The Appellate Lawyers Representatives' Guide to Practice in the United States Court of Appeals for the Ninth Circuit

March 2026 ed.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT 2

III. THE APPELLATE PROCESS 7

IV. FILING AN APPEAL OR EXTRAORDINARY WRIT 16

V. THE RIGHT TO COUNSEL ON APPEAL 32

VI. MEDIATION 41

VII. MOTIONS PRACTICE 48

VIII. EMERGENCY PROCEEDINGS 69

IX. DRAFTING THE BRIEF 74

X. EXCERPTS OF RECORD 98

XI. ORAL ARGUMENT 108

XII. POST-DECISIONAL PROCESSES 119

XIII. REVIEW OF IMMIGRATION DECISIONS 139

XIV. HABEAS CORPUS PROCEEDINGS 152

XV. CHEKLISTS 161

XVI. RESOURCES 186

* A detailed Table of Contents is on the next page.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT 2
- I. JURISDICTION 2
- II. LOCATION AND OPERATIONS 2
- III. PERSONNEL 3
  - A. Judges 3
  - B. Appellate Commissioner 4
  - C. Clerk's Office 4
  - D. Office of Staff Attorneys 4
    - 1. Inventory 4
    - 2. Research 5
    - 3. Motions 5
  - E. Circuit Court Mediators 5
  - F. Library 5
  - G. Circuit Executive's Office 5
  - H. The Judicial Council 5

III. THE APPELLATE PROCESS 7
- I. THE LIFE OF AN APPEAL 7
- II. COURT PROCEDURES FOR PROCESSING AND HEARING CASES 8
  - A. Inventory 8
  - B. Screening Panel 9
    - 1. Oral screening panel 9
    - 2. Written screening panel 10
    - 3. Petition for rehearing 10
  - C. Oral Argument Calendar 10
    - 1. Court calendars 10
    - 2. Panels of judges 11
    - 3. Assignment of case to a specific calendar 12
    - 4. Consideration by argument panel 13
    - 5. Oral argument 14
    - 6. Conference 14
    - 7. Decision 15
    - 8. Petition for rehearing 15

D. Complex Cases 15

IV. FILING AN APPEAL OR EXTRAORDINARY WRIT 16
I. APPEALS 16
A. Final Judgments 16
B. Appealable Interlocutory Orders 16
1. Statutory authorization 16
2. Collateral-order doctrine 17
3. By permission 17
4. Certain agency decisions 19
II. INITIATING AN APPEAL FROM A DISTRICT COURT DECISION 19
A. Notice of Appeal 19
1. Contents 20
B. Filing Fee 20
C. Representation Statement 20
D. Mediation Questionnaire 21
III. INITIATING AN APPEAL WITH PERMISSION 21
A. Petition for Permission to Appeal 21
1. 28 U.S.C. § 1292(b) 21
2. Class certification 22
3. Interlocutory bankruptcy appeal 22
4. 28 U.S.C. § 1453(c) 22
B. Answer in Opposition or Cross-Petition 22
C. Filing Fee 22
IV. INITIATING REVIEW IN AGENCY CASES 23
A. Petition for Review 23
B. Filing Deadlines 23
V. FILING DEADLINES FOR NOTICES OF APPEAL 23
A. Civil Cases. 23
B. Criminal Cases 24
C. Habeas Cases 24
D. Effect of Motion for Reconsideration 25
VI. EXTRAORDINARY WRITS 25
A. Statutory Authority 25
B. Types of Writs 25
C. Standard for Issuance of the Writ 26
D. Initiating an Extraordinary Writ. 26

1. Forum 26
2. Filing fee 27
3. Captioning 27
4. Form of petition 27
5. Resolution 27
VII. ORDERING THE TRANSCRIPT 27
A. Civil Appeals 28
B. Criminal Appeals 29
C. Late Transcripts 30
VIII. FILING A DISCLOSURE STATEMENT 31

V. THE RIGHT TO COUNSEL ON APPEAL 32
I. RIGHT TO COUNSEL ON APPEAL 32
A. Criminal Cases. 32
1. Right to counsel 32
2. No right to self-representation 32
3. Continuity of Counsel 33
B. Civil Cases 33
II. THE CRIMINAL JUSTICE ACT AND RULE 4-1 33
A. The Criminal Justice Act 33
B. Ninth Circuit Rule 4-1 35
III. APPOINTED COUNSEL UNDER CJA 35
A. Appointment Continues from District Court 35
B. New Application for CJA Counsel 35
C. Payment 36
IV. ADMISSION TO NINTH CIRCUIT 37
V. WITHDRAWAL OF COUNSEL 37
VI. ATTORNEY DUTIES 39
A. Notice of Appeal 39
B. Arguments 39
C. Post-Appeal Duties and Proceedings. 40

VI. MEDIATION 41
I. OVERVIEW OF THE MEDIATION PROGRAM 41
II. ELIGIBILITY FOR THE MEDIATION PROGRAM 41
A. Counseled Civil Cases 41
B. Immigration Cases 42
C. Non-parties 42

D. Referral Routes 42
1. Mediation Questionnaire and Settlement Assessment Conference 42
2. Panel referrals 44
3. Requests from counsel 44
III. EVALUATING WHETHER A CASE IS SUITABLE FOR MEDIATION 44
IV. THE MEDIATION PROCESS 45
A. Preparing for Mediation 46
B. Confidentiality 46
C. Determinations by Appellate Commissioner 47

VII. MOTIONS PRACTICE 48
I. GENERAL 48
A. When Required 48
B. Timing 48
1. Motions to extend the time to file a brief 48
2. Motions for a stay 48
3. Motions challenging denials of requests to proceed in forma pauperis or revocations of IFP status 49
4. Motions to intervene 49
5. Certificates of appealability 49
6. Motions for leave to file an amicus brief 49
7. Emergency motions 49
C. Format 50
D. E-filing 50
E. Contents of Motion 50
1. Caption 50
2. Grounds and relief sought 50
3. Prior recourse and bail status 50
4. Accompanying documents 51
5. Opposing party's position 51
6. Identity of the merits panel and oral argument date, if known. 51
7. What should not be included 51
F. Answering a Motion 51
G. Reply 51

H. Effect of Motion on Briefing Schedule 52
I. Oral Argument 52
J. Motion for Reconsideration 52
II. RULES PERTAINING TO SPECIFIC TYPES OF MOTIONS 53
A. Criminal Appeals 53
B. Immigration Petitions 53
C. Motions to File Oversized Briefs 53
D. Motions to Expedite 53
E. Motions to seal 54
1. E-filing 54
2. Service 54
3. Sealed excerpts 55
4. Notice of intent to file publicly 55
5. Maintaining a case under seal 55
6. Notice of filing documents under seal 56
7. Argument 56
8. Motions to unseal 56
9. Dispositions 56
10. Social Security and Immigration cases 57
F. Motions to strike briefs and/or excerpts 57
G. Motions to reinstate 57
H. Motions for voluntary dismissal, ... 57
I. Motions for a stay of appellate proceedings or to hold an appeal in abeyance 57
J. Motions for a limited remand 58
K. Motions to supplement/correct record to 58
L. Motions to withdraw as counsel 58
M. Requests for judicial notice 58
N. Motions for an extension of time 60
1. Streamlined extension 60
2. Non-streamlined extension 61
3. Effect of motion 62
O. Motions for reconsideration of orders issued by a motions panel 62
P. Motions to file amicus curiae briefs 62
Q. Motions to transmit physical or documentary exhibits 63

R. Motions to certify a state-law issue to a state supreme court 63

VIII. EMERGENCY PROCEEDINGS 69
I. OVERVIEW 69
II. EMERGENCY OR NOT 69
A. Time Constraint 69
B. Significant and Irreparable Harm 69
III. PRE-REQUISITES AND NOTICE 70
A. Relief Sought Below 70
B. Appeal or Petition Pending 70
C. Notice Provided 70
IV. CONTENTS OF EMERGENCY MOTION AND HOW TO FILE 71
A. Contents 71
V. SPECIAL CONSIDERATIONS FOR BAIL MOTIONS (9th Cir. R. 9-1) 71
A. Appeals of Orders Regarding Release or Detention Before Judgment 71
B. Appeals of Orders Regarding Release After Judgment. 71
VI. SPECIAL CONSIDERATIONS FOR INTERLOCUTORY CRIMINAL APPEALS 72
VII. SPECIAL CONSIDERATIONS FOR CAPITAL MOTIONS (MOTIONS FOR STAYS OF EXECUTION) (9th Cir. R. 22-2, 22-4, 22-6) 72
A. Submission to Lower Court 72
B. When to Notify the Court 72
C. Appeal or Petition Pending 72
VIII. SPECIAL CONSIDERATIONS FOR IMMIGRATION MOTIONS 73

IX. DRAFTING THE BRIEF 74
I. WORD LIMITS FOR BRIEFS 74
II. MANDATORY SECTIONS OF THE PRINCIPAL MERITS BRIEF 77
A. Cover 77
B. Table of Contents 78

C. Table of Authorities 78
D. Introduction 78
E. Jurisdictional Statement 78
F. Bail/Detention Status 79
G. Statement of the Issues Presented for Review 79
H. Statement of the Case 79
I. Summary of Argument 80
J. Argument. 80
1. Standard of review 80
2. Objection raised below 80
3. Argument
K. Conclusion 81
L. Statement of Related Cases 81
M. Addendum. 82
1. Pertinent constitutional provisions, treaties, statutes, ordinances, regulations, or rules 82
2. Orders challenged in immigration cases 83
N. Certificate of Compliance 83
O. Certificate of Service (if required) 83
III. OTHER BRIEFS 84
A. Reply Briefs 84
B. Cross-Appeals 84
C. Supplemental Briefs 84
D. Amicus Briefs 84
1. Motion for leave to file 84
2. Disclosure statement 85
3. Contents and form 85
4. Amicus briefs on the initial merits. 86
5. Amicus briefs filed in support of, or in opposition to, a petition for panel or en banc rehearing or during the pendency of rehearing 86
IV. WRITING A BRIEF 87
A. Brief-Writing Practice Tips 87
B. Record Citation 89
C. Legal Citation 91
D. Tone 91
E. Clean Copy 91

V. FILING THE BRIEF 92
A. Due Date 92
B. Extension of Time 93
1. Streamlined extensions 93
2. Motions for extensions of time 94
C. Paper Copies and Binding 95
D. Errors Discovered After Filing 95

X. EXCERPTS OF RECORD 98
I. PURPOSE OF THE EXCERPTS OF RECORD 98
II. RESPONSIBILITY 98
A. Non-Exempt Parties Must Submit Excerpts of Record. 98
B. No Excerpts Required of Pro Se Litigant. 99
III. CONTENTS OF THE EXCERPTS OF RECORD 99
A. All Decisions Being Appealed, Reviewed, or Challenged 99
B. Indictment 100
C. Transcripts 100
D. Trial Exhibits 100
E. Sealed Documents 101
F. Notice of Appeal and Lower Court Docket Sheet 101
G. Other Portions of the Record 101
H. What Not To Include in Excerpts of Record. 101
1. Briefing and motions 101
2. Presentence reports 102
3. Social Security administrative records 102
4. Exhibits not available in PDF format 102
IV. FORMAT OF THE EXCERPTS OF RECORD 102
A. Single Volume Excerpts of Record. 102
B. Multi-Volume Excerpts of Record. 103
C. Index. 103
D. Cover. 104
E. Certificate of Service. 104
F. Paper copies. 105

XI. ORAL ARGUMENT 108
I. LOGISTICS 108
A. How Cases Are Set for Oral Argument. 108
1. Pre-calendaring notices and responses 108
2. Hearing notices 108
3. Argument schedule 109
B. Timing of Oral Argument 109
C. Location of Oral Argument 110
1. In person 110
2. Virtual 110
D. Judge Panel Assignment 111
E. Submission Without Oral Argument 112
F. Unavailability for Scheduled Oral Argument 112
II. PREPARING FOR ORAL ARGUMENT 113
A. File Your Acknowledgment of Hearing Notice 113
B. Check for New Authority 113
C. Watch Videos of Other Oral Arguments 113
D. Check the Amount of Time Allotted to Each Side 113
III. THE DAY OF ARGUMENT 114
A. Check In with the Courtroom Clerk 30 Minutes Before the Start of the Calendar. 114
B. Be Camera Ready 114
C. Plan to Be at the Session from the Time It Starts 114
D. Practice Tips on Executing the Argument. 115
1. Answer the judges' questions 115
2. Know the record 115
3. Keep track of time 116
4. Avoid visual aids 116
5. Make sure that your cellphone or other portable electronic device is silenced. 116
6. Do not try to be funny 116
7. Start with your key points 116
8. Be candid but firm 116
9. Use an outline, not a script 117
10. Maintain a steady, even pace. 117
11. Dress appropriately 117
12. Practice 117
13. Volunteer 117

14. Never: 117
IV. POST-ARGUMENT 118
A. Correcting Misstatement 118
B. Advising Court of New Authority 118
C. Review Oral Argument 118

XII. POST-DECISIONAL PROCESSES 119
I. OVERVIEW 119
II. PREPARE THE CLIENT WITH GOOD COMMUNICATION 119
A. Describe the Appellate Process to the Client 119
B. Maintain Communication 120
C. Let the Client Know About the Decision Immediately 120
III. STEPS TO TAKE IF THE DECISION IS ADVERSE 121
A. Consult the Applicable Rules and Orders Relating to the Post-Decisional Process. 121
B. Compute and Docket the Relevant Due Dates in the Post-Decisional Process. 122
C. Decide Whether to Seek an Extension of Time to File a Petition for Panel Rehearing or Rehearing En Banc 123
D. Evaluate Whether to Petition for Panel Rehearing and/or Rehearing En Banc 123
1. When a petition for panel rehearing is appropriate 123
2. When a petition for rehearing en banc is appropriate 123
3. The rules for filing a petition for rehearing. 125
4. The rules for responding to a petition for rehearing 126
5. Amicus briefs in support of, or opposing, the petition for rehearing 127
6. The Court's vote on a petition for rehearing en banc 127
7. Next steps if the Court grants rehearing en banc 127
8. Alternatives to granting rehearing en banc 130

E. Evaluate Whether to Petition for Certiorari 130
F. Special Considerations for Legal Counsel in Criminal Appeals Regarding Petitioning for Certiorari 131
G. Determine Whether to Move to Stay the Mandate ... 132
IV. CONSIDERATIONS IF THERE IS A FAVORABLE DECISION 133
A. Attorney's Fees and Costs on Appeal 133
1. Costs on appeal 133
2. Attorney's fees on appeal 136
B. Effectuating Favorable Appellate Decisions 137
1. Effectuating a favorable decision 137
2. Steps to take to effectuate a favorable decision in criminal and habeas cases 138

XIII. REVIEW OF IMMIGRATION DECISIONS 139
I. INTRODUCTION 139
II. THE PETITION FOR REVIEW 139
A. Petition for Review 139
B. Timing and Process for Filing Petitions for Review .. 140
C. Contents of the Petition for Review. 141
D. Filing and Service of the Petition for Review 142
E. Filing Fee and In Forma Pauperis 143
F. Venue for the Petition for Review 144
III. EVALUATING THE RECORD ON REVIEW 144
IV. JURISDICTIONAL CONSIDERATIONS 145
A. Final Order of Removal 146
B. Limitations on Judicial Review of Certain Types of Issues 146
C. Exhaustion of Administrative Remedies 146
V. REQUESTING A STAY OF REMOVAL 146
VI. THE RECORD ON REVIEW 148
VII. MOTIONS IN PETITIONS FOR REVIEW 149
VIII. BRIEFS IN PETITIONS FOR REVIEW 150
IX. MEDIATION 150
X. POST-DECISION 151

XIV. HABEAS CORPUS PROCEEDINGS 152
I. TYPES OF HABEAS CASES 152
II. WHEN THE APPEAL MUST BE FILED 153
III. CERTIFICATES OF APPEALABILITY 154
A. Standard for a COA 155
B. Who Decides Whether to Grant a COA 155
C. Motion for Reconsideration 156
D. Uncertified Claims 156
IV. APPOINTMENT OF COUNSEL 157
V. SPECIAL LIMITATIONS ON THE COURT'S CONSIDERATION OF HABEAS APPEALS ("AEDPA") .. 158
VI. "SECOND OR SUCCESSIVE PETITIONS/MOTIONS" 159

XV. CHEKLISTS 161
I. CHECKLIST FOR DRAFTING MOTIONS 161
A. Caption 161
B. Format 161
C. Contents 162
D. Response and Reply 162
E. Motions With Special Rules 163
II. CHECKLIST FOR DRAFTING BRIEFS 165
A. Cover 165
B. Contents 165
C. Typeface and Length 166
D. Miscellaneous 167
III. CHECKLIST FOR PREPARING EXCERPTS OF RECORD 167
A. Cover 167
B. Contents 168
C. Multiple Volumes 170
D. Miscellaneous 171
IV. CHECKLIST FOR FILING BRIEFS AND EXCERPTS OF RECORD 183
A. Appellate Filing Fundamentals 183
B. Before Filing 183
C. Filing the Brief 184
D. Now What? 185

XVI. RESOURCES 186
I. THE FEDERAL RULES OF APPELLATE PROCEDURE, THE NINTH CIRCUIT RULES 186
II. ELECTRONIC RESOURCES 186
A. United States Court of Appeal for the Ninth Circuit (www.ca9.uscourts.gov) 186
B. The Supreme Court of the United States (www.supremecourt.gov) 187
C. The American Bar Association (www.americanbar.org/) 187
D. Federal Public Defender Websites (www.fpdcacd.org) 187
E. Cornell Law Library (https://law.library.cornell.edu/) 187
F. Findlaw (https://caselaw.findlaw.com/) 187
G. The Federal Bar Association (http://www.fedbar.org/) 187
H. Lawprose.org (http://www.lawprose.org/) 187
III. TREATISES 188
A. Moore's Federal Practice, 3d ed. (Michie-Lexis/Nexis 1997 and frequent updates). 188
B. C. A. Wright, A. Miller and M. K. Kane, Federal Practice and Procedure (West 1978 and annual updates). 188
IV. ARTICLES 188
V. LIVE ASSISTANCE 189
A. Substantive Motions and Emergency Matters (emergency@ca9.uscourts.gov) 189
B. Procedural Matters and General Questions (questions@ca9.uscourts.gov or call 415-355-8000) ... 189
C. Appellate Lawyer Representatives' Mentoring Program (mentoring@ca9.uscourts.gov) 190
VI. SPECIAL RESOURCES FOR CRIMINAL AND HABEAS CORPUS APPEALS 190

I.
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 or the employers of the appellate lawyer representatives.

This guide was most recently revised in March 2026. 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, follow the Court rules. If you notice any errors or have other suggestions for improvement to the guide, please email ALRPracticeGuide@ca9.uscourts.gov.

This guide is the collective work over numerous years of many Appellate Lawyer Representatives, Ninth Circuit personnel, and others. These individuals include Jean-Claude André, Liora Anis, James Azadian, Ryan Bounds, Merry Jean Chan, Hui Chen, Alex Christopher, Tania Culbertson, John Cutler, Ian Fein, Lisa Fitzgerald, Susan Gelmis, Brian Goldman, Eileen Goldsmith, Cheri Ho, Helen H. Hong, Dan Kaplan, Geoffrey Kehlmann, Paul Keller, Judah Lakin, Stephen Liacouras, Casey Pitts, Rohit Rajan, Sara Rief, Alexander Robbins, Johanna Schiavoni, Jocelyn Sperling, Leah Spero, and Anne Voigts.

