allowed by Fed. R. App. P. 28.1 or Ninth Cir. R. 28-2.7

TYPEFACE AND LENGTH (FED. R. APP. P. 32(a)(5) and (a)(7)):

- [ ] Typeface proportionally-spaced font at 14 point (such as Times New Roman or CG Times) or monospaced type with no more than 10.5 characters per inch
- [ ] Length for principal briefs (i.e., Opening and Answering briefs): 30 pages OR up to 14,000 words OR up to 1,300 lines (monospaced font only)
- [ ] Length for reply briefs: 15 pages OR up to 7,000 words (proportional fonts) OR up to 650 lines (monospaced font only)
- [ ] Briefs **must** include word or line count in the Certificate of Compliance pursuant to Fed. R. App. P. 32(a)(7)(C)).

MISCELLANEOUS:

- [ ] Personal information such as social security numbers must be redacted from the brief. See Fed. R. App. P. 25(a)(5) for specifics. When filing a brief, the ECF system will require attorneys to verify that personal information has been redacted.
- [ ] Margins: at least 1” on all sides. To account for page number, bottom margin can be set at .5 inch.
- [ ] Text double-spaced
- [ ] Pages serially paginated
- [ ] Footnotes must be in the same size text as the body of brief. (14 point font)

FILER'S CHECKLIST FOR UNSEALED APPELLATE BRIEFS[3]

CM/ECF FUNDAMENTALS:

- ☐ Briefs must be filed via CM/ECF
- ☐ All documents must be in PDF format; native PDF format is strongly preferred
- ☐ All PDF documents must be searchable
- ☐ In consolidated cases and cross-appeals, filers should check all consolidated case numbers, even if counsel is on only one of the case numbers. All consolidated case numbers should be on the cover of the brief.

BEFORE FILING:

- ☐ Have attorney username and password
- ☐ Signature lines in briefs must have "s/" followed by the typed name of the attorney
- ☐ Convert briefs, certificate of service, and any other attachments to PDF documents by publishing to PDF from the original word processing file to permit the electronic version of the document to be searched. Refer to Ninth Circuit Rule 25-5(d) for specifics.
- ☐ Make sure each PDF document is searchable
- ☐ Make sure attachments do not exceed the permitted size. (Once logged into ECF, click the Court Information link. In the page that opens, the Maximum PDF File Size shows you what the current limit is.) If they do, they must be divided into sub-volumes. *See* NINTH CIR. R. 25-5(d).

FIILING:

- ☐ Open 9th Circuit – Appellate ECF Login webpage at https://ecf.ca9.uscourts.gov/cmecf/servlet/TransportRoom?servlet=Login
- ☐ Click to check box next to "I understand that, if I file, I must comply with the redaction rules. I have read this notice." This certifies that private information has been redacted. *See* FED. R. APP. P. 25(a)(5).

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[3] If your brief needs to be sealed, do not use this checklist. You must file it in hard copy. *See* NINTH CIR. R. 27-13.

- [ ] Type attorney's username and password and click LOGIN
- [ ] Click FILING and then click FILE A DOCUMENT
- [ ] Type case number in CASE box and press the TAB key
- [ ] Select BRIEFS from the category list
- [ ] In the SELECT ONE box, click "Submit Brief for Review by the Court" or the option that best fits the reason for submitting the brief
- [ ] Click the case name to highlight in the CASE SELECTION box at the bottom.
- [ ] Click CONTINUE
- [ ] Click CONTINUE in the new gray box and then click OK
- [ ] Select the correct filing party(s)
- [ ] In the TYPE OF BRIEF dropdown box, select the appropriate type of brief you are filing.
  Note: Appellant files the Opening Brief;
  Appellee, the Answering or Response Brief; and
  Appellant, the Reply Brief.
- [ ] In the PDF DOCUMENT section, click BROWSE and locate the PDF version of the brief, then select OPEN
- [ ] The DESCRIPTION box defaults to "Main Document;" however, you may change this to the title of your brief if you wish
- [ ] Click CONTINUE
- [ ] Make sure the description in the pop-up dialog box is correct and click CONTINUE
- [ ] Make sure the description in second pop-up dialog box is correct and click CONTINUE

Your brief has now been submitted to the Court for review!