II.
THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

I. JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit reviews appeals from federal trial and bankruptcy court decisions in 15 judicial districts: Alaska, Arizona, California (Central, Eastern, Northern, Southern), Hawaii, Idaho, Montana, Nevada, Oregon, Washington (Eastern, Western), 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 several agencies, such as the Board of Immigration Appeals and the National Labor Relations Board.

II. LOCATION AND OPERATIONS

A. The Court is headquartered at 95 Seventh Street, San Francisco, California 94103. The mailing address is P.O. Box 193939, San Francisco, California 94119-3939. The Clerk's Office may be reached at (415) 355-8000 or by email at questions@ca9.uscourts.gov. Divisional Clerk's Offices are located in the courthouses in Pasadena, California; Seattle, Washington; and Portland, Oregon.

B. The Chief Judge manages court operations during her single non-renewable term, which is capped at 7 years. The Chief Judge is assisted by 3 judges, one for each of 3 regional units (Northern, Middle, Southern). The administrative judges serve a non-renewable 3-year term. All 4 judges are selected based on seniority.

C. The Northern Unit covers the districts of Alaska, Idaho, Montana, Oregon, Eastern Washington, and Western Washington. Cases arising from this unit are generally calendared in Seattle or Portland for oral argument.

D. The Middle Unit covers the districts of Arizona, Eastern California, Northern California, Guam, Hawaii, Nevada, and the Northern Mariana Islands. Cases arising from this unit are generally calendared in San Francisco for oral argument.

E. The Southern Unit covers the districts of Central California and Southern California. Cases arising from this unit are generally calendared in Pasadena for oral argument.

F. Court functions such as oral argument may be held in places specially designated by the Court. The Court sits regularly in Phoenix, Las Vegas, Honolulu, and Anchorage, and occasionally hears cases at law schools within the Circuit.

III. PERSONNEL

A. **Judges.** By statute, Congress authorizes 29 active judgeships within the Ninth Circuit. These are Article III federal judges nominated by the President, confirmed by the Senate, and appointed for life tenure during good behavior. The core of a judge's work is considering appeals and motions, and issuing orders and opinions setting forth their decisions and reasoning. A judge may take "senior status" after a certain combination of years of service and age. A judge who has taken senior status still hears and decides cases but may carry a reduced caseload. While a senior judge otherwise maintains the same responsibilities as an active judge, senior judges cannot vote on whether to take a case en banc. Most of the Court's senior circuit judges regularly hear cases. Although the Court is headquartered in San Francisco, most of the Court's judges maintain their residence chambers in other cities within the Circuit. The locations of the judges' chambers are listed on the Court's website at www.ca9.uscourts.gov/judicial-council/judges-seniority-list/. Judges generally hire law clerks to assist with their work.

B. **Appellate Commissioner.** The Appellate Commissioner role was created to serve a variety of functions for the Court of Appeals. Since 2021, the Director of the Office of Staff Attorneys has served as Appellate Commissioner, and handles duties such as ruling on a wide range of motions filed before a case is assigned to a 3-judge panel for decision on the merits, managing attorney disciplinary matters and attorney's fees in civil disputes upon referral by a panel, and conducting case management conferences in complex, multi-party criminal appeals. The CJA Administrative Attorney in the Clerk's Office manages compensation of appellate counsel appointed under the Criminal Justice Act (CJA) to represent parties financially unable to retain counsel.

C. **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's Office for information and assistance. No judge or any member of the Court staff will give legal advice. Court information, including Court rules, the general orders, calendars, and opinions, and many other resources for attorneys and the public are available on the Court's website at www.ca9.uscourts.gov.

D. **Office of Staff Attorneys.** Staff attorneys perform a variety of tasks for the Court. They work for the entire Court, not individual judges.

1. ***Inventory.*** After briefing is completed, the case management attorneys review the briefs and record and identify the primary issues raised in the case. The case management attorneys then assign a numerical weight to the case to reflect the complexity of the case and the number of issues presented. This weighting process is designed to distribute workload evenly among the active judges, as described in Chapter III.

2. ***Research.*** For cases that are not calendared for oral argument, research attorneys review briefs and records, research legal issues, and draft non-precedential memorandum dispositions for oral presentation to 3-judge panels.

3. ***Motions.*** Motions attorneys process all motions filed in a case before a panel is assigned, including procedural motions delegated to the Clerk. The motions unit attorneys also process emergency motions filed pursuant to Ninth Circuit Rules 27-3 and 27-4, and motions for reconsideration of orders issued by motions panels.

E. **Circuit Court Mediators.** Circuit Court Mediators are career members of the Court staff. They are experienced appellate practitioners who have had extensive mediation and negotiation training. Shortly after a new civil case is docketed, the Circuit Court Mediators review the Mediation Questionnaire to evaluate whether a case appears suitable for the Court's settlement program. *See* 9th Cir. R. 3-4 and 15-2. The Court's mediation program is discussed in detail in Chapter VI.

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

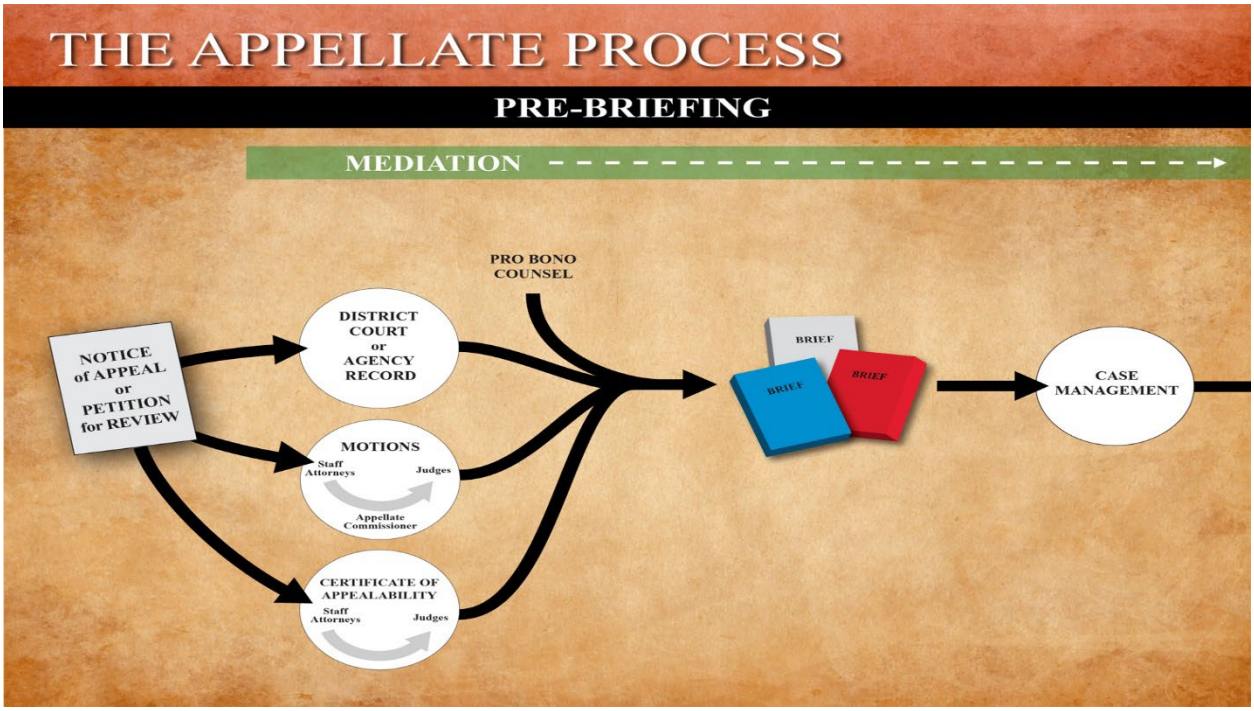
G. **Circuit Executive's Office.** The Circuit Executive's office is the arm of the Circuit's Judicial Council that provides administrative support to appellate, district court, magistrate, and bankruptcy judges in the Circuit.

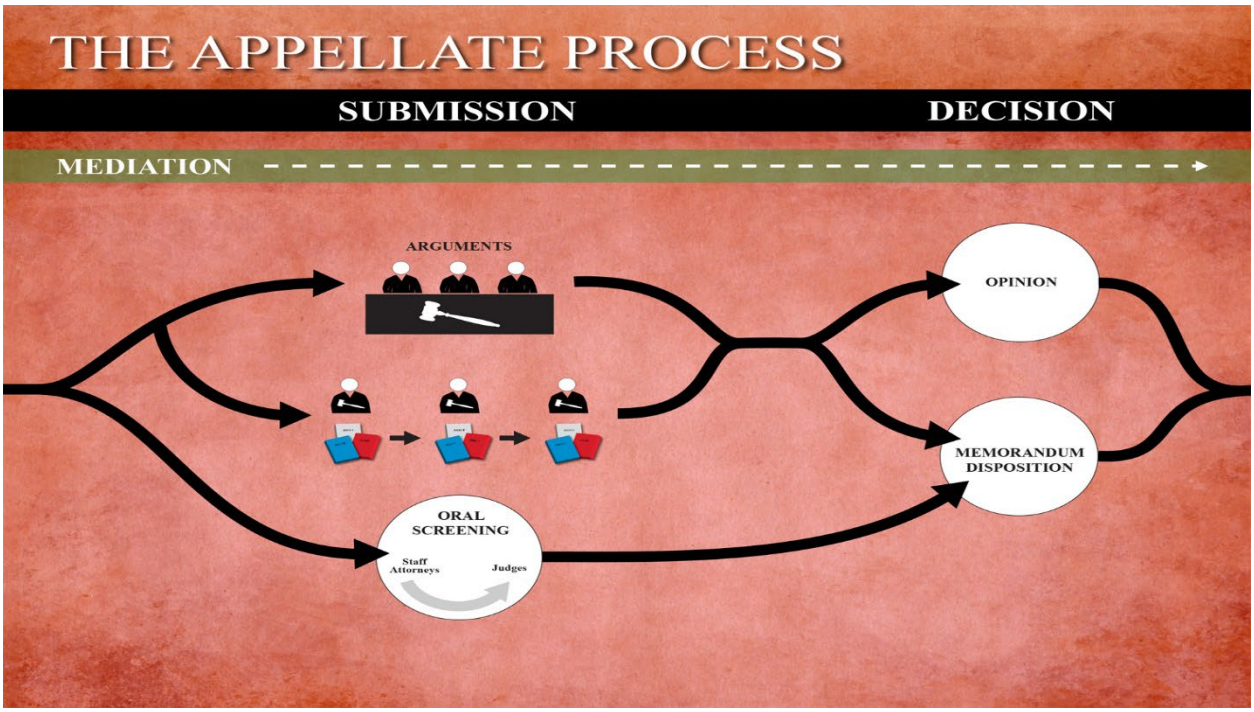
H. **The Judicial Council.** The Judicial Council, established pursuant to 28 U.S.C. § 332, is currently composed of the Chief Judge, 4 circuit judges, and 4 district court judges.

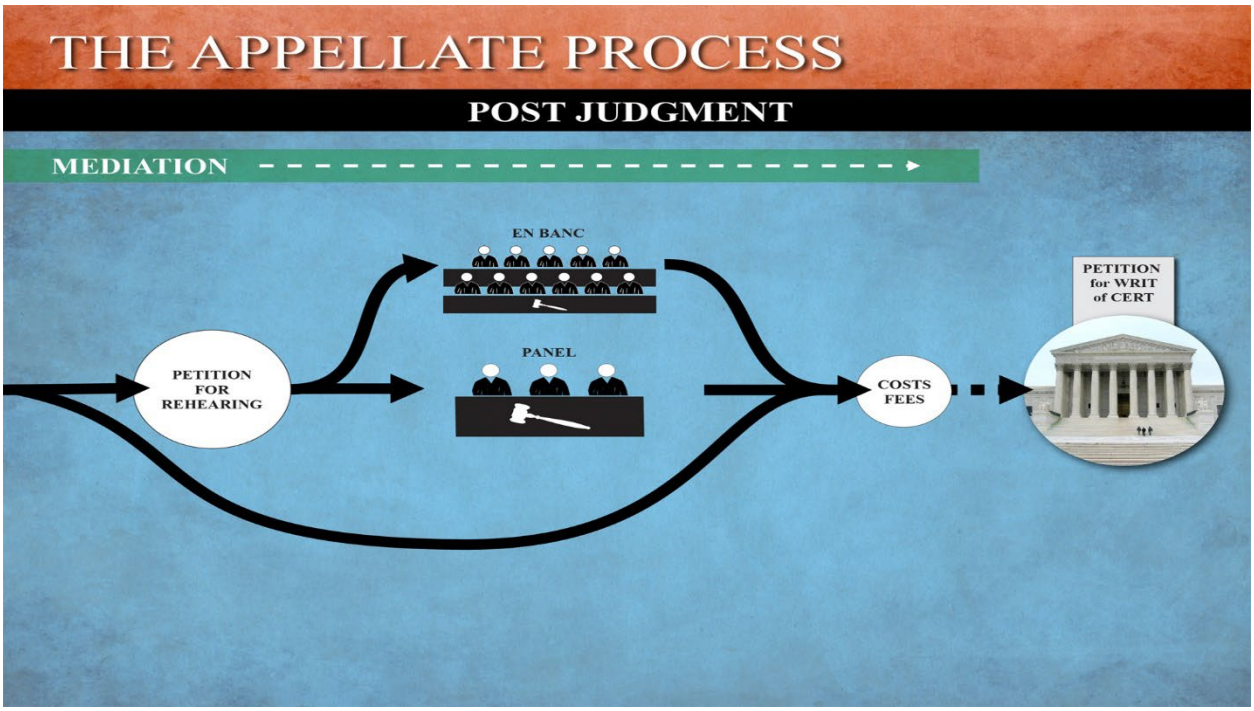
The Council convenes regularly to consider and act upon any matter affecting the administration of its own work, as well as that of all federal courts within the Circuit, including some judicial misconduct complaints.

III.
THE APPELLATE PROCESS

I. THE LIFE OF AN APPEAL







II. COURT PROCEDURES FOR PROCESSING AND HEARING CASES

A. **Inventory.** After the opening and answering briefs are filed with the Ninth Circuit, a case management attorney will inventory the case to assign a numerical weighting by type, issue, and complexity. This process enables the Court to balance judges' workloads and hear unrelated appeals involving similar legal issues at a single sitting.

This inventory process also helps to determine which of the 4 main routes to a decision by the Court a case will take: (1) by a 3-judge panel, after briefing and oral argument; (2) by a 3-judge panel, after briefing and calendaring, but without oral argument; (3) by an oral or written screening panel of judges, to whom staff attorneys have presented the case after briefing; and (4) through motions practice (primarily before the completion of briefing). Most cases are decided without oral argument. Regardless of how the Court reached its decision, a litigant may seek reconsideration of an adverse decision.

B. **Screening Panel.** A case will only be assigned to a screening calendar if the correct result appears clear and the applicable law is established in the Ninth Circuit based on Circuit or Supreme Court precedent, and the case is eligible for submission without oral argument under Federal Rule of Appellate Procedure 34(a) (*i.e.*, the panel unanimously agrees that the appeal is frivolous, the dispositive issue or issues have been authoritatively decided, or the decisional process would not be significantly aided by oral argument).

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.

A case placed on a screening calendar may be moved off if any one judge believes that the case does not meet the screening criteria, as outlined above. A case rejected from screening is typically scheduled for the next available argument calendar.

1. ***Oral screening panel.*** Once a case is placed on an oral screening calendar, a staff attorney prepares a proposed disposition of the case. An authoring judge is designated for each case presented to the oral screening panel, and the writing assignment rotates among the 3 panel members.

The staff attorney orally presents the proposed disposition to the screening panel at a periodically scheduled session. After the presentation, the panel members discuss the proposed disposition and make any necessary revisions. If the 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.

This "memorandum disposition" will ordinarily be unpublished. If the panel decides that the decision warrants publication or oral argument, it will move the case to the argument calendar track.

2. ***Written screening panel.*** When a written screening panel of judges indicates that it is ready for case assignments (identifying the number of cases that it is prepared to take), Court staff sends the panel the requested number of cases from a pool of cases designated for screening. The panel identifies for the Clerk's Office the judge who will have the writing assignment. The authoring judge prepares and circulates an optional bench memorandum and a proposed disposition for comment and approval.

   Like dispositions from oral screening panels, cases sent to a written screening panel ordinarily are decided by unpublished memoranda. If the panel has not issued a separate order submitting the case, a footnote in the disposition indicates that the panel unanimously agreed that the case should be submitted on the briefs pursuant to Federal Rule of Appellate Procedure 34(a).

3. ***Petition for rehearing.*** The Clerk will forward a petition for rehearing and/or rehearing *en banc* first to the staff attorney who presented the case to the oral screening panel, who will prepare a memorandum discussing the issues raised in the petition, and then send the petition and the memorandum to the panel for consideration. The process for seeking rehearing is discussed in Chapter XII of this guide (Post-Decisional Processes).

C. Oral Argument Calendar.

1. ***Court calendars.*** The Clerk sets the time and place of court calendars at least 6 months in advance, taking into account the availability of judges, the number of

cases to be calendared, and the hearing location required by statute or policy.

The Court posts the specific locations and dates of its sessions held in the current year and scheduled for the following year on its website: https://www.ca9.uscourts.gov/court-sessions/. Usually, court calendars, consisting of one week of multiple sittings, are held throughout the year in the following places:

- Monthly in San Francisco (usually the second week of each month but sometimes 2 weeks)
- Monthly in Pasadena (usually the first week of each month but sometimes 2 weeks)
- 6 to 8 times annually in Seattle (usually the first week of each month)
- 4 to 6 times in Portland
- 6 times in Phoenix
- 2 times in Nevada (Las Vegas and/or Reno)
- 3 times in Honolulu
- 1 time in Anchorage and
- On an ad hoc basis, in other federal courthouses throughout the Circuit such as Missoula, Richland, or at law schools.

2. ***Panels of judges.*** A 3-judge panel presides over each calendar. At present, all panels are composed of no fewer than 2 members of the Court, at least one of whom is an active judge at the time the panel is created. The third judge may, on occasion, be a district judge or judge from another circuit. Under Court

policy, district judges do not participate in appeals from their own districts.

Judges are randomly assigned to calendars by computer to particular days or weeks on the argument calendars to equalize the workload among the judges, and based on their indicated availability. The aim is to enable each active judge to sit with every other active and senior judge approximately the same number of times and to assign active judges an equal number of times to each of the locations at which the Court holds hearings.

Every year, each active judge, except the Chief Judge, is expected to sit on 32 days of oral argument calendars; one oral screening panel; one motions panel; and one Certificate of Appealability panel. Senior judges may decide how many cases they want to hear.

At the time judges are assigned to panels, the Clerk does not know which cases will be allocated to each of the panels. The identity of the judges assigned to a panel is not disclosed until the Monday of the week prior to argument.

3. ***Assignment of case to a specific calendar.***

a. **Priority.** Direct criminal appeals receive preference pursuant to Federal Rule of Appellate Procedure 45(b)(2) and are placed on the first available calendar after briefing is completed. Typically, this means that criminal appeals are scheduled for oral argument 3–4 months after briefing is complete. Other cases get priority hearing dates by statute or rule, such as applications for temporary or permanent injunctions, recalcitrant witness appeals, certain habeas corpus appeals, and appeals alleging deprivation of medical care to an incarcerated

person. *See* 9th Cir. R. 34-3. A case's designation on the Court's calendar is a function of both the statutory priority and the length of time it has been pending. Pursuant to Federal Rule of Appellate Procedure 2, the Court in its discretion may order that any individual case receive expedited treatment.

Non-priority civil, agency, or bankruptcy appeals cases are typically scheduled for oral argument about 12 months from the notice of appeal date. If briefing is not extended or delayed, this is generally 4–5 months from completion of briefing.

b. Randomization and retention. 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, and capital cases will be set before the same panel upon a later appeal. 9th 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. A matter on remand from the United States Supreme Court is also referred to the panel that previously heard the matter. The Court occasionally groups together cases with similar issues so that they can be considered by the same panel, and, as with individual cases, these clusters of cases are randomly assigned to a panel.

4. ***Consideration by argument panel.*** After a case has been assigned to a panel, the Clerk will distribute the briefs and excerpts of record to each of the judges scheduled to hear the case. The electronic case materials are available 14 weeks before the scheduled date for hearing, and under Court policy, each judge

must personally read all of the briefs before oral argument.

5. ***Oral argument.*** Roughly 16 weeks before a calendar, the Court will send a pre-calendaring notice to the parties that a case is being considered for oral argument during that particular calendar. The parties have 3 days from receiving the notice to notify the Court of any conflicts with those dates. The Clerk subsequently sends a hearing notice to all counsel of record approximately 10 weeks prior to the date of oral argument. The hearing notice advises of the location and date of the argument and the amount of time allotted for argument, but not the identity of the judges on the panel. The identity of the judges on the panel are published the Monday of the week preceding argument on the oral argument calendar on the Court's website at www.ca9.uscourts.gov/calendar/.

   Merits panels often 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 is unlikely to enhance review and decision-making, the panel will notify the parties of this determination as soon as possible after the case is calendared, generally at least 2 weeks before the hearing date. However, cases may, in rare instances, be submitted without oral argument as late as the day of argument.

6. ***Conference.*** At the conclusion of each day's argument session, the judges on each panel confer on the cases they have heard. Each judge expresses his or her tentative views, and the judges vote 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 or unpublished memorandum. The presiding judge then

assigns each case to a judge for the preparation and submission of a disposition.

7. ***Decision.*** The Court has no time limit, but most cases are decided within 3 months to a year.

8. ***Petition for rehearing.*** A litigant who receives an adverse decision, whether published or unpublished, may seek rehearing. The process for doing so is discussed in Chapter XII of this guide (Post-Decisional Processes).

D. **Complex Cases.** A party may request, or the Court may order *sua sponte*, special management for complex appeals. If special management is ordered, Court staff will schedule a case management conference to manage the appeal effectively and develop a briefing plan. Case management conferences are held only in exceptional circumstances, such as complex cases involving numerous separately represented litigants or extensive district court or agency proceedings.

IV.
FILING AN APPEAL OR EXTRAORDINARY WRIT[1]

I. APPEALS

Only certain orders can be appealed to the Ninth Circuit Court of Appeals.

A. **Final Judgments.** The Ninth Circuit has jurisdiction over appeals from final decisions of the district courts. 28 U.S.C. § 1291. A final decision, or final judgment, is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (citations omitted). Examples of final judgments include a judgment following an order granting summary judgment as to all claims in a civil case and a judgment imposing a sentence in a criminal case.

B. **Appealable Interlocutory Orders.** Rulings that decide some issue(s) in the case, but not the whole case, are "interlocutory orders." These are generally not subject to appellate review. However, certain interlocutory orders may be appealed.

1. ***Statutory authorization.*** Statutes other than 28 U.S.C. § 1291 provide for appellate jurisdiction over some interlocutory orders. The most common example is an order granting or denying a motion for injunctive relief. Whether the motion seeks preliminary or permanent relief, the non-prevailing party may file a direct appeal from the district court's order under 28 U.S.C. § 1292(a)(1). Other examples include a partial judgment certified under Federal Rule of Civil Procedure 54(b), certain interlocutory orders involving

[1] Many of the subjects covered in this section are addressed in greater detail in the Ninth Circuit's Appellate Jurisdiction Outline: http://www.ca9.uscourts.gov/guides/appellate-jurisdiction.

arbitration proceedings (9 U.S.C. § 16), and certain interlocutory orders in admiralty cases (28 U.S.C. § 1292(a)(3)). The government may also appeal certain orders in criminal cases under 18 U.S.C. § 3731.

2. ***Collateral-order doctrine.*** The collateral-order doctrine allows appeals from certain interlocutory rulings (preceding final judgment) so long as those rulings conclusively decide an issue separate from the merits of the case and would be effectively unreviewable after final judgment. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Such rulings are deemed "final" within the meaning of 28 U.S.C. § 1291. Common examples of immediately appealable collateral orders are orders denying immunities from suit, including an order denying summary judgment based on qualified immunity when the question involves a matter of law, and an order denying absolute immunity. *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 725 (9th Cir. 2017); *A. K. H. by & through Landeros v. City of Tustin*, 837 F.3d 1005, 1010 (9th Cir. 2016). The doctrine does not extend to orders denying defenses that merely shield a defendant from liability rather than immunity from suit. *Geo Group, Inc. v. Menocal*, 607 U.S. __ (2026).

3. ***By permission.*** In certain instances, 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:

   a. **Lower-court certification required.** 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), *and* then the Ninth Circuit exercises its discretion to grant permission to appeal. Examples:

i. **28 U.S.C. § 1292(b)**. A district court may certify for immediate appeal an interlocutory ruling in a civil case that otherwise would not be appealable, where the order involves "a controlling question of law as to which there is substantial ground for difference of opinion," and immediate appellate review will "materially advance the ultimate termination of the litigation." The district court's denial of certification under § 1292(b) is not subject to review.

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

b. No lower-court certification required. Appeals in which no certification from the district court is required. Examples:

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

ii. **Review of remand rulings under 28 U.S.C. § 1453(c).** Under the Class Action Fairness Act ("CAFA"), "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 certification by the district court.

4. ***Certain agency decisions.*** Decisions from certain agencies may be reviewed by the Ninth Circuit after internal agency appeals are exhausted, where the case arises from within the Ninth Circuit's geographic jurisdiction. Such agencies include the Board of Immigration Appeals (BIA), National Labor Relations Board (NLRB), Occupational Safety and Health Review Commission (OSHRC), Labor Benefits Review Board (LBRB), Environmental Protection Agency (EPA), Federal Energy Regulatory Commission (FERC), Department of Energy (DOE), Federal Aviation Administration (FAA), National Transportation Safety Board (NTSB), Federal Railroad Administration (FRA), Federal Trade Commission (FTC), Securities and Exchange Commission (SEC), Agricultural Marketing Service (AMS), Interior Board of Land Appeals (IBLA).

II. INITIATING AN APPEAL FROM A DISTRICT COURT DECISION

A. **Notice of Appeal.** Filing a timely notice of appeal in the district court—not the Ninth Circuit—is the necessary first step to initiating an appeal in the Ninth Circuit. In general, the filing of a notice of appeal divests the district court of jurisdiction over the appealed matter and transfers jurisdiction to the Ninth Circuit. Filing a notice of appeal is the appropriate method for initiating a direct appeal seeking review of final judgments and certain interlocutory or collateral orders. The filing deadlines for notices of appeal are discussed below in Section V.

1. ***Contents.*** A form Notice of Appeal, Ninth Circuit Form 1, is available at: https://www.ca9.uscourts.gov/forms/.

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 or order 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). Form 1 has a fill-in field for an electronic signature at the very bottom of the page.

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. This violates Ninth Circuit Rule 4-1 and the Court's rules and practice against allowing counsel to submit any pleadings not signed by counsel directly. When the Court catches this error, it will issue the inevitable order to counsel, referencing Ninth Circuit Rule 4-1(a), entering counsel as counsel of record on appeal, and directing counsel that they must comply with Ninth Circuit Rule 4-1(c) by filing the pertinent motion if they desire to be relieved as counsel.

B. **Filing Fee.** Parties in civil cases must pay the filing fee to the district court, unless they have previously been allowed to proceed *in forma pauperis*.

C. **Representation Statement.** In a civil case, a represented party filing a notice of appeal must contemporaneously file a Representation Statement, Ninth Circuit Form 6 (https://www.ca9.uscourts.gov/forms/), which identifies the

parties and includes the names, addresses, and telephone numbers of the parties' counsel. Attach Form 6 to the notice of appeal, and file them in the district court. Self-represented litigants and counsel in non-civil cases are encouraged to file a Representation Statement, but they are not required to do so. The instructions for Form 6 are at https://www.ca9.uscourts.gov/forms/. Once the appeal has been opened, review the Ninth Circuit's listing of parties and counsel to ensure that it is accurate.

D. **Mediation Questionnaire.** After the appellant files a notice of appeal in a civil case, the Clerk of the Court will set a deadline for filing a Mediation Questionnaire (as part of the Court's scheduling order). Within five days after a counseled civil appeal is docketed, the appellant must – and the appellee may – file the Mediation Questionnaire, Ninth Circuit Form 7 (https://www.ca9.uscourts.gov/forms/). The Mediation Questionnaire is a public document that will appear on the Court's docket. After the Mediation Questionnaire has been filed, the parties will receive a link to a webform they can use to submit additional, confidential information directly to the Circuit Mediators.

III. INITIATING AN APPEAL WITH PERMISSION

A. **Petition for Permission to Appeal.** A litigant must file a petition for permission to appeal in the Ninth Circuit. Fed. R. App. P. 5. If the Ninth Circuit grants permission, the appeal will be docketed. Different deadlines for filing the petition for permission apply, depending on the order at issue:

1. ***28 U.S.C. § 1292(b).*** A petition for permission to appeal under 28 U.S.C. § 1292(b) must be filed in the Court of Appeals within 10 days of the district court's certification. This requirement is jurisdictional.

2. ***Class certification.*** A petition for permission to review a district court's order granting or denying class certification filed under Federal Rule of Civil Procedure 23(f) must be filed in the Court of Appeals within 14 days of the district court's class certification order. This requirement is not jurisdictional but failure to file a timely petition can result in dismissal. *See Nutraceutical Corp. v. Lambert*, 586 U.S. 188 (2019) (Rule 23(f)'s 14-day deadline is not subject to tolling).

3. ***Interlocutory bankruptcy appeal.*** The petition must be filed in the Ninth Circuit within 30 days of the certification order. Fed. R. App. P. 6(c)(2)(A). This requirement is jurisdictional.

4. ***28 U.S.C. § 1453(c).*** A petition for permission to appeal under 28 U.S.C. § 1453(c) must be filed in the Court of Appeals within 10 days of the district court's order granting or denying remand. This requirement is jurisdictional.

B. **Answer in Opposition or Cross-Petition.** Appeals by permission are governed by Federal Rule of Appellate Procedure 5 and Ninth Circuit Rule 5-2, and are processed like motions. Responses and cross-petitions are not required, but they are allowed. *See* Fed. R. App. 5(b)(2); 9th Cir. R. 5-2. These are due 10 days after the petition is served. Replies are also permissible. Although the rules are silent on replies (and thus there is no set deadline), because the petitions are processed like motions, it is advisable to file any reply within the 7 days prescribed by Federal Rule of Appellate Procedure 27(a)(4).

C. **Filing Fee.** No filing fee is initially required to file the petition. Fed. R. App. P. 5. However, if the petition is granted, the appellant must pay the required fees for the appeal to the district court within 14 days of the grant of permission.

IV. INITIATING REVIEW IN AGENCY CASES

A. **Petition for Review.** The process for reviewing an agency order directly in the Ninth Circuit is initiated by filing a petition for review rather than a notice of appeal in the district court. *See* Fed. R. App. P. 15. A form Petition for Review is available at: https://www.ca9.uscourts.gov/forms/. Consult the applicable statutes governing the agency for filing deadlines.

B. **Filing Deadlines.** 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)). An untimely petition will be dismissed.

V. FILING DEADLINES FOR NOTICES OF APPEAL

A. **Civil Cases.** The deadline for filing a notice of appeal in a civil case is jurisdictional; late filing will doom a case. In a civil case, the notice of appeal must be filed in the district court within 30 days of entry of the appealed judgment or order. Fed. R. App. P. 4(a)(1)(A). However, the time to appeal for any party is 60 days 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. Fed. R. App. P. 4(a)(1)(B). If one party timely files a notice of appeal, any other party may cross-appeal by filing a notice of appeal within 14 days after the date when the first notice was filed, even if it would otherwise not be timely. Fed. R. App. P. 4(a)(3). Under limited circumstances, the district court may extend the time to file a notice of appeal by 30 days or 14 days after the date when the order granting

the motion is entered, whichever is later, upon a showing of excusable neglect or good cause. Fed. R. App. P. 4(a)(5), (6).

If any party files a timely postjudgment motion of the type specified in Federal Rule of Appellate Procedure 4(a)(4)(A), the time to appeal for all parties runs from entry of the order disposing of the last such motion. To be timely, generally the postjudgment motion must be filed no later than 28 days after entry of judgment. In bankruptcy cases, however, the postjudgment motion must be filed within the deadlines for filing postjudgment motions under the applicable Federal Rules of Bankruptcy Procedure, which are generally 14 days. Fed. R. App. P. 6(a).

B. **Criminal Cases.** In a criminal case, the deadline to appeal is not jurisdictional but is a claim-processing rule subject to forfeiture. *United States v. Sadler*, 480 F.3d 932, 941–42 (9th Cir. 2007). The defendant must file a notice of appeal within 14 days of (a) entry of the appealed judgment or order, or (b) the government's filing of its notice of appeal. Fed. R. App. P. 4(b)(1)(A). 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). A district court may extend the time for filing by up to 30 days upon a finding of excusable neglect or good cause. Fed. R. App. P. 4(b)(4).

If any party files a timely motion of the type specified in Federal Rule of Appellate Procedure 4(b)(3)(A), the time to appeal is 14 days after the later of either the entry of the order disposing of the last such remaining motion, or the entry of the judgment of conviction.

C. **Habeas Cases.** Habeas corpus cases are considered civil cases. Accordingly, appeals from the denial of 28 U.S.C. § 2254 motions 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 deadline because the United States is the responding party.

D. **Effect of Motion for Reconsideration.** When a party moves for reconsideration of a decision within the time to appeal, this renders that decision nonfinal for purposes of appeal. When the district court issues its order on the motion for reconsideration, that begins the clock for filing a timely notice of appeal as to both the order on the motion for reconsideration and the underlying decision. *United States v. Ibarra*, 502 U.S. 1, 4–6 (1991).

VI. EXTRAORDINARY WRITS

In addition to hearing appeals, the Ninth Circuit Court of Appeals may also issue extraordinary writs.

A. **Statutory Authority.** Federal courts are empowered to issue extraordinary writs by the All Writs Act, 28 U.S.C. § 1651: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

B. **Types of Writs.** There exist a variety of writs "agreeable to the usages and principles of law," appearing under a colorful variety of Latin names. The two most commonly filed in the Court of Appeals in pursuit of a quasi-appellate remedy are writs of mandamus and prohibition, which are treated as interchangeable in the Ninth Circuit for purposes of how they are filed, processed, and decided. A writ of mandamus invokes the original jurisdiction of the appellate court to order an inferior tribunal (*i.e.*, a district court or, sometimes, an administrative agency over which the Court of Appeals has appellate jurisdiction) to do (or to refrain from doing) some action where the petitioner can satisfy the court that grounds for such an order exist. A writ of prohibition is similarly an order from the appellate court to the inferior tribunal that directs the inferior tribunal to cease any actions taken outside its proper jurisdiction.

C. **Standard for Issuance of the Writ.** "The remedy of mandamus is a drastic one, to be involved only in extraordinary situations." *Bauman v. United States District Court*, 557 F.2d 650, 654 (9th Cir. 1977). The *Bauman* factors for whether the writ should issue are: (1) whether the petitioner has no other adequate means, such as direct appeal, to attain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way not correctable on subsequent appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft-repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression. The third factor is a necessary condition for granting a writ of mandamus. *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011).

D. **Initiating an Extraordinary Writ.**

1. ***Forum.*** Petitions for writs of mandamus and prohibition are filed in the United States Court of Appeals, *not* the lower tribunal,[2] though a copy must be furnished to the judge of the tribunal whose order is sought to be reviewed. Fed. R. App. P. 21(a)(1). A petition or answer filed by counsel must be submitted via the ACMS system. Unrepresented parties must file an original of the petition, an answer, if ordered, and any supporting papers and appendices in paper format.

[2] Where it is unclear whether an order is appealable under the "collateral order" doctrine or appealable by permission, or reviewable by mandamus, it is permissible to ask the Court of Appeals to hear the matter on appeal, or, in the alternative, to treat the appeal as a writ of mandamus. In this situation, the Notice of Appeal must be filed in the district court, and the petition for a writ of mandamus must be filed in the Court of Appeals.

2. ***Filing fee.*** There is a $600 filing fee, payable to the Clerk of the Court of Appeals.

3. ***Captioning.*** Since writs of mandamus and prohibition are original actions by the petitioner against the lower tribunal, they were historically styled "[Name of Petitioner] v. [Name of Tribunal]; [Name of opposing party in lower court], Real Party in Interest." However, the Federal Rules of Appellate Procedure now require that they be styled "In re [name of petitioner]," Fed. R. App. P. 21(a)(2)(A), which is then followed by the traditional caption.

4. ***Form of petition.*** The form of the petition is governed by Ninth Circuit Rule 21-2. The petition must be limited to 30 pages or 8,400 words (pursuant to Ninth Circuit Rule 32-3(2)). No answer to a petition may be filed unless ordered by the Court, and except in emergency cases the Court will not grant a petition without a response. 9th Cir. R. 21-4. However, if a party seeking mandamus *also* files a motion for a stay, the opposing party is not precluded from filing an opposition to the motion for a stay.

5. ***Resolution.*** Petitions for writs of mandamus (and others) are referred to the motions panel. The motions panel may deny the petition, call for a response and retain jurisdiction to decide the petition, direct that the petition and response be presented to a subsequent motions panel, or direct that the petition and response be referred to a merits panel for disposition.

VII. ORDERING THE TRANSCRIPT

For the Ninth Circuit to consider the official reporter's transcript of oral proceedings before the district court, the parties first must order, and arrange payment for, the transcript. The filing of the notice of appeal triggers the designation/ordering process and deadlines may arrive before an appellant is provided with a Ninth

Circuit case number and schedule. Ninth Circuit Rule 10-3 establishes the rules governing the ordering of the reporter's transcript. Please note, however, that Ninth Circuit Rule 10-3.1(a) allows the parties to stipulate to the portions of the transcript to be ordered and bypass the somewhat cumbersome designation/cross-designation process.

A. **Civil Appeals.** In a civil case, the first step after filing a notice of appeal is for the appellant to serve on the appellee (not the court or the court reporter) 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. 9th Cir. R. 10-3.1. The appellant must do this within 7 days of filing the notice of appeal, or within 7 days of the entry of an order disposing the last timely filed post-judgment motion of a type specified in Federal Rule of Appellate Procedure 4(a)(4). This requirement only applies if the appellant plans to order less than all of the transcripts. If the appellant is ordering all transcripts, there is no need for the appellee's input and the appellant need not serve a transcript statement.

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 7 days of the service date of the appellant's initial notice.

Within 14 days of filing the notice of appeal, the appellant must file a transcript designation order form with the district court (not the Ninth Circuit). Transcript designation order forms should be obtained or downloaded from the district court.