NOW WHAT?

The Court will review the brief and order its filing with instructions to file the required paper copies, generally within 24-48 hours. If the Court finds deficiencies in the brief, it will send an email or post a deficiency notice on the describing the errors and providing instructions to resubmit the corrected brief.

DRAFTER'S CHECKLIST FOR APPELLATE EXCERPTS OF RECORD AND SUPPLEMENTAL EXCERPTS

COVER OF EXCERPTS OF RECORD (NINTH CIR. R. 30-1.6)

- ☐ Identical to the brief cover, pursuant to Federal Rule of Appellate Procedure 32(a), except "Excerpts of Record" is substituted for "Brief of Appellant" or "Supplemental Excerpts of Record" is substituted for "Answering Brief."
- ☐ White cover.
- ☐ Include volume number in title.
- ☐ Each volume must contain a cover page.

CONTENTS (NINTH CIR. R. 30-1.4 and 30-1.5)

Documents to include in the Excerpts:

- ☐ Complete index that lists the name of each document included, the pages each document is on, the place each document is found in the district court record. If the Excerpts of Record contain multiple volumes, each volume should have, at its front, a complete index listing the contents in all volumes.
- ☐ Indictment or other charging document.
- ☐ Notice of appeal, judgment or interlocutory order appealed from.
- ☐ Any opinion, findings of fact, or conclusions of law relating to the judgment or order appealed from.
- ☐ Any other orders or rulings, including minute orders, sought to be reviewed (if the ruling was made orally, include the transcript pages containing the ruling and any discussion or findings pertinent to that ruling).
- ☐ Any jury instruction given or refused at issue on appeal, together with any pertinent pages of the transcript at which the instruction is discussed and ruled upon.
- ☐ If the appeal involves a suppression hearing, change of plea hearing, or sentencing hearing, the pertinent pages of the transcript of that hearing.
- ☐ If the appeal involves a challenge to the admission or exclusion of evidence at trial, the transcript pages at which the evidence is discussed (including any offers of proof), objected to, or ruled upon.

- [ ] All pages of the transcript cited in the brief.
- [ ] Copies of all exhibits or affidavits cited in the brief. (If copies cannot be produced, explain why in a footnote in your brief).
- [ ] The complete trial court docket sheet.
- [ ] Proof of service showing service on all parties of record. This should be at the end of the Excerpts of Record in the same form as the proof of service for the brief, changing only the title of the document served.
- [ ] In an appeal from the grant or denial of a 28 U.S.C. § 2255 motion, Ninth Circuit Rule 30-1.4(b) specifically requires that the Excerpts of Record include:
    - [ ] The final indictment and,
    - [ ] When an issue on appeal concerns matters raised at a suppression hearing, change of plea hearing, or sentencing hearing, the relevant transcript pages from that hearing.
- [ ] Sealed documents must be contained in separate sealed volume(s) and CANNOT be filed electronically. This does not include Presentence Reports, however. Refer to Ninth Cir. R. 27-13, 25-5, and 30-1.10 for further guidance.

Documents to include in the Supplemental Excerpts of Record:

- [ ] Anything from the record relied upon in your brief that is not in the Excerpts.
- [ ] Anything that should have been included in the Excerpts but was not.

MULTIPLE VOLUMES (NINTH CIR. R. 30-1.6): If the Excerpts are less than 75 pages, one volume may be used. If the Excerpts are more than 75 pages, the following requirements apply:

- [ ] Each volume must be no more than 300 pages (including cover, table of contents, and proof of service). Each volume does not need to contain exactly 300 pages. Break where appropriate.
- [ ] The first volume should contain decisions, orders, findings of fact or conclusions of law, and other dispositions that relate to the issues being appealed. NINTH CIR. R. 30-1.6(a). Transcripts should be included where they provide the record of a district court's decision. The first volume may be smaller than other volumes.
- [ ] All additional documents should be included in subsequent volumes.

- [ ] Volume 2 should not begin at page 1 again, but rather should follow sequentially the last page in volume 1.

- [ ] Each volume should contain a full table of contents for all of the volumes.