Per Ninth Circuit Rule 10-3.1, financial arrangements must be completed 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). Pauper status does not automatically entitle a litigant to free transcripts. If the 28 U.S.C. § 753(f) order does not explicitly include permission to obtain transcripts at government expense, a litigant must specifically move for this relief in the district court first, before seeking relief from the Ninth Circuit.

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 post-judgment motion of a type specified in Federal Rule of Appellate Procedure 4(b)(3). 9th Cir. R. 10-3.2.

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 14 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 chapter of this guide.[3]

[3] A client's pauper status for purposes of receiving court-appointed counsel does not automatically entitle appellant to transcripts of opening and closing argument, jury instructions, or jury selection. The

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

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

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. Before filing such a notice, a party must first contact the court reporter and supervisor in an effort to cause preparation of the transcripts. 9th Cir. R. 11-1.2.

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. Rule 11-1.2 also requires the appellant to describe the contacts made with the reporter and the reporter's supervisor in an effort to

---

district judge must specifically authorize preparation of those transcripts via a notation on the reporter's payment voucher.

resolve the default informally. The Court treads carefully when dealing with reporters, so including all the required recitals is important.

VIII. FILING A DISCLOSURE STATEMENT

For all cases initiated in the Ninth Circuit after December 1, 2024, all parties, intervenors, and amici must file a Form 34 Disclosure Statement (available at: https://www.ca9.uscourts.gov/forms/) in the following cases: (1) any case in this Court involving a nongovernmental corporation, association, joint venture, partnership, limited liability company, or similar entity; (2) any bankruptcy case; (3) any criminal case involving an organizational victim; or (4) any case involving review of state court proceedings. Fed. R. App. P. 26.1; 9th Cir. R. 26.1-1.

The disclosure must advise the Court of any parent companies and any publicly held company with a 10% or greater ownership interest (*e.g.,* stock or partnership shares) in an entity appearing before the Court (including an organizational victim), and whether any judge of the Court participated in any prior proceedings in the case. If such information changes, a supplemental disclosure statement is required.

The disclosure statement, which is essential to the Court's ability to evaluate possible recusals, must be filed within 14 days of appellate docketing or with any motion if the motion is filed within the default 14 days.

Briefs should not separately include disclosure statements.

V.
THE RIGHT TO COUNSEL ON APPEAL

I. RIGHT TO COUNSEL ON APPEAL

A. Criminal Cases.

1. ***Right to counsel.*** 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 post-judgment or 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 1964, 18 U.S.C. § 3006A ("CJA"), and Ninth Circuit Rule 4-1.

2. ***No right to self-representation.*** 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. Ninth Circuit Rule 4-1(d) provides as follows:

> A defendant does not have a right to self-representation in a direct criminal appeal, even if the defendant proceeded pro se in the district court. Self-representation will not be permitted in direct criminal appeals except in the unusual case where the court determines that allowing the defendant to proceed pro se is in the best interests of the defendant, and would not undermine a just and orderly resolution of the

appeal. Any motion seeking permission to proceed pro se on appeal must explain how these interests would be served. This court does not appoint standby counsel.

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.

3. ***Continuity of Counsel.*** The Ninth Circuit generally follows a policy of continuity of counsel from district court through 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. *See* 9th Cir. R. 4-1(a)(2).

B. **Civil Cases.** There is no constitutional or general statutory right to the appointment of counsel in civil cases. If a pro se litigant files the notice of appeal, the court assumes the appellant is pro se even if the litigant had counsel in the district court. 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. A pro se litigant with a pending appeal filed in this Court may file a motion for appointment of an attorney under this program with the Clerk of the Court. For more information, see http://www.ca9.uscourts.gov/probono/

II. THE CRIMINAL JUSTICE ACT AND RULE 4-1

A. **The Criminal Justice Act.** 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." 18 U.S.C. § 3006A(c). Whether counsel from district court proceedings continues on, 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 resolution of any petition for writ of *certiorari* and all "ancillary matters appropriate to the proceedings." *Id.*

In habeas corpus cases arising under 28 U.S.C. § 2254, the Ninth Circuit generally appoints counsel when a certificate of appealability ("COA") has been granted by the Circuit or district court, 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 gives the habeas corpus appellant the option of retaining pro se status. This option is not generally available to appellants in direct criminal appeals.

If the Ninth Circuit has not appointed counsel where a COA has issued, or the respondent is appealing the district court's grant of relief, a pro se habeas petitioner may request appointment of counsel by filling out and signing under penalty of perjury a Form 23 CJA Financial Affidavit (available at: https://www.ca9.uscourts.gov/forms/) and submitting it to the Court with a request for appointment of counsel.

B. **Rule 4-1.** 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. (This continuity of counsel rule also applies to retained counsel.) Unless appointed counsel moves to withdraw, their prior appointment generally will continue for the appeal, and they will be provided a new payment voucher through the Ninth Circuit Court of Appeals eVoucher system. No further action is required of appointment counsel for their appointment to continue.

The provisions of Rule 4-1 apply to any case where the client is entitled to the appointment of counsel under the CJA, including habeas matters.

III. APPOINTED COUNSEL UNDER CJA

A. **Appointment Continues from District Court.** 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 (*in forma pauperis*) 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.

B. **New Application for CJA Counsel.** 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 Form 23 CJA Financial Affidavit (available at: https://www.ca9.uscourts.gov/forms/).

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.

C. **Payment.** 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 Court of Appeals CJA Unit 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 or jurisdictional, late submission may delay payment.

The Court uses an eVoucher system. Instructions for utilizing the 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, at: https://www.ca9.uscourts.gov/attorneys/criminal-justice-act-electronic-vouchers/.

The Guide to Judiciary Policy, Volume 7, has detailed information about what is and is not reimbursable and the required documentation under the Criminal Justice Act. Any attorney seeking compensation under the CJA would be well-advised to review the Guide before submitting a voucher. The Guide is available at: https://www.uscourts.gov/sites/default/files/vol_07.pdf. In addition to the Guide, the Administrative Office has developed an on-line CJA reference tool which is available at: https://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justice-act-cja-guidelines.

The Ninth Circuit Compensability Handbook also details what constitutes a compensable CJA service and was created to provide additional guidance and detailed examples on what is presumptively compensable within the Ninth Circuit throughout the many stages of CJA representation. The handbook is available at: https://cdn.ca9.uscourts.gov/datastore/cja/Ninth%20Circuit%20Comp%20Handbook.pdf.

IV. ADMISSION TO NINTH CIRCUIT

To practice before the Ninth Circuit, an attorney must be admitted to the bar under Federal Rule of Appellate Procedure 46 and Ninth Circuit Rule 46-1, and may apply for admission using Form 13, available at: https://www.ca9.uscourts.gov/forms/.

If retained or appointed counsel in district court becomes attorney of record in the Court of Appeals and would like to withdraw, they do not need to be admitted to practice to file a motion on our docket. Instead, counsel must register at: https://www.ca9.uscourts.gov/efiling/#section-registration.

V. WITHDRAWAL OF COUNSEL

Ninth Circuit Rule 4-1(c) provides that either retained or appointed counsel who wants to withdraw from the appeal may seek to do so by, "within 14 days after the filing of the notice of appeal," submitting one of the following filings with the Ninth Circuit:

1. A notice of appearance and substitution by new retained counsel;

2. A motion by retained counsel to withdraw and to appoint counsel under the Criminal Justice Act, supported by a completed financial affidavit (Form 23 CJA Financial Affidavit, accessible here: https://www.ca9.uscourts.gov/forms/);

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

4. A motion by retained or appointed counsel to withdraw and to permit the defendant to proceed pro se; or

5. If the defendant or petitioner no longer wishes to pursue their appeal, a motion to voluntarily dismiss the appeal, which in a criminal appeal must include the defendant's written consent or an explanation why consent could not be obtained.

The motion must be served on the client and must provide the client's current address and inmate registration number if in custody.

Although the rule states that the motion must be filed within 14 days of the filing of the notice of appeal, later-filed motions are generally entertained. Counsel should plan ahead and file the motion as soon as possible. Most attorneys file it as soon as a case number has been assigned to the appeal.

Retained or appointed counsel in the district court may also file a motion to be relieved or withdraw as counsel of record and for appointment of new counsel in district court contemporaneously with the notice of appeal. In this instance, the district court will issue an order and new counsel will be appointed on appeal. Counsel must ensure that the district court issues the order allowing for withdrawal and that the appointing authority has also been served with the order for new counsel.

If, after conscientious review of the record, appointed counsel believes the appeal is frivolous, by the due date for the opening brief, appointed counsel shall file a separate motion to withdraw and an opening brief that identifies anything in the record that might arguably support the appeal, with citations to the record and applicable legal authority. *See* 9th Cir. R. 4-1(c)(2). The motion and brief must be accompanied by a proof of service on defendant, and the cover of the brief shall state that it is being filed pursuant to *Anders v. California*, 386 U.S. 738 (1967).

Counsel should also designate all appropriate transcripts and include them in the excerpts of record. The filing of the motion, brief, and excerpts will vacate the previously established briefing schedule. The Court will then set a briefing schedule allowing the defendant to file a pro se supplemental brief and directing appellee by a certain date to either file an answering brief or notify the Court by letter that no answering brief will be filed.

As a practical matter, counsel should be aware that filing an *Anders* brief can be a time-consuming process that will delay the disposition of the appeal. Counsel wishing to raise issues that may currently be foreclosed under the law are not limited to an *Anders* brief. Those issues may be included in a standard opening brief so long as counsel clearly identifies and acknowledges the contrary and controlling authority.

VI. ATTORNEY DUTIES

No matter the stage 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.

A. **Notice of Appeal.** Criminal defense counsel must consult with the client to determine if the client desires to pursue an appeal. If the client wants to pursue an appeal, Supreme Court precedent, Ninth Circuit Rule 4-1(a)(1), and governing professional standards *require* that counsel file the notice of appeal. *See Garza v. Idaho*, 586 U.S. 232, 241 (2019). 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.

B. **Arguments.** While the choice of whether to pursue an appeal belongs to a defendant, the choice of what arguments to make within an appeal belongs to appellate counsel. *Id.* at 240.

C. 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, unless the opposing party petitions for rehearing or certiorari. If the case is remanded, any change of counsel will be handled in the district court.

If the appeal is not successful, either in whole or in part, Ninth Circuit Rule 4-1(e) directs counsel, whether retained or appointed, to advise the client "promptly" of the right to initiate further review by filing a petition for writ of certiorari with the United States 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 filing 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. Please consult Ninth Circuit Rule 4-1(e) for all the requirements for a motion to withdraw as counsel in this context.

If counsel does not move to be relieved of his or her appointment, counsel's representation continues through filing a petition for writ of certiorari or providing representation when an opposing party files a petition for writ of certiorari, up to and including briefing and argument at the United States Supreme Court.

VI.
MEDIATION

I. OVERVIEW OF THE MEDIATION PROGRAM

The Court established the Circuit Mediation Program ("Program") pursuant to Federal Rule of Appellate Procedure 33 and Ninth Circuit Rule 33-1. *See* General Orders, Ch. 7. The purpose of the Program is to facilitate the voluntary resolution of cases. 9th Cir. R. 33-1(a). The Program has existed for more than thirty years. Circuit mediators work with attorneys and their clients to resolve civil cases pending in the Court. The Court offers this service at no cost because it helps resolve disputes quickly and efficiently, and it 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.

The Program is staffed by a chief circuit mediator and 7 circuit mediators who all work exclusively for the Court. The mediators are licensed attorneys who have an average of 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. The Court's mediation webpage (https://www.ca9.uscourts.gov/mediation/) contains additional information, answers to frequently asked questions, and the mediators' names and contact information.

Although the mediators are Court employees, their work is kept separate from the Court's other operations. The Court has enacted strict confidentiality rules and practices; what happens in mediation stays in mediation.

II. ELIGIBILITY FOR THE MEDIATION PROGRAM

A. **Counseled Civil Cases.** Almost all civil cases in which the parties are represented by counsel are eligible for the Program. The Program is not open to any case involving a

pro se litigant absent extraordinary circumstances. *See* General Order 7.3.

B. **Immigration Cases.** The Court has used mediation to help resolve many immigration cases. Although immigration cases are often seen as all-or-nothing legal disputes, experience has shown that some immigration cases are good candidates for settlement discussions. The cases which most readily lend themselves to mediation are 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 for further proceedings.

C. **Non-parties.** The Program is not limited to the case on appeal in the Ninth Circuit, as long as all parties agree. 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.

D. **Referral Routes.** 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 court staff. Even if the appeal is not selected initially for inclusion in the Program, counsel may request that the case be considered for mediation.

1. ***Mediation Questionnaire and Settlement Assessment Conference.*** The mediators look the Mediation Questionnaire (Form 7) to help determine whether a case might be an appropriate candidate for inclusion in the Program and to provide the best possible mediation services to the parties and their counsel. The Mediation Questionnaire is filed in the Ninth Circuit within five days of the docketing of an appeal or a petition for review. The Mediation Questionnaire (Form 7) is available at https://www.ca9.uscourts.gov/forms/. It is mandatory

for appellants in civil appeals, even if settlement appears unlikely. There are a few exceptions: A Mediation Questionnaire is not required in appeals/petitions in which the appellant/petitioner is pro se; appeals under 28 U.S.C. §§ 2241, 2254, and 2255; petitions for a writ under 28 U.S.C. § 1651; and petitions for review of an order of the Board of Immigration Appeals. 9th Cir. R. 3-4(b), 15-2. The Mediation Questionnaire is optional for appellees/respondents.

The Mediation Questionnaire is filed on the public docket and is not confidential. If counsel wish to provide confidential information to the Court's mediators, after Form 7 is filed, all counsel receive a link in the Notice of Docket Activity that allows them to separately submit relevant confidential information directly to the Circuit Mediators.

After the Mediation Questionnaire is filed, 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 consider whether the case has settlement potential. This initial assessment conference typically lasts 30–60 minutes and includes a discussion of the case's litigation and settlement history. After the call, counsel and the mediator will decide whether further discussion would be fruitful. If the parties are interested in working to resolve the dispute, the mediator helps devise a settlement process that meets the needs of the participants in that case. If 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 changing the briefing schedule or consolidating cases.

2. ***Panel referrals.*** Approximately five percent of the Program's cases come from referrals from panels of judges and from court staff. When a merits panel refers a case to mediation, it is usually after oral argument but before the panel submits 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.

3. ***Requests from counsel.*** In any counseled case, counsel may send a request to be included in the Program to ca09_mediation@ca9.uscourts.gov. The request can be made confidentially.

III. EVALUATING WHETHER A CASE IS SUITABLE FOR MEDIATION

In determining whether a particular case is appropriate for mediation, counsel, the parties, and the mediator will consider many factors, including the following:

1. The parties' interest in participation;

2. The likelihood that a Ninth Circuit decision will not end the dispute;

3. A desire to make or avoid legal precedent;

4. The existence of other appeals that raise the same legal issue;

5. The desire to preserve a business or personal relationship;

6. The existence of non-monetary issues;

7. The possibility that a creative resolution might provide better relief than the Court could fashion;

8. A history of strong feelings that may have prevented effective negotiations;

9. The possibility that one or all parties could benefit from a fresh look at the dispute;

10. A desire to open and improve communications between or among the parties; and

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

IV. THE MEDIATION PROCESS

If the parties are interested in working to resolve the dispute, 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, by videoconference, or by telephone. In-person mediations may be held at the Court or, in appropriate cases, other locations. The mediator will make every effort to hold an in-person session in a venue that is most convenient for the greatest number of participants. Mediators will travel to locations throughout the Ninth Circuit when warranted.

Working with the mediator, the parties will determine what issues to address and how the 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, the focus may be rebuilding relationships or joint problem solving. The mediator may facilitate direct discussions between the parties, or 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 all participants.

The mediator will ask questions, reframe problems, facilitate communication, and help the parties to understand each other and 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.

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 extend the briefing schedule.

If a case is not resolved through mediation, the appeal is not delayed because the Court schedules oral argument based on the date the notice of appeal is filed, not on the dates the briefs are filed. The Circuit mediators work expeditiously to avoid delay in the processing of the appeal should the case not settle.

A. **Preparing for Mediation.** The most effective and efficient mediations are those in which counsel and their clients are fully prepared. Counsel should know the applicable standard(s) of review, 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.

B. **Confidentiality.** To encourage efficient and frank settlement discussions, the Court exercises great care to ensure strict confidentiality of the settlement process. Settlement-related information disclosed to a Court mediator will be kept confidential and will not be disclosed to the judges deciding the appeal or, with narrow exceptions, to any other person outside the Program participants. 9th Cir. R. 33-1(c)(4)(B). A party may also request that its separate discussions with a mediator be kept confidential from the other parties.

Any person, including a Court mediator, who participates in the mediation program, must maintain the confidentiality of the settlement process. With limited exceptions, this confidentiality applies to all oral and written communications made during the mediation process. 9th Cir. R. 33-1(c)(4). Documents and correspondence related to settlement are maintained only in the Circuit Mediation Office and are not 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.

Written settlement agreements, however, are not confidential except as agreed by the parties. 9th Cir. R. 33-1(c)(5). Moreover, the rule does not prohibit disclosures that are otherwise required by law. 9th Cir. R. 33-1(c)(6).

C. **Determinations by Appellate Commissioner.** Parties who have settled the case may stipulate to have one or more issues in the appeal submitted to an appellate commissioner for a binding determination. 9th Cir. R. 33-1(d).

VII.
MOTIONS PRACTICE

I. GENERAL

A. **When Required.** Pursuant to Federal Rule of Appellate Procedure 27, an application for an order or other relief must be ordinarily made by motion. Motions generally fall into one of two categories: substantive and procedural. Substantive motions include, for example, motions for summary affirmance, motions to dismiss an appeal for lack of jurisdiction, or (in the criminal context) motions to enforce an appeal waiver. Procedural motions include motions for an extension of time or motions for leave to file an overlength brief. A non-exhaustive list of types of motions appears at the end of this chapter. *See also* the helpful motions tab on the Court's website: https://www.ca9.uscourts.gov/staff-attorneys/motions/.

B. **Timing.** Although there are specific rules for specific types of motions, you generally should file as soon as possible. Some of the specific time limits are as follows:

1. ***Motions to extend the time to file a brief***. In most appeals, any party (which includes an intervenor where intervention has been granted, but not pending intervenors or amicus) may submit one "streamlined" request for a 30-day extension of time to file a brief on the merits (not motions, bail memoranda, or original petitions and responses thereto). When intervention has been granted, an intervenor is a party. Written motions to extend the time for filing a brief are due at least 7 days before the brief is due. 9th Cir. R. 31-22(b). You may use Form 14 in lieu of preparing your own written motion for extension of time. Form 14 is accessible at https://www.ca9.uscourts.gov/forms/.

2. ***Motions for a stay***. 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. *See* 9th Cir. R. 27-2.

3. ***Motions challenging denials of requests to proceed* in forma pauperis *or revocations of IFP status.*** Under Federal Rule of Appellate Procedure 24(a)(5), an appellant has 30 days from the district court's denial of the request to proceed *in forma pauperis* on appeal – or the revocation of that status – to renew the request in the Court of Appeals.

4. ***Motions to intervene.*** Under Federal Rule of Appellate Procedure 15(d), a prospective intervenor has 30 days from the filing of a petition for review to move to intervene in an agency case.

5. ***Certificates of appealability.*** Under Ninth Circuit Rule 22-1(d), an appellant has 35 days from the district court's denial of a request for a certificate of appealability to file a motion for that relief in this Court.