MISCELLANEOUS

- [ ] Single-sided documents only. FED. R. APP. P. 32(a)(1)(A).

- [ ] Margins: at least 1" on all sides. To account for page number, bottom margin can be set at .5 inch.

- [ ] Text double-spaced.

- [ ] Although not required, ideally, transcripts and documents should be arranged in reverse-chronological order so that the transcript/document with the most recent filing date is on top.

- [ ] Docket sheet is the last document in the Excerpts. NINTH CIR. R. 30-1.6.

- [ ] The entire content of the Excerpts must be paginated consecutively, with page numbers on the bottom right corner.

Note: Further Excerpts of Record are addressed in Ninth Cir. R. 30-1.7 and 1.8.

When a pro se litigant files no Excerpts of Record, you may file an abbreviated version of the Supplemental Excerpts of Record. *See* NINTH CIR. R. 30-1.7. You may file a full Supplemental Excerpts if you wish, however.

Rules on the Ninth Circuit website: http://www.ca9.uscourts.gov/rules/

COMPILER'S CHECKLIST FOR EXCERPTS AND SUPPLEMENTAL EXCERPTS OF RECORD

CREATE AN EXCERPT OF RECORD FILE

☐ **Create a new folder entitle "ER" or "SER." You will add all items that need to be included to that specific folder.**

☐ **Compile district court records and transcripts into your new, single folder**

Option I Copy and paste

If you have kept pdf copies of the district court documents, paste the ones you need into your newly-created ER folder

Option II Using Pacer

If you don't have a local .pdf copy of each document you need, retrieve them from Pacer and save them to the excerpts folder. *See* the Pacer User Manual (.pdf).

Option III Using Lexis/Nexis Courtlink

STEP 1 Log into **Lexis/Nexis Courtlink** using your Lexis/Nexis Courtlink ID and password.

STEP 2 Select **[New Docket Number Search]** under My Courtlink tab.

STEP 3 Select appropriate court system, court type, and court case.

- Type in district court number.
- Click **[Submit Search]**.

STEP 4 Click on box to the left of each document you need for your excerpts.

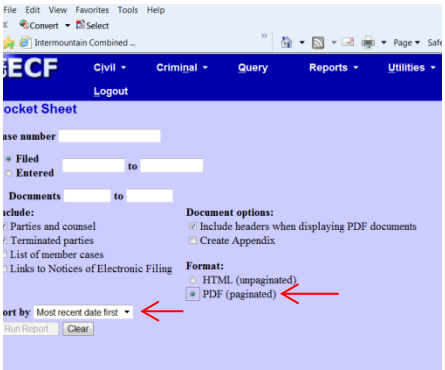
- Click **[Retrieve Documents]**.
- Click **[Order Documents]**.

- Click **[Finish and View List]**.

STEP 5 Open each document that you retrieved from the district court docket and save in the SER folder.

Create .pdf copy of docket report

STEP 1 Log in to Pacer and bring up the case
STEP 2 Select the "Report" tab at the top and then select "Docket Sheet"
STEP 3 Type in case number
STEP 4 Click the box next to "PDF (paginated)" under the "Format" options, change the "Sort by" option to "Most recent data first," then click the "Run Report" button at the lower left:

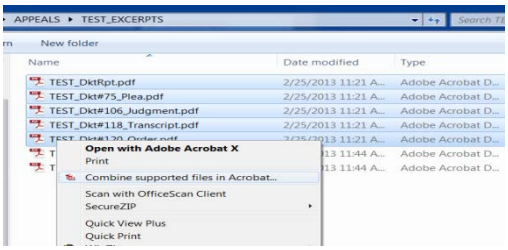


STEP 5 When the report opens, save it to the folder.

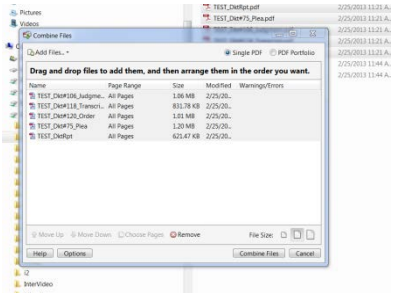
Put it all together

STEP 1 Using Adobe Acrobat Pro, combine all documents into one .pdf with the notice of appeal, decisions of the district court on review first, the docket sheet last, and all the documents in between in reverse chronological order.