6. ***Motions for leave to file an amicus brief.*** Under Federal Rule of Appellate Procedure 29(a)(6), a motion for leave to file a friend-of-the-Court brief is due within 7 days after the filing of the principal brief of the party the friend of the Court wishes to support. See 9th Cir. R. 29-2(e) for deadlines to file amicus briefs pertaining to post-disposition proceedings. When all parties consent to the filing of an amicus brief, no motion is necessary but the brief must be filed within 7 days after the filing of the principal brief that the amicus wishes to support.

7. ***Emergency motions.*** See Chapter VIII, Emergency Proceedings, below, regarding motions requiring relief within 21 days.

C. **Format.** A motion may not exceed 20 pages or 5,200 words in length, not counting the corporate disclosure statement and accompanying documents authorized by Federal Rule of Appellate Procedure 27(a)(2)(B), unless the Court permits or directs otherwise. Fed. R. App. P. 27(d)(2); 9th Cir. R. 27-1(1)(d), 32-3. Other Rules governing formatting are set forth at Federal Rule of Appellate Procedure 27(d) and 32(c), and Ninth Circuit Rules 27-1, 32-3. *See also infra* Checklists for Appellate Motions.

D. **E-filing.** Motions must be filed using the Court's e-filing system unless the filer is exempt. 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. 9th Cir. R. 27-1.

E. **Contents of Motion.**

1. ***Caption.*** 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.

2. ***Grounds and relief sought.*** A motion 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.

3. ***Prior recourse and bail status.*** In criminal and immigration cases, motions must indicate whether the movant has previously applied for the relief sought and provide the bail/detention status of defendant/petitioner. 9th Cir. R. 27-8. Although not required by the rules, providing a criminal defendant's projected release date is helpful to the Court.

4. ***Accompanying documents.*** 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.

5. ***Opposing party's position.*** You should include opposing counsel's position whenever possible, and if not, explain what steps you took to find out that position. Advisory Committee Note to 9th Circuit Rule 27-1.

6. ***Identity of the merits panel and oral argument date, if known.*** If the case has been assigned to a merits panel, you should include the information listed at Ninth Circuit Rule 25-4.

7. ***What should <u>not</u> be included:***

   a. A notice of motion.

   b. A proposed order.

   c. Irrelevant or unnecessary documents. Remember that the Court has access to the district court docket.

F. **<u>Answering a Motion.</u>** A response must be filed within 10 days after service of the motion unless the Court shortens or extends the time. The Court may decide a procedural motion before an opposition is filed. Fed. R. App. P. 27(b). Like the motion, it may not exceed 20 pages or 5,200 words in length. Fed. R. App. P. 27(d)(2). 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.

G. **<u>Reply.</u>** Any reply to a response must be filed within 7 days after service of the response. The reply is limited to 10 pages or 2,600 words in length. A reply must not present matters that do not relate to the response.

H. **Effect of Motion on Briefing Schedule.** Some motions stay the briefing schedule. 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. 9th Cir. R. 27-11. A motion for summary disposition will also stay briefing until the motion is decided. See https://www.ca9.uscourts.gov/staff-attorneys/motions/#Effect-of-Motions-on-Briefing. *Motions for reconsideration do not by themselves toll the schedule for record preparation and briefing.*

I. **Oral Argument.** There typically will not be oral argument on a motion, but the panel orders otherwise. Fed. R. App. P. 27(e).

J. **Motion for Reconsideration.** A party that disagrees with the decision on a motion may file a motion for reconsideration. 9th Cir. R. 27-10. 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 (with the exception that motions for reconsideration of dispositive orders in civil matters in which there is a federal party must be filed within 45 days). 9th Cir. R. 27-10. Please note that you should follow the procedures set out in Ninth Circuit Rule 27-10, *not* the procedures applicable for rehearing of merits panel opinions, memorandum dispositions, and dispositive orders. An opposition to a motion for reconsideration of a motions panel order may be filed only if the Court orders the filing of such a response. 9th Cir. R. 27-10(b). This prohibition applies solely to motions for reconsideration of a motions panel's order.

II. RULES PERTAINING TO SPECIFIC TYPES OF MOTIONS

A. **Criminal Appeals.** Motions filed in criminal appeals must include any previous application for the relief sought and the defendant's bail status. 9th Cir. R. 27-8.1.

B. **Immigration Petitions.** Motions in immigration cases must include any previous application for the relief sought and the petitioner's custody status. 9th Cir. R. 27-8.2.

C. **Motions to File Oversized Briefs.** Per Ninth Circuit Rule 32-2(a), the proposed brief *must* accompany the motion – no exceptions. However, be aware that Ninth Circuit Rule 32-2(b) provides for a routine enlargement of brief size under *limited* circumstances. As such, Circuit Rule 32-2(a) notes that the Court disfavors motions to exceed the applicable limits and will grant them "only upon a showing of diligence and extraordinary and compelling need," except in capital cases.

D. **Motions to Expedite.** Motions to expedite briefing and hearing may be filed and will be granted upon a showing of good cause. 9th Cir. R. 27-12. "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 after the filing of the notice of appeal; (2) the projected release date for an incarcerated criminal defendant is within 12 months after 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. An expedited schedule means a court reporter is not entitled to any extensions of

time to prepare the transcript, and extensions of time will be denied barring truly exceptional circumstances.

A motion to expedite should be filed early as calendars are prepared months in advance of hearing dates.

E. **Motions to seal.** A motion to seal must explain the specific reasons for sealing and describe the potential for irreparable injury in the absence of such relief. 9th Cir. R. 27-13. The Court will not seal a document based solely on the stipulation of the parties, and the fact that a document was filed under seal in district court is not a sufficient basis for filing it under seal in this Court. In the motion, you should request the least restrictive scope of sealing and limit the request in scope to only the specific documents or portion of documents that merit sealing, for example, propose redaction of a single paragraph or limit the request to a portion of a contract. The motion and document will be provisionally sealed pending a ruling on the motion.

1. ***E-filing.*** Under Circuit Rule 27-13, all documents – *including those under seal* – must be e-filed unless the filer is exempt from the electronic filing requirement. Each document or volume of documents submitted under seal shall include the words "UNDER SEAL" on its cover and/or first page.

2. ***Service.*** Because documents submitted under seal, including any motion to seal or notice of sealing or unsealing, will not be viewable to the parties via the Appellate Case Management System ("ACMS") or Case Management/Electronic Case Filing ("CM/ECF") systems noticing, any document, notice, or motion submitted under seal must be served on opposing counsel in paper form or, if all parties are registered for electronic filing, via email. *See* 9th Cir. R. 25-5(f).

3. ***Sealed excerpts.*** Rather than moving to file the entire excerpts of record under seal, a party shall submit any document(s) it wishes to seal as a separate, final volume. *See* 9th Cir. R. 27-13(c) and 30-1.4(d).

4. ***Notice of intent to file publicly.*** If the documents were under seal in the district court, but the filing party does not intend to ask that the materials continue under seal, file the documents provisionally under seal, along with a notice of intent to file publicly (see Ninth Circuit Form 20, entitled "Notice of Intent to Unseal," https://www.ca9.uscourts.gov/forms/), to allow any other party an opportunity to move for appropriate relief within 21 days of the notice.

   A non-party to the appeal may move to intervene for the limited purpose of moving to seal or maintaining the case under seal. Documents will remain provisionally sealed pending resolution of such a motion.

   Absent a motion by another party to continue the seal, or a notice pursuant to Circuit Rule 27-13(d), the provisional seal will be lifted *without notice* and the documents will be made available to the public.

5. ***Maintaining a case under seal.*** A party who wants a case that was fully sealed in the district court to remain fully sealed on appeal must file a motion to continue the seal *within 21 days* of the filing of the notice of appeal. The motion must explain with specificity (1) why the entire case must be sealed on appeal and (2) why no less restrictive alternatives are available. If the sealing is required by statute or procedural rule, a motion is not required; instead, a party must file a notice that references the appropriate statute or rule within 21 days of the filing of the notice of appeal (see Ninth Circuit Form 19, entitled "Notice of Sealing," https://www.ca9.uscourts.gov/forms/). If

you do not file a motion or notice, the seal may be lifted without notice and the case in full will be made available to the public.

6. ***Notice of filing documents under seal.*** Any sealed materials in the excerpts of record that are required to be maintained under seal must be submitted under seal, and must be accompanied by a notice of sealing under Ninth Circuit Rules 27-13(d) and 30-1.4(d) (when a statute or procedural rule requires that a document be filed under seal, use Ninth Circuit Form 19, entitled "Notice of Sealing," https://www.ca9.uscourts.gov/forms/).

7. ***Argument.*** Except as otherwise ordered by the Court, the Court will NOT close oral argument to the public in any type of case, even when the case itself or the briefs or excerpts of record have been filed under seal. A party seeking a closed hearing must move for such extraordinary relief at least 14 days prior to the scheduled argument date and explain with specificity (1) why such relief is required and (2) whether any less extraordinary alternative is available.

8. ***Motions to unseal.*** By contrast, motions to unseal may be made on any grounds permitted by law. The parties in a civil case may stipulate to the public filing in this Court of a document that was filed under seal in the district court. *See* 9th Cir. R. 27-13(h).

9. ***Dispositions.*** The Court will presumptively file any disposition publicly, even in cases involving sealed materials. If you think that the Court's disposition should be sealed, you must file a motion seeking that relief within 28 days of the completion of briefing.

10. ***Social Security and Immigration cases.*** Documents in Social Security and immigration cases, including administrative records, are not generally filed under seal in the Ninth Circuit. However, remote electronic access to documents is limited by rule to the parties to the case, though the documents will be available for public viewing in the Clerk's Office. *See* Fed. R. Civ. P. 5.2(c); Fed. R. App. P. 25(a)(5). Orders and dispositions in these cases are also presumed to be publicly available.

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. 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 filing of the opening brief or payment of the fee.

H. **Motions for voluntary dismissal.** In a criminal case, motions or stipulations for voluntary dismissal 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. Fed. R. App. P. 42; 9th Cir. R. 27-9.1; *see* 9th Cir. R. 27-9.2 (involuntary dismissal of criminal appeal).

I. **Motions for a stay of appellate proceedings or to hold an appeal in abeyance.** If possible, note the position of the opposing party with respect to the stay. Not that when intervention has been granted, an intervenor is a party. Per the Advisory Committee Note to Ninth Circuit Rule 27-1, it is possible to ask in the alternative for an extension of time to file your brief.

J. **Motions for a limited remand.** These are governed by Federal Rule of Appellate Procedure 12.1. A party may request a stay of appellate proceedings while the district court is considering whether to provide an indicative ruling. If the district court is inclined to consider the issue, the appellate court will often remand to allow it to do so.

K. **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 request. Consider whether it would be better to file a Federal Rule of Civil Procedure 60(b) motion in the district court, based on the additional evidence.

L. **Motions to withdraw as counsel.** There are very specific procedures outlined in Ninth Circuit Rule 4-1 for criminal/habeas appeals. In civil cases, you may file a notice of withdrawal or substitution in lieu of a motion (no form or other attachment is required), but you must provide the address of the client if the client will be appearing pro se. If the client is a corporation, new counsel must first enter an appearance or you must file a motion to withdraw and confirm that you have informed a corporate client that it may not proceed pro se.

M. **Requests for judicial notice.** The record on appeal ordinarily is limited to material that was before the trial court, but one recognized "exception[] to that general rule" is for facts and documents subject to judicial notice. *See Reebok Int'l, Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552, 556 n.5 (9th Cir. 1992). This is because Federal Rule of Evidence 201 permits a court to "judicially notice a fact that

is not subject to reasonable dispute [where] it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" and expressly permits judicial notice on appeal. Fed. R. Evid. 201(b), (d); *see also* Fed. R. Evid. 1101(a).

Although Rule 201(c) suggests that judicial notice "is mandatory 'if requested by a party and [the court is] supplied with the necessary information,'" *Papai v. Harbor Tug and Barge Co.*, 67 F.3d 203, 207 n.5 (9th Cir. 1995), *rev'd on other grounds*, 520 U.S. 548 (1997), the courts treat whether to take such notice as a matter of discretion, *see, e.g.*, *United States v. W.R. Grace*, 504 F.3d 745, 766 (9th Cir. 2007). Thus, any motion for judicial notice should explain not only why taking notice of the requested facts or material are "not subject to reasonable dispute," Fed. R. Evid. 201(b), but also why doing so is fair and just under the circumstances.

To this end, the Court has sometimes rejected attempts by appellants to obtain *reversal* based on materials that were never before the district court. *See, e.g., Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1000 (9th Cir. 2006). But where the appellee is requesting notice to *defend* the district court's ruling, the sandbagging concern is absent and the Court has been more receptive to taking notice. *See, e.g., Wilbur v. Locke*, 423 F.3d 1101, 1112 (9th Cir. 2005).

For example, the Court has taken notice of "various newspapers, magazines, and books," explaining that "[c]ourts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time.'" *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010). The Court has recognized the propriety of taking notice of materials that bear on the common usage and understanding of words and phrases. *See Mendler v. Winterland Production, Ltd.*, 207 F.3d 1119, 1122 (9th Cir. 2000); *Johnson v. Weedin*, 16 F.2d 105, 105 (9th Cir. 1926). And the Court has also taken notice of

widely accepted scientific facts, *see United States v. Howard*, 381 F.3d 873, 880 n.7 (9th Cir. 2004); the record or pleadings in other actions involving one of the same parties, *see Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007); registered trademarks, *see Au-Tomotive Gold, Inc. v. Volkswagen of America, Inc.*, 457 F.3d 1062, 1064 n.2, 80 U.S.P.Q.2d 1293 (9th Cir. 2006); and documents created by government agencies and employees, *see Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 851 n.10 (9th Cir. 2016).

Motions for judicial notice typically are filed contemporaneously with the brief that relies on the material subject to the request. Indeed, the Circuit Advisory Committee Note to Rule 27-1 expressly provides that "[t]he parties may refer to the materials the request addresses with the understanding that the Court may strike such references and related arguments if it declines to grant the request." Any motion for judicial notice will thus be considered by the panel assigned to decide the case.

N. **Motions for an extension of time.** Parties—not pending intervenors or amicus—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 (or Form 14, https://www.ca9.uscourts.gov/forms/, in lieu of a written motion).

1. ***Streamlined extension.*** The streamlined process applies to due dates for opening, answering, reply, and cross-appeal merits 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 and/or rehearing en banc, amicus briefs, and supplemental briefs ordered by the Court; to any briefs in Preliminary Injunction Appeals (9th Cir. R. 3-3), Incarcerated Recalcitrant Witness Appeals (28 U.S.C. § 1826) (9th Cir. R. 3-5), or Class Action Fairness Act appeals (28 U.S.C. § 1453(c)). You may seek a

streamlined extension of time only 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 submitting a streamlined request. Streamlined extensions of time are generally not available if the Court has expedited briefing. Per the Advisory Committee Note to Ninth Circuit Rule 31-2.2, the streamlined extension of time is intended to be the sole extension of time to file a given brief. When submitting the streamlined request, use the Filing Type "Streamlined Request to Extend Time to File Brief." No form, attachment, or motion is required with the ACMS or CM/ECF submission of a streamlined request for extension of time.

2. ***Non-streamlined extension.*** In lieu of preparing your own written motion for an extension of time, you may use Form 14, accessible at https://www.ca9.uscourts.gov/forms/. A written motion (or Form 14) should be filed 7 days before the brief is due. It must demonstrate diligence and substantial need, and, if you choose to prepare your own written motion (rather than utilizing Form 14), 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.

9th Cir. R. 31-2.2(b).

3. ***Effect of motion.*** If your motion for an extension of time has not been acted upon and the deadline for your brief is rapidly approaching, do not fret. Circuit Advisory Note to Rule 31-2.2 ("If a party files a motion for a first extension of time to file a brief on or before the due date for the brief, and the Court does not rule on the motion until shortly before the due date, or on or after the due date for the brief, the Court ordinarily will grant some additional time to file the brief even if the Court does not grant the motion in full.").

O. **Motions for reconsideration of orders issued by a motions panel.** Motions for reconsideration of non-dispositive orders must be filed within 14 days in all cases. 9th Cir. R. 27-10; Gen. Order 6.11. 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, motions 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.

P. **Motions to file amicus curiae briefs.** Per Federal Rule of Appellate Procedure 29(a)(3), the motion must be accompanied by the proposed brief. Federal Rule of Appellate Procedure 29(a)(3) includes other required recitals that must be included in the motion. Under Ninth Circuit Rule 29-3, the movant must describe its efforts to obtain the consent of the parties to the filing of the brief. (If all parties

consent, there is no need to file a motion.) Parties can anticipate that the motions will be referred to the merits panel for resolution; that panel is in the best position to determine whether the brief would be helpful. See 9th Cir. R. 29-2 for procedures governing amici briefs pertaining to post-disposition proceedings.

Q. **Motions to transmit physical or documentary exhibits.** Under Ninth Circuit Rule 27-14, if an exhibit was not recorded in the district court's electronic casefile, such as a video or audio exhibit, and a party considers review of the exhibit to be important in resolving the appeal, that party should file a motion to transmit a physical exhibit – with a notice or motion to seal or unseal the physical exhibit if the district court admitted it under seal, also paying careful attention to the procedures and requirements under Circuit Rule 27-13 (*see also* Ninth Circuit Forms 19 and 20). The exhibit or a copy thereof should not accompany the motion. The Court will not rule on the motion until after the principal briefs are filed; review of the briefs will inform the decision on the motion. Documentary exhibits that were presented to and considered (or rejected) by the district court may be included in the excerpts of record without a motion to transmit exhibits.

R. **Motions to certify a state-law issue to a state supreme court.** Federal courts of appeals may certify a state law question to a state's highest court if certain considerations are satisfied. Generally speaking, the courts of appeals will consider so certifying if the "dispute presents novel issues of state law peculiarly calling for the exercise of judgment by the state courts." *McKesson v. Doe*, 592 U.S. 1, 5 (2020). The Ninth Circuit certified nearly four times as many questions between 2015 and 2019 (84) as it did between 1990 and 1994 (23).

Whether to certify is a matter commended to the Court's discretion, and the Court will more often certify a state question on its own (or after soliciting the parties' views)

than in response to a motion. That said, in an appropriate case, a motion for certification may motivate the Court to consider certification earlier than it might otherwise have considered doing so. Litigants should be aware, however, that the Court looks with disfavor upon motions to certify that are filed after the moving party has failed to avail itself of a prior opportunity to seek certification. *See, e.g.*, *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1108 (9th Cir. 2013), *as amended on denial of reh'g and reh'g en banc* (July 8, 2013) (denying certification and criticizing moving party for filing motion a month and a day after oral argument from which "any objective witness . . . would have concluded that the chances that [the movant] would prevail on the merits were slim at best"); *Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008) (denying certification and noting a "presumption against certifying a question to a state supreme court after the federal district court has issued a decision").

In most cases, the question whether to certify a case to the state's highest court will be addressed by the merits panel after the completion of briefing. Include your certification request in your merits brief.

APPENDIX: TYPES OF MOTIONS[4]

1. Threshold Motions to Establish or Defeat Appellate Jurisdiction
   a. Motion to Dismiss the Case or Appeal (including for mootness)
   b. Motion to Dismiss for Lack of Jurisdiction
   c. Motion to Dismiss Case for Failure to Prosecute under Ninth Circuit 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 joint motion is often appropriate)
   a. Motion to Intervene (including in agency proceeding)
   b. Motion to Substitute Party
   c. Motion to Participate as Amicus Curiae
   d. Motion to Hear Case with Other Case
   e. Motion to Consolidate Cases or Separate Appeals in the Same Case

4. Motions to Speed Up, Shorten, Suspend, Terminate, or Reinstate Appeal
   a. Motion 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. Motion to Stay Proceedings
   d. Motion to Stay Proceedings Pending Settlement

---

[4] See the last chapter of the User Guide at this link for a complete list of filing types in CM/ECF: https://cdn.ca9.uscourts.gov/datastore/uploads/cmecf/ecf-user-guide.pdf.

e. Motion to Dismiss the Case Voluntarily Pursuant to Rule 42(b)
f. Motion to Reinstate Case After FRAP 42-1 Dismissal

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

6. Motions Regarding Oral Argument (these are discouraged, especially close to oral argument date)
   a. Motion to Reschedule Oral Argument
   b. 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. Motion to File Oversized Brief
   b. Motion to Strike Portion/Whole of Document

9. Motions Pertaining to the Content of the Record on Appeal
   a. Motion to Supplement Record on Appeal
   b. Motion to Take Judicial Notice
   c. Motion to Unseal Document
   d. Motion to Seal Document
   e. Motion to Transmit Physical and/or Documentary Exhibits

10. Motions for Sanctions

11. Motions Regarding Fees and Costs
   a. Motion to Proceed *In Forma Pauperis*
   b. Motion to Complete Production of Reporters Transcript at Government Expense
   c. Motion for Attorney's 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. Motion to Stay the Mandate
d. Motion to Recall Mandate

TOP-10 TECHNICAL FLAWS IN MOTIONS

1. **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. 9th Cir. R. 27-8.1, 8.2.

2. **INCORRECT OFFICIAL CAPTION OR ABBREVIATED CAPTION.** The official caption or abbreviated caption is incorrect. Fed. R. App. P. 32(a)(2)(A)-(D).

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

4. **NO GROUNDS STATED FOR ENLARGEMENT OF TIME.** The motion does not state the grounds for an enlargement of time. Fed. R. App. P. 27(a)(2)(A); 9th Cir. R. 31-2.2(b).

5. **INCORRECT FONT SIZE.** Font size is less than 14-point. Fed. R. App. P. 32(a)(5)(A).

6. **NO RECITAL OF PREVIOUS APPLICATIONS FOR THE RELIEF SOUGHT.** Fed. R. App. P. 8; 9th Cir. R. 27-8.1, 8.2.

7. **INCORRECT SPACING.** The text is not double spaced. Fed. R. App. P. 27(d)(1)(D).

8. **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. 9th Cir. R. 27-1, 31-2.2(b)(6).

9. **NOT SEARCHABLE.** The reader must be able to electronically search the text of the document. 9th Cir. R. 25-5(d).

10. **INCORRECT CASE NUMBERS.**

VIII.
EMERGENCY PROCEEDINGS

I. OVERVIEW

Except as otherwise stated 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 OR NOT

A. **Time Constraint.** Under Ninth Circuit Rule 27-3, an emergency motion is one that a movant says must be decided within 21 days to avoid irreparable harm. (Counsel must certify to the Court that all representations are true and counsel is encouraged to use Ninth Circuit Form 16 to do so.) The date by which relief is needed should be specified in the caption under the legend "Emergency Motion Under Circuit 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. 9th Cir. R. 27-2.

B. **Significant and Irreparable Harm.** Emergency motions should be filed only when significant and irreparable harm to a party will result if relief is not obtained within 21 days. For example, the imminent knocking down of a building would justify filing an emergency motion. Motions for procedural relief (such as for an extension of time) do not meet this standard. *See* Advisory Committee Note to 9th Cir. R. 27-3. When filing a motion relating to specific harm that will occur more than 21 days later but by a date certain, include that date on the caption page of the motion and explain in the motion the nature of the harm and the significance of the date. 9th Cir. R. 27-1(3).The Court will do its best to provide a ruling on the motion within the requested time if the motion justifies the request.

III. PRE-REQUISITES AND NOTICE

A. **Relief Sought Below.** Most motions (e.g., a motion to stay a preliminary injunction pending appeal) must be filed *first* in the federal district court (or Bankruptcy Appellate Panel or agency, if relief was available). Fed. R. App. P. 8(a). You must explain why the requested emergency relief could not have been sought earlier. *See* 9th Cir. R. 27-3(c)(iii). If relief was available, Ninth Circuit Rule 27-3(c)(v) 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. **Appeal or Petition Pending.** An emergency motion may be filed *only* if an appeal or petition is pending in the Court of Appeals. If the appeal or petition was recently filed, and counsel does not yet have a Ninth Circuit case number or access to the e-filing system, counsel should contact the court by email (emergency@ca9.uscourts.gov) or telephone ((415) 355-8020).

C. **Notice Provided.** Before filing an emergency motion, a movant must "make every practicable effort" to contact the court (either by email at emergency@ca9.uscourts.gov or telephone at (415) 355-8020) and opposing counsel, and to serve the motion, at the earliest possible time. 9th Cir. R. 27-3(a). The earliest possible time may be as soon as counsel knows that an emergency motion will be filed. If the emergency motion requires a very quick turnaround (e.g., less than 48 hours), counsel may want to call while the request for relief is still pending in the 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 (e.g., delaying enforcement or implementation of an injunction for a week to permit the Court of Appeals to rule on an emergency stay application).

If a matter requires attention before the next business day, the court can be contacted after hours by email (emergency@ca9.uscourts.gov) or telephone ((415) 355-8020).

IV. CONTENTS OF EMERGENCY MOTION AND HOW TO FILE

A. **Contents.** Ninth Circuit Rule 27-3 outlines the required cover page and certificate of counsel that must follow the cover page. To facilitate proper handling, the cover page must style the motion as an "Emergency Motion Under Circuit Rule 27-3." The required Form 16, entitled "Circuit Rule 27-3 Certificate for Emergency Motion," must be completed and submitted. In other respects, the general rules regarding contents of a motion, outlined in Federal Rule of Appellate Procedure 27, discussed above in Section VII, apply.

V. SPECIAL CONSIDERATIONS FOR BAIL MOTIONS (9TH CIR. R. 9-1)

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. The required caption for the notice of appeal, the briefing schedule, and the documents required to accompany the memorandum in support of the motion, are set forth in Ninth Circuit Rule 9-1.1.

B. **Appeals of Orders Regarding Release After Judgment.** When an appeal is pending from an underlying criminal judgment or sentence, a party may file a motion for bail pending appeal (or for revocation of bail) under Federal Rule of Appellate Procedure 9(b). However, the motion *must* first have been made (orally or in writing) in the district court. The documents required to accompany the motion and the briefing schedule are set forth in Ninth Circuit Rule 9-1.2.

VI. SPECIAL CONSIDERATIONS FOR INTERLOCUTORY CRIMINAL APPEALS

Under Ninth Circuit Rule 27-4, parties to interlocutory criminal appeals (pretrial or midtrial) may use the emergency motion procedure in Rule 27-3 to request that the interlocutory appeal be expedited or disposed of summarily. The rule sets out specific materials that should be included with the motion regarding the ongoing criminal proceedings.

VII. SPECIAL CONSIDERATIONS FOR CAPITAL MOTIONS (MOTIONS FOR STAYS OF EXECUTION) (9TH CIR. R. 22-2, 22-4, 22-6)

A. **Submission to Lower Court.** A motion for 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, if so on what grounds, and if not, why the motion should not be remanded. One exception is a motion for stay of execution that is filed with an application for leave to file in the district court a second or successive ("SOS") petition. SOS applications are filed first in the Court of Appeals.

B. **When to Notify the Court.** Counsel should notify the court by telephone (415-355-8020) or e-mail (emergency@ca9.uscourts.gov) as soon as counsel is aware that emergency relief will be sought from the Court of Appeals.

C. **Appeal or Petition Pending.** An emergency motion may be filed *only* if an appeal or petition is pending in the Court of Appeals. If an appeal or petition was recently filed, and counsel does not yet have a Ninth Circuit case number or access to the e-filing system, counsel should contact the court by telephone (415-355-8020) or e-mail (emergency@ca9.uscourts.gov).

VIII. SPECIAL CONSIDERATIONS FOR IMMIGRATION MOTIONS

Under General Order 6.4(c), the filing of an initial motion or request for stay of removal temporarily stays the order of removal until further order of the Court, so the motion for stay need not be filed as an emergency. However, if a prior motion for stay was denied, any later motion for stay or for reconsideration may be filed as an emergency if removal is imminent. If you need to file a petition for review and/or motion to stay removal as an emergency (*i.e.,* if removal is imminent), counsel should contact the court by phone (415-355-8020) or email (emergency@ca9.uscourts.gov).

IX.
DRAFTING THE BRIEF

I. WORD LIMITS FOR BRIEFS

There are many different kinds of written filings that are acceptable to the Ninth Circuit Court of Appeals, including ones that are technically motions or petitions, but are still colloquially thought of as briefing. The following chart sets the word limits for these filings. Note that court rules or orders that refer to briefs do not set the requirements for motions, petitions, or answers to motions or petitions.

The word count refers to the body of the brief (*i.e.*, from the first sentence to the last) and includes footnotes and headings, as well as any words in an embedded image that are meant to be read. It does not include the caption, signature block, certificates, statements, or addenda. Fed. R. App. P. 32(f); 9th Cir. R. 32-1(c), (f).

Type of brief	Word or page limit for attorney, barring specific court order	Source	Word or page limit for joint briefs	Source	Word or page limit for unrepresented litigant, barring specific court order	Source
Opening or Answering brief (principal brief)	14,000 words or 30 pages	9th Cir. R. 32-1(a); Fed. R. App. P.32(a)(7)(A)	14,000 words +1,500 words or 5 pages and requires Form 8	9th Cir. R. 32-2(b)	50 pages handwritten or typed	9th Cir. R. 32-1(g)
First or Third cross-appeal brief (Principal brief or Response/reply brief in	14,000 words or 30 pages	9th Cir. R. 28.1-1(b); Fed. R. App. P. 28.1(e)(1)	14,000 words +1,500 or 5 pages and requires Form 8	9th Cir. R. 32-2(b)	50 pages handwritten or typed	9th Cir. R. 28.1-1(g)

Type of brief	Word or page limit for attorney, barring specific court order	Source	Word or page limit for joint briefs	Source	Word or page limit for unrepresented litigant, barring specific court order	Source
cross-appeal)						
Second cross-appeal brief (Response/principal brief in cross-appeal)	16,500 words or 35 pages	9th Cir. R. 28.1-1(c); Fed. R. App. P. 28.1(e)(1)	16,500 words +1,500 words or 5 pages and requires Form 8	9th Cir. R. 32-2(b)	59 pages handwritten or typed	9th Cir. R. 28.1-1(g)
Reply brief or Cross-appeal reply brief	7,000 words or 15 pages	9th Cir. R. 28.1-1(d), 32-1(b); Fed. R. App. P. 28.1(e)(1), 32(a)(7)(A)	7,000 words + 1,500 words or 5 pages and requires Form 8	9th Cir. R. 32-2(b)	25 pages handwritten or typed	9th Cir. R. 28.1-1(g), 32-1(g)
Opening or Answering brief in capital case	21,000 words	9th Cir. R. 32-4				
Reply brief in capital case	9,800 words	9th Cir. R. 32-4				
Amicus brief on initial merits	7,000 words or 15 pages	Fed. R. App. P. 29(a)(5)				
Amicus brief while petition for rehearing is pending	4,200 words or 15 pages	9th Cir. R. 29-2(c)(2)				
Amicus brief after court has voted to rehear case	7,000 words or 25 pages	9th Cir. R. 29-2(c)(3)				

Type of brief	Word or page limit for attorney, barring specific court order	Source	Word or page limit for joint briefs	Source	Word or page limit for unrepresented litigant, barring specific court order	Source
9(a) bail appeal memorandum or Response to 9(a) bail appeal memorandum	5,200 words or 20 pages	Fed. R. App. P. 27(d)(2)(A); 9th Cir. R. 27-1(1)(d)				
Reply on 9(a) bail appeal memorandum	2,600 words or 10 pages	Fed. R. App. P. 27(d)(2)(C); 9th Cir. R. 27-1(1)(d)				
Petition for rehearing or ordered Response to petition for rehearing	4,200 words or 15 pages	9th Cir. R. 40-1(b)				
Petition for permission to appeal, Cross-petition, or Answer under Fed. R. App. P. 5	5,200 words or 20 pages	Fed. R. App. P. 5(c); 9th Cir. R. 5-2(b)				
Petition for writ of mandamus or prohibition under Fed. R. App. P. 21	7,800 words or 30 pages	Fed. R. App. P. 21(d); 9th Cir. R. 21-2(c)				

Type of brief	Word or page limit for attorney, barring specific court order	Source	Word or page limit for joint briefs	Source	Word or page limit for unrepresented litigant, barring specific court order	Source
Motion or Response to motion	5,200 words or 20 pages	Fed. R. App. P. 27(d)(2); 9th Cir. R. 27-1(1)(d)				
Reply to response to motion	2,600 words or 10 pages	Fed. R. App. P. 27(d)(2); 9th Cir. R. 27-1(1)(d)				

II. MANDATORY SECTIONS OF THE PRINCIPAL MERITS BRIEF[5]

This section focuses on the opening and answering merits briefing (including in cross-appeals) filed by counsel under Federal Rules of Appellate Procedure 28–32.1, and Ninth Circuit Rules 28-1, 28-2, 28.1-1, 32-1, 32-2, 32-3, 32-4. *See also infra* Checklists for Appellate Briefs. The structure for these briefs may be helpful when drafting other filings, but may not be strictly required. Briefs that fail to comply with these Rules may be stricken by the Court. 9th Cir. R. 28-1(a). This section also provides some practice tips.

A. **Cover.** The front cover of a brief must contain: (a) the Ninth Circuit case number centered at the top; (b) the name of the court; (c) the title of the case (this is the caption identifying the name and litigating position of the parties, per Federal Rule of Appellate Procedure 12(a)); (d) the nature of the proceeding (*e.g.*, appeal, petition for review, etc.) and the

[5] A model "shell" brief is available at https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000858.

name of the court, agency, or board whose decision is being appealed; (e) the title of the brief, identifying the party or parties for whom the brief is filed; and (f) the name, office address, and telephone number of counsel representing the party for whom the brief is filed. It is often helpful to include counsel's email address. The cover of the paper copies of briefs must be the following colors: appellant's brief—blue, appellee's brief—red, intervenor's or amicus curiae's brief—green, any reply brief—gray, and any supplemental brief—tan. The cover of the electronic version of a brief does not need to be colored. Fed. R. App. P. 32(a)(2).

B. **Table of Contents.** The table of contents must list the brief's sections and headings, along with the page numbers where they appear. Fed. R. App. P. 28(a)(2). Consider using descriptive headings so that a judge reviewing the Table of Contents can quickly understand the structure of the brief and the arguments you are advancing.

C. **Table of Authorities.** The table of authorities must list all the cases (alphabetically arranged), statutes, and other authorities cited, along with the page numbers where they appear. Fed. R. App. P. 28(a)(3).

D. **Introduction.** Neither the Federal Rules of Appellate Procedure nor the Ninth Circuit Rules require an introduction. However, a short introduction assists the Court by succinctly explaining the nature of the case and the core arguments.

E. **Jurisdictional Statement.** The jurisdictional statement must set forth, in the following order: (a) the statutory basis for subject matter jurisdiction of the district court or agency whose decision has been appealed, (b) the basis for claiming that the judgment or order appealed from is final or otherwise appealable, including the statutory basis of jurisdiction in this Court, and (c) the facts pertinent to timeliness, including the date of entry of the judgment or

order appealed from, the date of filing of the notice of appeal or petition for review, and the statute or rule under which the appeal is timely. The jurisdictional statement should include both citations to the applicable statutory provisions and the facts establishing jurisdiction under them. Fed. R. App. P. 28(a)(4); 9th Cir. R. 28-2.2. If the appellee or respondent agrees with the appellant's or petitioner's jurisdictional statement, the answering brief need not include this. Fed. R. App. P. 28(b)(1).

F. **Bail/Detention Status.** The opening brief in a criminal appeal must address the defendant's bail status. If the defendant is in custody, the projected release date should be included. 9th Cir. R. 28-2.4(a). 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. 9th Cir. R. 28-2.4(b).

G. **Statement of the Issues Presented for Review.** State the issue(s) in a succinct way—preferably one that suggests the answer you want without being too argumentative. Fed. R. App. P. 28(a)(5). If the appellee or respondent agrees with the appellant's or petitioner's statement, the answering brief need not include this. Fed. R. App. P. 28(b)(2).

H. **Statement of the Case.** This section should concisely set forth the facts relevant to the issues submitted for review, describe the relevant procedural history, and identify the rulings presented for review, with appropriate references to the record. Fed. R. App. P. 28(a)(6). If the appellee or respondent agrees with the appellant's or petitioner's statement, the answering brief need not include this. Fed. R. App. P. 28(b)(3).

The statement of the case should be accurate and comprehensively set forth all of the facts relied upon in your argument section. Leaving out inconvenient facts will damage your credibility. In some briefs, it may be advisable to include a Background section in your Argument with relevant details pertaining to the specific argument. This should read like a compelling story of what happened.

I. **Summary of Argument.** The summary must contain a succinct, clear, and accurate condensation of the arguments made in the body of the brief and must not merely repeat the argument headings. Fed. R. App. P. 28(a)(7). This section should also make clear how your various arguments relate to one another. For example, if the Court need not reach argument B if it rules in your favor on argument A, say so.

J. **Argument.**

1. ***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 "Standard of Review" heading preceding the discussion of the issues). Fed. R. App. P. 28(a)(8)(B); 9th Cir. R. 28-2.5. If the appellee or respondent agrees with the appellant's or petitioner's statement, the answering brief need not include this. Fed. R. App. P. 28(b)(4). The brief must also identify where in the record each issue was raised and ruled on. The Ninth Circuit's website includes an outline of standards of review (https://www.ca9.uscourts.gov/guides/standards-of-review/). The outline can be a useful starting point, but please make sure you conduct your own independent research.

2. ***Objection raised below***. If a ruling challenged 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), the appellant must state where in the record the objection and ruling are set forth.

3. ***Argument.*** The appellant or petitioner must present their contentions and the reasons supporting them, with citations to the relevant authorities and to the parts of the record on which the appellant relies. Fed. R. App. P. 28(a)(8)(A). Failure to develop an argument constitutes waiver of that argument.

It is often advisable to begin with your strongest argument. Omitting implausible or weak arguments can strengthen your brief's overall persuasiveness. Disclosing controlling adverse authority is required.

The appellee or respondent must respond to the arguments raised in the opening brief. It is often helpful to address the arguments in roughly the same order as the appellant's brief, but you may wish to deviate, for example, to raise a threshold issue (*e.g.*, standing) that the appellant has not addressed.

K. **Conclusion.** The brief must include a short conclusion stating the precise relief sought. Fed. R. App. P. 28(a)(9). In many briefs, the conclusion consists of a single sentence telling the Court exactly what action it should take. For example: "For the reasons stated above, the defendant respectfully requests that this Court affirm the district court's order." Or: "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.").

L. **Statement of Related Cases.** Each party must identify in a statement at the end of its initial brief (after the Conclusion and before the certificate of compliance) any known related cases pending in the Ninth Circuit. Cases are deemed "related" if they: (a) arise out of the same or

consolidated cases in the district court or agency; (b) raise the same or closely related issues; or (c) involve the same transaction or event. The statement should include the name and appellate docket number of the related case and describe its relationship to the case being briefed. 9th Cir. R. 28-2.6. If you do not know of any related cases in this Court, no statement is required. If you are/represent the appellee(s), you do not need to include any related cases that have already been identified by the appellant(s). Ninth Circuit Form 17 (https://www.ca9.uscourts.gov/forms/) may be used in place of creating your own statement of related cases. The statement of related cases constitutes a certificate of counsel, excluded from the page and word limitations of Federal Rule of Appellate Procedure 32(f) and Ninth Circuit Rule 32-1.