- From your SER folder, click and hold "Ctrl" and click to select all of the documents you want to include in Volume I. Right-click on any of the selected files, and from the window that opens, select "Combine supported files in Acrobat…"



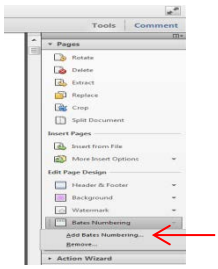
- At this point, a "Combine Files" window will open:



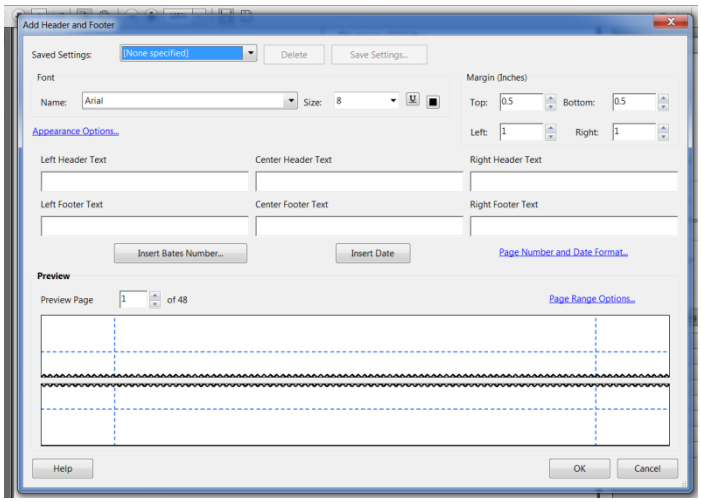
- To arrange these files in the order you want, simply click-and-drag the individual files into place, or select a file and use the "Move Up" and "Move Down" buttons. (**Tip:** If you begin your document names with ordinal numbers or yyy.mm.dd, you can simply click the Name field heading to sort the documents into your predetermined order.)
- When you are finished, click "Combine Files" button in the lower right of the window, then name and save the resulting document in the folder
    - If the method above doesn't work with your setup, try this alternative:
        - Open the first file that will be in Volume I. In the upper left menu bar, click "File," then "Combine," then "Merge Files into a Single PDF." A window will open, with the first file in Volume I already in it. Click the "Add Files" box in its upper left corner and click on "Add Files." If the directory that comes up isn't the one where the rest of the excerpts documents are, navigate to the SER folder. Control-click the other files you want to add. Then click "Add Files." Then arrange the files, combine, save, and name as above.

STEP 2 Number the pages (and add header or footer text, if any) to Volume I

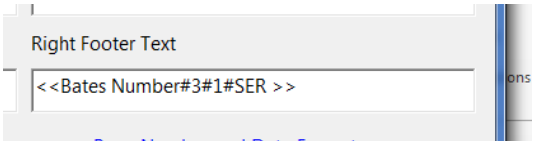
- Open (or leave open) your Volume I documents file in Acrobat
- Click on the "Tools" option on the left of the screen. Note: If "Tools" is not on the left of the screen, it maybe be under the "View" tab.
- Click "Pages" and under "Edit Page Design" section, click the "Bates Numbering" drop-down arrow and select "Add Bates Numbering . . ."



- Acrobat's "Bates Numbering" window will now open
- Click the "Add Files" button, and then select "Add Files."
- Select your combined documents file (yes, even though you already have it open)
- Click "Add Files"
- Click "OK"
- Now the "Add Header and Footer" window opens:



- In this window
  - Change the font characteristics to “Times New Roman” and 14-point font
  - Type any text into any of the header or footer boxes where you want the text to appear, if any. (Tip: Keep in mind that any headers will probably be obscured by the circuit court’s docket stamp once the SER is filed.)
- To enter page numbers using Bates Numbering method:
  - Click inside the “Right Footer Text” box
  - Click “Insert Bates Number”
  - A “Bates Numbering Options” box will appear. Set these options as appropriate and click “OK”
  - This will insert code into the box, which looks (depending on your selected format) something like this:



- Re-save the document with the newly added Bates numbers
  - Click “File” tab at top
  - Click “Save As”
  - Select “PDF”
  - In the “Save As” window, locate the document you just named and click on it once to select
  - A dialog box will open telling you that this file already exists and asking if you want to replace the existing file. Click “Yes”

- **Optional (but recommended):** Shrink the document pages so that your page numbers don’t get obscured by other document text. To do this,

click “Appearance Options . . .” (just above the Left Header Text box), then in the window that comes up check the box next to “Shrink document to avoid overwriting the document’s text and graphics.” Then, click “OK.” The “Appearance Options . . .” window will close, and you will see the changes reflected in the Preview portion of the “Add Header and Footer” window.

- **Caveat 1:** Once you save the (now shrunken) document, the shrinking cannot be undone! Therefore, you might want to have a backup copy before you do the shrinking so you can go back to the previous one and make changes. You can do this by giving the (now shrunken) document a different name as indicated below.
- **Caveat 2:** If after saving the document you make further adjustments to the header and footer, be sure to **UNCHECK the “Shrink” box** before you save those changes. If you do not, the box will remain checked, which means that the document will be reshrunk every time you save changes to the header and footer.

- Look at the Preview, make any further adjustments necessary, and then click “OK” and save the file as a new file name. Your combined .pdf now has page numbers.

STEP 3: Repeat steps for subsequent Volumes – with one exception

Because you are running numbers through all of your volumes and not starting each volume with page 1, then in addition to everything in STEP 2, you will have to set the page start number for each subsequent volume. Here’s how:

- In the “Add Header and Footer” window, click “Page Number and Date Format
  . . .”
- Enter the number in the “Start Page Number Box.” (When you click the “Insert Page Number” box, it will enter <<Bates Number#3#1#ER >> in the text box, but the actual start number you entered will be reflected in the Preview.

☐ **Prepare cover page, index, and certificate of service**

STEP 1: Prepare a cover page for each volume of excerpts

STEP 2: Prepare a complete index, including describing each document, the district court ECF No., and all page numbers references. Since each volume will contain a complete index of all documents for all volumes, you only need to prepare one index.

STEP 3: Prepare a certificate of service for each volume of excerpts

STEP 4: Convert all caption pages, index, and certificates to .pdf and save them to your ER folder

☐ **Assemble the Volumes**

STEP 1: In the ER folder, select the .pdf files you created for the caption for Volume I, index,
the combined ER documents for Volume I, and the certificate of service for Volume I

STEP 2: Right-click on any of the selected files, then select "Combine supported files in Acrobat . . ."

STEP 3: Arrange files in the following order:

1. Caption for Volume I
2. Index
3. Combined ER documents for Volume I
4. Certificate of Service for Volume I

STEP 4: Click "Combine Files," then name as FullLastNameFirstIntitial**_ER_Vol I_final** and save the volume in the ER folder

STEP 5: Repeat for each subsequent volume

Your volumes are now ready to be filed.

See filing instructions: Filer's Checklist for Excerpts of Records

Excerpts of Record Frequently Asked Questions: http://www.ca9uscourts.gov/cmecf/faqs/er
Rules on the Ninth Circuit website: http://www.ca9.uscourts.gov/rules/

RESOURCES FOR NINTH CIRCUIT PRACTICE

I. THE FEDERAL RULES OF APPELLATE PROCEDURE AND THE NINTH CIRCUIT RULES

Appellate counsel are strongly recommend to consult, in the first instance, the Federal Rules of Appellate Procedure and the Ninth Circuit Rules. Most questions, especially procedural ones, are answered by these rules. Beyond that, many questions regarding circuit procedure are answered by the Ninth Circuit General Orders.

II. ELECTRONIC RESOURCES

A. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(www.ca9.uscourts.gov) The circuit website contains html and pdf versions of the FRAP, the Ninth Circuit Rules, and the General Orders. The circuit website also contains outlines regarding certain specific legal topics prepared by members of the Ninth Circuit staff, including standards of review, and immigration law and procedure. These outlines can provide a useful starting point for legal research. The website also provides downloadable forms needed for the processing of civil and criminal appeals. The website also contains some guidance to the rules, namely a form entitled "After Opening a Case," and a video called "Perfecting Your Appeal," which contains useful information for practitioners.