M. Addendum.

1. ***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. If you include them in an addendum, you must indicate in the brief after the statement of issues that the authorities are set out in an addendum. The addendum must be bound with but separated from the body of the paper copies of the brief (and from any other addenda) by a distinctively colored page. A party need not resubmit material included in any prior brief or addendum, but the brief should include a statement indicating, "Except for the following, all pertinent statutory authorities are set out in the [indicate appellate party designation]'s previously filed [indicate brief or addendum]." 9th Cir. R. 28-2.7.

2. ***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 paper copy of the brief but separated from the brief by a distinctively colored page. 9th Cir. R. 28-2.7.

N. **Certificate of Compliance.** The brief must include a certification that the document complies with the applicable type-volume limitation. Fed. R. App. P. 32(g). The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. Ninth Circuit Form 8 (https://www.ca9.uscourts.gov/forms/) must be used to certify compliance. Federal Rule of Appellate Procedure 32(f) sets forth the items in the brief that may be excluded when computing the length of the brief (*e.g.*, the statement of related cases); all other items must be included. If using a word processor's word count function to determine the brief's length, *be sure that the function is set to include words that appear in footnotes*.

O. **Certificate of Service (if required).** Where all case participants are registered for electronic filing, no certificate of service or service of paper copies upon other parties and counsel registered for electronic filing is necessary. *See* 9th Cir. R. 25-5(g)(1). Registration for the Appellate Electronic Filing System constitutes consent to electronic service. *See* 9th Cir. R. 25-5(g)(1). Case initiation filings in original proceedings and petitions for review, any sealed filings, and any electronically submitted filing in a case involving a pro se litigant or an attorney who is not registered for the Court's electronic filing system must be served in person or by mail or email pursuant to Fed. R. App. P. 25(c)(1) and be accompanied by a certificate of service stating the date and method of service. 9th Cir. R. 25-5(g)(2). Parties may use Ninth Circuit Form 15 (https://www.ca9.uscourts.gov/forms/).

III. OTHER BRIEFS

A. **Reply Briefs.** Although filing a reply brief is optional, most litigants file one. The reply brief must contain tables of contents and authorities, with appropriate page references. Fed. R. App. P. 28(c); 9th Cir. R. 28-1(a). The word limit is lower than for a principal brief, and you should focus on responding to the answering brief's contentions.

B. **Cross-Appeals.** Federal Rule of Appellate Procedure 28.1 and Ninth Circuit Rule 28.1-1 govern briefing in cases involving a cross-appeal and address the required contents of each brief, the colors of the covers, and length. In particular, parties should be aware that the cross-appeal reply brief is limited to the issues raised by the cross-appeal.

C. **Supplemental Briefs.** A supplemental brief filed pursuant to a court order or accompanying a motion to file a supplemental brief must contain tables of contents and authorities, with appropriate page references, unless the Court directs or permits the brief to be in letter format. 9th Cir. R. 28-1(a).

D. **Amicus Briefs.** **W**hile the United States or its officer or agency or a state may file an amicus curiae brief without consent of the parties or leave of court, any other amicus curiae may file a brief only by leave of court or, during the principal briefing stage, if the brief states that all parties have consented to its filing, but the Court may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification. Fed. R. App. P. 29(a)(2); 9th Cir. R. 29-2. The Court disfavors the filing of multiple amicus curiae briefs raising the same points in favor of one party and encourages amici to file a joint brief. Circuit Advisory Committee Note to 9th Cir. R. 29-1.

1. ***Motion for leave to file.*** If the parties do not consent to the filing of a non-governmental amicus brief, or if the non-governmental amicus brief is filed during the

petition for rehearing stage, the would-be amicus must file a motion for leave to file the amicus brief. Fed. R. App. P. 29(a)(2); 9th Cir. R. 29-2(a). The motion must be accompanied by the proposed brief and state the movant's interest, why an amicus brief is desirable, and why the matters asserted are relevant to the disposition of the case. Fed. R. App. P. 29(a)(3).

2. ***Disclosure statement.*** Any amicus or prospective amicus that is a nongovernmental corporation, association, joint venture, partnership, limited liability company, or similar entity must file a disclosure statement with its initial pleading in the case. Fed. R. App. P. 26.1; 9th Cir. R. 26.1-1. The disclosure statement must be separate from the brief or other pleading and completed using Ninth Circuit Form 34 (https://www.ca9.uscourts.gov/forms/).

3. ***Contents and form.*** An amicus brief must comply with Federal Rule of Appellate Procedure 32. In addition to those requirements, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Fed. R. App. P. 28, but must include:

   - A table of contents;
   - A table of authorities;
   - A concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;
   - Unless the amicus curiae is the United States, or its officer or agency, or a state, a statement whether a party's counsel authored the brief in whole or in part, whether a party or party's counsel contributed money that was intended to fund preparing or submitting the brief, or

whether a person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief (and if so, identifies each person);

- An argument; and
- A certificate of compliance.

Because the Court will review the amicus briefs in conjunction with the parties' briefs, amicus briefs should not repeat arguments or factual statements made by the parties.

4. ***Amicus briefs on the initial merits.***

   a. Length. Amicus briefs are limited to 7,000 words or 15 pages. Fed. R. App. P. 29(a)(5).

   b. Time for filing. An amicus must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus that does not support either party must file its brief no more than 7 days after the appellant's or petitioner's principal brief is filed.

5. ***Amicus briefs filed in support of, or in opposition to, a petition for panel or en banc rehearing or during the pendency of rehearing.*** An amicus curiae may be permitted to file a brief when the Court is considering a petition for panel or en banc rehearing or when the Court has granted rehearing. 9th Cir. R. 29-2. As a general matter, the Court considers the filing of amicus curiae briefs related to petitions for rehearing or en banc review to be appropriate only when the post-disposition deliberations involve novel or particularly complex issues. Circuit Advisory Committee Note to 9th Cir. R. 29-2.

a. Format and length. Ninth Circuit Rule 29-2(c) addresses the requirements for format and length. In particular, amici are limited to 15 pages or 4,200 words for a brief submitted while a petition for rehearing is pending and 25 pages or 7,000 words for a brief submitted after the Court has voted to rehear a case.

b. Time for filing. An amicus brief submitted to support or oppose a petition for rehearing must be served (along with a motion for leave if filed by a non-governmental amicus curiae) no later than 10 days after the petition or response of the party the amicus curiae wishes to support is filed or is due. An amicus brief that does not support either party must be served no later than 10 days after the petition. 9th Cir. R. 29-2(e)(1). With respect to briefs submitted during the pendency of rehearing, an amicus curiae supporting the petitioning party or not supporting either party must serve its brief no later than 21 days after the petition for rehearing is granted. An amicus curiae supporting the position of the responding party must serve its brief no later than 35 days after the petition for rehearing is granted. 9th Cir. R. 29-2(e)(2).

IV. WRITING A BRIEF

A. <u>Brief-Writing Practice Tips.</u> 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 surnames or consistent descriptive terms such as "employer" or "the bank." Fed. R. App. P. 28(d).

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

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

e. Use emphasis (*i.e.*, bolding, italicizing, underlining) sparingly.

f. The word limit is a maximum; you need not use your entire allocation. 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 . . ."). That said, failure to fully develop an argument constitutes waiver. And parties may 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. 9th 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.

g. If you are the appellant, explain not only why the lower court or agency erred, but also what the correct result under the law is and why that means your client should win. Although each case is different, it is often effective to structure each issue in the argument section by first

identifying the applicable law, then explaining why your client wins under that law, given the facts and standard of review.

h. If you are the appellee, do not focus solely on the other side's brief. Explain why the district court reached the correct result, which can be for reasons other than those articulated by the district court if supported by the record. After articulating why you win, it is often easier to then debunk the arguments made in the opening brief.

i. Be straightforward about the case's strengths and weaknesses, both factual and legal. In particular, you must disclose controlling adverse authority even if the other side has not raised it. Addressing adverse authority allows you to frame the relevant question and explain in the first instance why that authority does not control here.

j. Address case or statutory authority relied on by the lower court or agency.

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

l. Do not waste time arguing obvious or undisputed points.

m. Do not use boilerplate, especially regarding well-established standards, but if there is a controlling standard, include it.

B. **Record Citation.** Be accurate. According to the Ninth Circuit's Rules, "*[e]very* assertion in briefs regarding matters in the record shall be supported by a reference to the location in the excerpts of record where the matter is to be found," unless the filer is exempt from the excerpts requirement. 9th Cir. R. 28-2.8 (emphasis added). In immigration cases, the parties should cite to the certified administrative record.

Ninth Circuit Rule 28-2.8 allows parties to omit record citations for "undisputed facts offered only for general background." The commentary to the Rule specifies that "citations directly to the underlying record are . . . prohibited." One of the most common reasons cited in moving to strike a brief is the failure to adequately cite to the record. Ninth Circuit Rule 30-1.6 sets forth specific conventions to be used when citing to the Excerpts of Record:

> Parties shall cite to the initial Excerpts of Record in the following format: [volume number]-ER-[page number(s)]. If only one volume exists, the volume number shall be omitted. Multi-volume examples: 1-ER-12, 4-ER-874–76. Single-volume example: ER-26–32. The same format applies to Supplemental Excerpts of Record except that "SER" applies rather than "ER." The same format applies to Further Excerpts of Record except that "FER" applies rather than "ER." Multiple parties on the same side of an appeal who are submitting separate excerpts must include a unique identifier in the citation, such as 1-JonesER-59. Arabic numerals should be used for numbers, rather than Roman numerals. Citations to several nonsequential pages should use the complete citation format, such as "2-ER-51, 2-ER-98." Citations to the administrative record in social security cases shall be CAR-[page number]. Citations to the administrative record in immigration cases shall be to AR-[page number]. Citations to presentence report documents shall be PSR-[paragraph number and/or page number].

Note that strict compliance with Rule 30-1.6's conventions is required, most significantly the use of hyphens (-) between the volume number, ER/SER/FER/CAR/AR/PSR abbreviation, and first page number, and then en dashes (–) to note the range in multi-page citations.

C. **Legal Citation.** Support your argument with appropriate legal authorities, cited according to the Bluebook convention. Be accurate. When appropriate to do so, quote directly from the language in the cases and in the record as you write the argument, rather than paraphrasing. Although you should avoid block quotes, incorporating the language from the record and cases into your brief builds credibility and makes it easier for the reader to accept your representations about the record and cases. You should ordinarily not cite any unpublished decisions issued prior to January 1, 2007. Fed. R. App. P. 32.1; 9th Cir. R. 36-3. You should avoid 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. 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

D. **Tone.** Be respectful. To quote the late Chief Judge Browning, you can "disagree without being disagreeable." Argue the merits of your case, not the integrity of your opponent or the court with whom you disagree.

E. **Clean Copy.** Proofread for misspellings, grammatical mistakes, and other errors. Do not assume that spellcheck will catch every error. Do not assume you will be able to submit an errata later to correct typos or nits. The Court no longer accepts errata for briefs and excerpts of record, so you would need to file a motion to submit a replacement brief. Also, pay attention to typography. Your brief may be considered by as many as four different audiences at the Court—case management attorneys performing the initial inventory of the case, staff attorneys assisting members of the Court if the case is deemed suitable for a screening panel, in-chambers law clerks if the case is assigned to a merits panel, and the judges. Each potential audience member may use different methods for reviewing your brief:

on paper, on a computer screen, or on a tablet. Your goal should be to maximize readability and retention. Font choice, avoiding or minimizing block quotes, and minimizing white space, over-emphasis (*i.e.*, combining more than one of italics, underlining, and bolding), and over-capitalization in headings all lead to greater readability and retention. The Seventh Circuit has helpfully published guidance on typography for appellate briefs, available at https://www.ca7.uscourts.gov/assets/pdf/type.pdf.

V. FILING THE BRIEF

A. **Due Date.** The Court will normally issue an order setting a briefing schedule for the appeal. An electronic filing must be successfully completed by 11:59 p.m. Pacific Time. Failure to file an opening brief on time may result in the dismissal of the appeal. 9th Cir. R. 31-2.3, 42-1. The appellant or petitioner must concurrently but separately file excerpts of the record, unless the filer is exempt as a pro se party or is a party to a petition for review of an immigration order of removal. 9th Cir. R. 30-1.2, 30-1.3. The filing of the appellant's brief before the due date does not advance the due date for the appellee's brief. Fed. R. App. P. 28.1(f), 31(a); 9th Cir. R. 31-2. If the appellee decides not to file an answering brief, the appellee must notify the Court by letter by the due date for the answering brief or face sanctions. 9th Cir. R. 31-2.3. Any supplemental excerpts of record must be filed concurrently with the answering brief. 9th Cir. R. 30-1.2. Any brief or excerpts of record that is not served via the electronic filing system, such as when the opposing party is not registered for electronic filing, must be served upon all other parties on the same day it is submitted to the Court. Fed. R. App. P. 25(b); 9th Cir. R. 25-5(g)(2), 30-1.2, 31-1.

Cross-appeals are appeals taken by opposing parties from the same judgment or order. In a cross-appeal, the party who files a notice of appeal first is the appellant for the purposes of Federal Rules of Appellate Procedure 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. The Clerk's Office will automatically consolidate cross-appeals and issue an updated briefing schedule. Not all related appeals are cross-appeals, such as when separately represented parties on the same side of a case file separate appeals from the same judgment, or when opposing parties file appeals from different orders (for example, the defendant appeals an adverse judgment and the plaintiff appeals a less-than-satisfactory post-judgment attorneys' fees order). The Clerk's Office may not automatically consolidate such appeals. To consolidate them, the parties can file a joint motion to consolidate with a proposed briefing schedule.

B. **Extension of Time.** The Court discourages motions for extension of time, particularly multiple motions. Circuit Advisory Committee Note to 9th Cir. R. 31-2.2. There are two options: an initial streamlined request for an extension of time and a written motion for an extension of time (or Form 14, in lieu of preparing your own written motion). Note that these procedures may be subject to change, so always check the most current version of the rules before seeking an extension. 9th Cir. R. 31-2.2.

1. ***Streamlined extensions.*** The Clerk's Office may grant a party an initial streamlined request for a single extension of time of no more than 30 days to file an opening, answering, reply, or cross-appeal brief, except where a Notice of Oral Argument has issued or where a case has been previously expedited. The streamlined extension does not apply to any other deadlines, including deadlines for petitions for rehearing, amicus briefs, answers to original proceedings (mandamus petitions or permissive appeal petitions), supplemental briefs ordered by the Court, or any brief in Preliminary Injunction Appeals (9th Cir. R. 3-3), Incarcerated Recalcitrant Witness Appeals (28 U.S.C. § 1826; 9th 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 for the brief, you may not use this procedure. The request can be filed up to the day the brief is due. You should make this request directly through the electronic filing system using the electronic filing type "Streamlined Request for Extension of Time to File Brief." No form or motion is required with the ACMS or CM/ECF filing.

2. ***Motions for extensions of time.*** (*See also Motions Practice,* Chapter VII.*)* If you are not eligible for an initial streamlined request (for example, if you are seeking an extension of more than thirty days, or an additional extension of time, or if you are not a party), you must file a written motion for an extension of time. The Advisory Committee Note to Ninth Circuit Rule 31-2.2 explains that if a party files a motion for a first extension of time to file a brief on or before the due date for the brief, and the Court does not rule on the motion until shortly before the due date, or on or after the due date for the brief, the Court ordinarily will grant some additional time to file the brief even if the Court does not grant the motion in full. If the Court does not act on a motion, it nonetheless expects the moving party to file the brief within the time requested in the motion. In lieu of preparing your own motion, you may use Form 14 (https://www.ca9.uscourts.gov/forms/). A motion for an extension of time is deemed untimely if not filed 7 days before the brief in question is due—but this deadline is not jurisdictional. If you miss this deadline, do not file a motion to shorten time to alleviate the late filing. Under Ninth Circuit Rule 31-2.2(b), your written motion 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 separately represented party 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.

C. **Paper Copies and Binding.** Once the Court accepts an electronically-filed brief, it may order production of paper copies to the Court. 9th Cir. R. 25-5(c). The paper copies of the brief must be bound securely on the left side in a manner that does not obscure the text and permits the brief to lie reasonably flat when open. Fed. R. App. P. 32(a)(3). Only one side of the paper may be used. Fed. R. App. P. 32(a)(1).

D. **Errors Discovered After Filing.** If, after filing the brief, you discover an error that requires correction, you should submit a replacement or corrected brief, and you will need to file a motion for leave to do that. Note that, if the brief was very recently submitted and has not yet been filed by the clerk, and the correction is not substantive, you may be able to ask the clerk to replace it on the docket with the corrected version without a motion.

TOP-10 TECHNICAL FLAWS IN BRIEFS

1. **PDF IS NOT SEARCHABLE.** The brief is not an electronically searchable document because the PDF file was created by scanning the paper brief, which is prohibited. 9th Cir. R. 25-5(e).

2. **MISSING ADDENDUM.** The brief does not include the required addendum. In an immigration case, the petitioner's opening brief must include an addendum comprised of the challenged orders of the immigration court and Board of Immigration Appeals. All briefs should include pertinent constitutional provisions, treaties, statutes, ordinances, regulations, or rules in an addendum to the brief. 9th Cir. R. 28-2.7.

3. **INCORRECT FONT SIZE.** The brief, including footnotes, has a font size smaller than 14-point. Fed. R. App. P. 32(a)(5)(A).

4. **MISSING 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(a), (b), (c); 9th Cir. R. 28-1(a).

5. **MISSING DETENTION OR BAIL STATUS STATEMENT.** The brief does not state the immigrant's/defendant's current detention/bail status. 9th Cir. R. 28-2.4.

6. **MISSING OR INCORRECT CITATIONS TO EXCERPTS OF RECORD.** The brief does not include citations to the excerpts of record in the required format. 9th Cir. R. 28-2.8, 30-1.6.

7. **COVER LISTS AN INCORRECT CASE NUMBER OR INCORRECT CAPTION.** The brief's cover page lists an incorrect Court of Appeals case number or an incorrect case caption. Fed. R. App. P. 32(a)(2).

8 **INCORRECT SPACING.** The brief is not double spaced. Fed. R. App. P. 32(a)(4).

9 **MISSING OR INCORRECTLY FORMATTED SIGNATURE.** The brief does not have an "s/" for each signature line followed by the typed name of counsel. 9th Cir. R. 25-5(e).

10 **WRONG FILING TYPE SELECTED AT FILING.** The filer selected the wrong electronic filing type when submitting the brief in the Appellate Electronic Filing System. The appellant's or petitioner's principal brief is the Opening Brief. The appellee's or respondent's principal brief is the Answering Brief. The initial brief in cross-appeal cases is the First Brief on Cross-Appeal. The response/principal brief in cross-appeal cases is the Second Brief on Cross-Appeal. The reply/response brief in cross-appeal cases is the Third Brief on Cross-Appeal. A supplemental brief filed in response to a Court order requesting supplemental briefing is a Supplemental Brief. If the supplemental brief is in letter format, it is a Letter Brief. *See* Fed. R. App. P. 28, 28.1.