B. SUPREME COURT OF THE UNITED STATES (www.supremecourt.gov)

The Supreme Court's website contains a variety of useful material, including the Supreme Court Rules, recent slip opinions, and a directory.

C. AMERICAN BAR ASSOCIATION

(www.americanbar.org/publications/preview) provides on-line merits briefs of cases pending before the U.S. Supreme Court. This invaluable resource is extremely useful in evaluating and briefing federal circuit appeals.

D. FEDERAL PUBLIC DEFENDER WEBSITES.

The Office of the Federal Public Defender for the Central District of California, www.fpdcacd.org The website of the Office of the Federal Public Defender for the Central District of California contains links to various federal and state court websites, as well as websites for state and federal government. Among other things, it contains a list of FAQs regarding federal appeal issues and procedures. CJA attorneys may obtain access (via secure login) to a private section, which includes directories for the Ninth Circuit and district courts, and various training materials.

Each Office of the Federal Public Defender has its own website: www.ndcalfpd.org, www.cae-fpd.org, www.fdsdi.com, www.fdsidaho.org, www.wawfpd.org, www.fdewi.org, www.fdom.org, www.fpdaz.org, www.nvx.fd.org.

III. TREATISES

Moore's Federal Practice, 3d ed. (Michie-Lexis/Nexis 1997 and frequent updates): This comprehensive, multi-volume treatise has chapters devoted to appellate practice in the federal courts.

C. A. Wright, A. Miller and M. K. Kane, *Federal Practice and Procedure* (West 1978 and annual updates): Also a comprehensive, multi-volume treatise with chapters devoted to federal appellate practice.

Chris Goelz, Meredith Watts and Cole Benson, *Ninth Circuit Civil Appellate Practice* (Rutter Group 1995 and annual updates)

Mayer Brown, LLP, P. Lacovara, ed., *Federal Appellate Practice* (BNA 2008)

M. Tigar and J. Tigar, *Federal Appeals: Jurisdiction and Practice*, 3d ed. (West 1999 & pocket part updates).

R. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument*, 2d ed. (NITA 2003): A classic book written by a Senior Judge of the Third Circuit with tips on appellate brief writing and argument.

Ulrich, Paul G., *Federal Appellate Practice: Ninth Circuit* (West 2d ed.)

Hertz, Randy and Liebman, James, Federal Habeas Corpus Practice and Procedure (Lexis Nexis 6th ed. 2011)

IV. ARTICLES

Kozinski, Alex, *How You Too Can Lose Your Appeal*, Montana Lawyer (Oct. 23, 1997)

Kozinski, Alex, *The Wrong Stuff*, 1992 Brigham Young University Law Review 325 (1992).

Pregerson, Harry & Painter-Thorne, Suzianne D., *The Seven Virtues of Appellate Brief Writing: An Update from the Bench*, 38 Sw. L. Rev. 221 (2008).

Pregerson, Harry, *The Seven Sins of Appellate Brief Writing and Other Transgression*, 34 University of California Los Angeles Law Review 431 (1986)

V. LIVE ASSISTANCE

A. SUBSTANTIVE MOTIONS AND EMERGENCY MATTERS For questions that cannot be answered by consulting the rules, contact the Ninth Circuit's Motion Unit and ask for the duty attorney. The telephone number is available on the Ninth Circuit website under the link for public telephone directory.

B. PROCEDURAL MATTERS AND COURT REPORTER ISSUES If your question or problem is not resolved by consulting the rules, contact the Procedural Motions of the Ninth Circuit for live assistance. Again, the telephone number is available on the public telephone directory listed on the Ninth Circuit website.

VI. SPECIAL RESOURCES FOR CRIMINAL AND HABEAS CORPUS APPEALS:

Generally, most Federal Public Defender offices take questions from criminal defense attorneys appointed pursuant to the Criminal Justice Act. Some Federal Public Defender offices also handle habeas corpus appeals, and may be available to answer questions from counsel appointed in those cases. Try calling the office and asking for the appellate duty attorney. If the office lacks an appellate unit, ask for the general duty attorney.