X.
EXCERPTS OF RECORD

Instead of the record Appendix to the Brief used in other circuits, Ninth Circuit Rule 30-1 requires the parties to file Excerpts of Record unless they are unrepresented or parties in an immigration petition for review.

I. PURPOSE OF THE EXCERPTS OF RECORD

The Excerpts of Record (ER) should be a well-organized and accessible collection of all parts of the record—and *only* those parts of the record—that are necessary to understand and decide the issues on appeal. 9th Cir. R. 30-1.1. Parties should not expect the Court to search through district court records. A well-organized Excerpts of Record will assist judges and their staff in considering the issues instead of being distracted by a records search for relevant documents. It is difficult for a person without knowledge of the record and legal issues to create a useful Excerpts of Record.

II. RESPONSIBILITY

A. Non-Exempt Parties Must Submit Excerpts of Record.

1. A counseled appellant or petitioner who is not a party in an immigration petition for review must submit Excerpts of Record when filing the opening brief; and must submit Further Excerpts of Record when filing the reply brief only if documents or portions of documents referred to in the brief are not included in the Excerpts or Supplemental Excerpts of Record. 9th Cir. R. 30-1.2(a), (c).

2. A counseled appellee or respondent who is not a party in an immigration petition for review must submit Supplemental Excerpts of Record when filing the answering brief only if documents or portions of documents referred to in the brief are not included in the Excerpts of Record. 9th Cir. R. 30-1.2(b).

3. Any counseled party must submit Supplemental Excerpts of Record when filing a supplemental brief only if documents or portions of the documents referred to in the brief are not included in any previously filed Excerpts, except in immigration petitions for review. 9th Cir. R. 30-1.2(d), (i).

4. An Excerpts of Record is not required for any immigration petition for review challenging an order of removal. 9th Cir. R. 30-1.2(i).

B. No Excerpts Required of Pro Se Litigant.

Any party proceeding without counsel is exempt from submitting Excerpts of Record. Appellee or respondent, when submitting Supplemental Excerpts of Record, must include all the documents that are cited in the pro se opening brief or otherwise required by Ninth Circuit Rule 30-1.4, as well as the documents cited in the answering brief. 9th Cir. R. 30-1.3.

III. CONTENTS OF THE EXCERPTS OF RECORD

A. All Decisions Being Appealed, Reviewed, or Challenged.

The initial Excerpts of Record must include all decisions being appealed, reviewed, or collaterally challenged, whether oral or written, final or interim. 9th Cir. R. 30-1.4(a); *see also infra* Checklists for Excerpts of Record. The excerpts ordinarily should include:

1. the judgment, interlocutory order, or any other order or ruling (including text of minute orders copied in a sheet of paper) sought to be reviewed,

2. the relevant portion of the reporter's transcript reflecting the discussion on which an alleged error in an oral ruling, order, finding of fact, or conclusion of law rests,

3. the entire sentencing transcript in a criminal appeal challenging sentencing,

4. any jury instruction given or refused that presents an issue on appeal, and

5. any relevant state court decisions in a habeas corpus proceeding.

B. **Indictment.** In criminal cases, the excerpts must include the final indictment or other charging document. Circuit Advisory Committee Note to 9th Cir. R. 30-1.4.

C. **Transcripts.** Reporter's transcripts, including trial transcripts, should be placed in the excerpts by hearing date, except that hearings or trials spanning multiple dates or sessions should appear in regular chronological order for that hearing or trial, using the first day of the hearing or trial as the relevant date. Transcripts may be submitted as a separate volume or volumes of no more than 300 pages each, paginated consecutively with the other volumes of excerpts. You may elect to include only portions of the transcript, but you should provide enough surrounding pages to provide relevant context. Where a brief raises a sufficiency of the evidence or harmless error argument, the filer ordinarily should include the entire trial transcript(s). If filing the brief with a motion to withdraw pursuant to *Anders v. California*, the initial Excerpts of Record must include the complete transcripts for the plea hearing or trial and the sentencing hearing. 9th Cir. R. 4-1(c)(6), 30-1.4(c); Circuit Advisory Committee Note to 9th Cir. R. 30-1.4.

D. **Trial Exhibits.** Evidentiary or trial exhibits in PDF format are arranged together either with the trial transcripts or at the end of the final non-sealed volume of excerpts (before the notice of appeal and docket sheet). These exhibits 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 Circuit Advisory Committee Note to 9th Cir. R. 27-14. Other exhibits that are not capable of being submitted in PDF format (video or audio exhibits, for example) cannot be included in the excerpts and must instead be submitted separately to the Court when directed to do so in response to a motion to transmit exhibits. 9th Cir. R. 30-1.4(c).

E. **Sealed Documents.** Documents required to be sealed under Ninth Circuit Rule 27-13(d) or provisionally sealed under Ninth Circuit Rule 27-13(e) or (f) must be submitted in a separate, final volume or volumes of the excerpts. Pre-sentence reports (PSR) and related sealed sentencing documents cannot be included in the sealed volume and must be filed separately. 9th Cir. R. 30-1.4(d).

F. **Notice of Appeal and Lower Court Docket Sheet.** The notice of appeal and lower court docket sheet must be included at the end of the last non-sealed volume in the initial Excerpts of Record. 9th Cir. R. 30-1.4(f).

G. **Other Portions of the Record.** Include all other documents that are relevant to deciding the appeal. 9th Cir. R. 30-1.1 and Circuit Advisory Committee Notes to 9th Cir. R. 30-1.1 and 30-1.4. Note that rules governing particular kinds of cases include particularized instructions as to what must be included in the excerpts. *See* 9th Cir. R. 13-2 (tax court cases), 17-1 (agency review), 22-6(c), 32-4 (capital cases).

H. **What Not To Include in Excerpts of Record.**

1. ***Briefing and motions.*** Unless necessary to show that an issue was raised or forfeited/waived, you should generally not include briefing (*e.g.*, memoranda of points and authorities or other legal briefing) filed in the district court. Circuit Advisory Committee Note to 9th Cir. R. 30-1.4.

2. ***Presentence reports.*** In criminal cases, PSR and sealed sentencing memoranda and related documents must be filed separately, pursuant to Ninth Circuit Rule 27-13(d), by using the electronic filing type "Presentence Report UNDER SEAL," which will automatically seal the document. 9th Cir. R. 30-1.4(d).

3. ***Social Security administrative records.*** In social security appeals, the certified administrative record cannot be included in the Excerpts of Record and must be filed separately. 9th Cir. R. 30-1.4(e).

4. ***Exhibits not available in PDF format.*** Exhibits not available electronically from the district court docket or in PDF format should be submitted separately pursuant to Ninth Circuit Rule 27-14. 9th Cir. R. 30-1.4(c).

IV. FORMAT OF THE EXCERPTS OF RECORD

A. Single Volume Excerpts of Record.

A single volume of Excerpts of Record is limited to 300 pages. 9th Cir. R. 30-1.5(b). When the entire set of excerpts, including cover page and index, does not exceed 300 pages and contains no sealed documents, organize the volume by file date in reverse chronological order, except for the notice of appeal, unless an alternative organization makes more sense in your case. 9th Cir. R. 30-1.4(a). (If there are sealed documents, these must be in a separate, final volume, regardless of the number of total pages.) The notice of appeal and lower court docket sheet should be at the very end. 9th Cir. R. 30-1.4(f). All pages of the volume, including the cover page, index, blank or divider pages, and any certificate of service, must be numbered consecutively beginning with the cover page counted as page 1. 9th Cir. R. 30-1.5(c). The same applies to single-volume Supplemental Excerpts of Record (SER) or Further Excerpts of Record (FER).

B. Multi-Volume Excerpts of Record.

When the entire set of excerpts exceeds 300 pages, or the excerpts include both sealed materials and non-sealed materials, the Excerpts of Record must be submitted in multiple volumes of no more than 300 pages each. 9th Cir. R. 30-1.4, 30-1.5(b). All pages of the set of excerpts, including the cover (caption) page for each volume, any divider or blank pages, and any certificate of service, must be numbered consecutively across all volumes in the set, beginning with the cover page of Volume 1 counted as page 1. 9th Cir. R. 30-1.5(c). The same applies to multi-volume Supplemental Excerpts of Record (SER) or Further Excerpts of Record (FER). Volume 1 of any multi-volume set of initial Excerpts of Record must include all decisions being appealed, reviewed, or collaterally challenged, whether oral or written, final or interim, and **nothing else**, organized in reverse chronological order. 9th Cir. R. 30-1.4(a). All other portions of the record must be in subsequent volumes of the excerpts, organized in reverse chronological order, except for the notice of appeal, which must be placed with the lower court docket sheet at the end of the last non-sealed volume. 9th Cir. R. 30-1.4(b), (f). Any sealed documents must be submitted in a separate, final volume or volumes of excerpts, limited to only sealed documents. 9th Cir. R. 30-1.4(d).

C. Index.

All Excerpts of Record must include an index (or table of contents) that lists all documents in order, including a citation to where each document may be found in the lower court record (*i.e.*, its district court docket entry number), and its volume and page number location in the excerpts, using a descriptive label for each document. 9th Cir. R. 30-1.5(a). Description labels of the listed documents are helpful (*e.g.*, "Exhibit 12 - 2018 Deposition of Jeanne Smith" is more helpful than "Exhibit 12 to motion for summary judgment").

1. For a single-volume Excerpts of Record, the index may be included in the single volume of excerpts and its consecutive page numbering. 9th Cir. R. 30-1.5(b).

2. For multi-volume Excerpts of Record, the index must be formatted as a separately bound Index Volume with its own separate page numbering. 9th Cir. R. 30-1.5(a), (c).

D. Cover.

Each volume must begin with a caption (cover) page that mirrors the brief's cover page, with the title "Excerpts of Record" (or "Supplemental Excerpts of Record" or "Further Excerpts of Record"). The caption page of each volume, including the index volume, must include the volume number (*e.g.*, "Volume 2 of 6" or "Index Volume"). 9th Cir. R. 30-1.5(d).

E. Certificate of Service.

Any excerpts of record that will not be served via the Court's electronic filing system require a certificate of service and must be served on all other parties in paper format, or by email if the party has consented to electronic service, at the same time the excerpts are submitted to the Court. 9th Cir. R. 25-5(g), 30-1.2. This certificate must state the date and method of service. You are encouraged to use Ninth Circuit Form 15 (https://www.ca9.uscourts.gov/forms/) as your Certificate of Service for electronic filings when one or more parties are not registered for electronic filing, or when the filing is electronically submitted using an "under seal" filing type. If all parties are registered for electronic filing, no certificate of service or service of paper copies upon other parties and counsel registered for electronic filing is necessary, except for sealed filings. 9th Cir. R. 25-5(g).

F. Paper copies.

If ordered by the Court, paper copies of each volume, including the Index Volume, must be printed on letter-sized paper in black or colored ink where appropriate, and bound securely on the left with a white cover (caption) page. Paper copies can be printed double-sided if the binding allows each volume to lie completely flat when open, such as comb, spiral, coil, or wire binding, and if the weight of the paper is sufficient to prevent bleeding through when marked on one side in ink or highlighter. 9th Cir. R. 30-1.5(e). The clerk's order filing the excerpts will specify when and how many copies to submit to the Court. Do not send any paper copies to the Court until the clerk requests them. 9th Cir. R. 30-1.2(f).

TOP-10 TECHNICAL FLAWS IN EXCERPTS OF RECORD

1 **PAGE NUMBERS ARE NOT CONSECUTIVELY NUMBERED.** The pages of all excerpts of record, including the caption (cover) page for each volume, any divider or blank pages, and any certificate of service, must be consecutively numbered across all volumes except the Index Volume (table of contents), beginning with the caption page of Volume 1 or the single volume as page 1. 9th Cir. R. 30-1.5(c).

2 **INDEX NOT FORMATTED AS A SEPARATE VOLUME.** The excerpts of record must be accompanied by a separately bound Index Volume that lists all documents contained in the excerpts. An index cannot be included in the numbered volumes. 9th Cir. R. 30-1.5(a).

3 **INDEX MISSING DISTRICT COURT CITATIONS.** The Index Volume must include a citation to each document's location in the lower court record (i.e., its docket entry number). 9th Cir. R. 30-1.5(a). The Index Volume must also list the documents in the order they appear in the excerpts, including the document's volume and page location in the excerpts, using a descriptive label for each document. 9th Cir. R. 30-1.5(a).

4 **EXCERPTS MISSING NOTICE OF APPEAL AND/OR LOWER COURT DOCKET SHEET.** The excerpts of record must include the notice of appeal and lower court docket sheet at the end of the last volume of the non-sealed excerpts. 9th Cir. R. 30-1.4(f).

5 **VOLUME 1 INCLUDES NON-DECISIONS.** The only documents permitted in Volume 1 of a multi-volume set of initial excerpts of record are the written or oral decisions being appealed, reviewed, or challenged. All other parts of the excerpts must be in subsequent volume(s). 9th Cir. R. 30-1.4(a) & (b).

6 **OVERSIZED EXCERPTS VOLUME.** The excerpts of record are limited to 300 pages per volume, including the caption page, pages used as dividers, blank pages, and any certificate of service. 9th Cir. R. 30-1.5(b).

7 **EXCERPTS INCLUDE PHYSICAL EXHIBIT(S).** Physical exhibits, which include audio and video exhibits, cannot be included in the excerpts of record and must be submitted pursuant to the procedures described in 9th Cir. R. 27-14. 9th Cir. R. 30-1.4(c).

8 **EXCERPTS INCLUDE SEALED PRESENTENCE REPORT.** The presentence report cannot be included in the excerpts of record and must be filed separately under seal. 9th Cir. R. 27-13(d), 30-1.4(d).

9 **SEALED EXCERPTS NOT SEPARATED FROM NON-SEALED EXCERPTS.** The sealed materials must be separated into a final volume restricted to sealed documents. 9th Cir. R. 27-13(c), 30-1.4(d).

10 **EXCERPTS SUBMITTED IN MULTIPLE DOCKET ENTRIES.** All non-sealed volumes of the excerpts of record must be attached to a single filing transaction in the electronic filing system.

XI.
ORAL ARGUMENT

I. LOGISTICS

A. How Cases Are Set for Oral Argument.

1. ***Pre-calendaring notices and responses.*** Most cases before the Court are not set for oral argument. For those that are, pre-calendaring notices identifying the month and location that the case is being considered for the argument calendar, along with a link to upcoming court sessions, are sent approximately 18 weeks before the anticipated calendar date. When you receive this notice, review the dates immediately to determine whether you have any conflicts. If you do, respond to the court within 3 business days by using Form 32 to advise the court of any unavoidable conflicts that would prevent you from appearing on any of the calendar dates under consideration. Each arguing counsel who has a conflict should file Form 32, accessible here: https://www.ca9.uscourts.gov/forms/. If you do not have a conflict, or you will not be the attorney arguing the case, you do not need to file Form 32. File Form 32 using the electronic document filing type "Response to Case Being Considered for Oral Argument."

2. ***Hearing notices.*** Hearing notices scheduling the date and time of your oral argument are distributed approximately 10 weeks before the hearing date. Complete the Acknowledgment of Hearing Notice as soon as possible, but no later than 30 days before the argument date, and submit it using that electronic filing type. No electronic or paper form (or attachment) need be filed in connection with the Acknowledgment of Hearing Notice. However, you should submit a PDF attachment with this electronic filing type when requesting a specific disability accommodation, making

some other unique request in relation to oral argument, or providing other unique information. Once you receive the hearing notice, be sure to visit the oral argument calendar page at https://www.ca9.uscourts.gov/calendar/, which allows you to look at the entire calendar to learn what other cases will be argued that day or other days that week. You may find other cases that have related issues, thus allowing you to explore possible coordination with other counsel.

3. ***Argument schedule.*** Having a case calendared does not mean that there will necessarily be an oral argument. If all 3 judges on the panel agree that the decisional process would not be significantly aided by oral argument, the case may be submitted without argument. Fed. R. App. P. 34(a)(2).

B. **Timing of Oral Argument.** The timing of oral argument generally depends on when the notice of appeal was filed, not when briefing was completed. However, the timing of oral argument also depends on a number of other factors, including the type of case, and whether there are related cases before the Court. In general, criminal cases get first priority. Non-criminal appeals involving (1) recalcitrant witnesses (28 U.S.C. § 1826); (2) habeas corpus petitions (Title 28 U.S.C. Ch. 153); (3) applications for temporary or permanent injunctions; (4) alleged deprivations of medical care or other cruel or unusual punishment of inmates; and (5) other claims entitled to priority on the basis of good cause (28 U.S.C. § 1657) will also be accorded priority. If you believe that your case should get priority based on good cause under 28 U.S.C. § 1657, you should file a motion for expedition at the earliest opportunity, preferably before briefing. 9th Cir. R. 34-3.

C. **Location of Oral Argument.** The Court sits monthly in San Francisco and Pasadena. The Court sits in Seattle and Portland between 5 and 7 months each year. The Court also regularly hears cases in other federal courthouses, including in Phoenix, Honolulu, Anchorage, Las Vegas, and occasionally in other locations. Each court calendar usually consists of one week of multiple sittings. Typically, cases are heard in the administrative units in which they arise. However, to assist the Court in filling calendars in relatively remote locations, and possibly to secure an earlier argument date, the parties may notify the Clerk that they are amenable to having their case placed on any available argument calendar, regardless of location. 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.

1. ***In person.*** Absent order of the Court, parties are expected to appear in person at the courthouse. If an in-person appearance poses a hardship, the party must file a motion for permission to appear remotely by video in ACMS (filing type Motion to Appear Remotely for Oral Argument) or CM/ECF (filing type motion for any type of relief other than reconsideration). Such a motion must be filed within 7 days of receiving notice that the case has been calendared, absent exigent circumstances.

2. ***Virtual.*** In some circumstances, such as a rescheduled or urgent hearing, or those that were presented during the COVID-19 pandemic, the Court may decide to conduct the oral argument remotely. If so, the notice you receive from the Court will nevertheless identify the physical courtroom to which the argument is assigned (*e.g.*, "Courtroom 1, San Francisco CA"), but you will be notified by the Court that the argument will be held remotely, with all of the judges and attorneys appearing by video, and that

travel to the courthouse will not be required. If your argument is scheduled to take place remotely, Court staff will contact you at least 2 weeks before the scheduled argument to determine your method of connecting to the videoconference, obtain the telephone number and email address at which you may be reached on the day of the argument, and provide you with a link you may use to test your connection with the Court during designated testing times. When you test your connection, you should use the equipment and location you will use for the actual argument, because the Court will use the test to confirm that your wireless connection is adequate and that you can be seen and heard clearly. The message you receive from Court staff will also contain useful tips on how to set up the location from which you present your remote argument to maximize clarity and minimize distractions. Among other factors, you should ensure that your face is well-lit, that you are positioned sufficiently close to the microphone, and that no inappropriate or distracting items are visible behind you. Remote arguments (unless sealed) will be streamed and archived on the Court's webpage just as in-person arguments are. Only the attorneys arguing the case will be permitted to join the videoconference; all others must watch either the live feed or the archived recording. So far as possible, attorneys conducting argument remotely should dress and comport themselves as they would if in a physical courtroom.

D. **Judge Panel Assignment.** On the Monday of the week before the scheduled argument, the Court will list the judges assigned to the calendar on the oral argument calendar posted to the Court's website. All panels are composed of no fewer than 2 members of the Court, at least one of whom is an active judge at the time the panel is assigned. District court and other federal judges may be invited to sit by

designation; district judges do not participate in the disposition of appeals from their own districts. The panels receive the documents for their assigned cases approximately 14 weeks before the scheduled time for hearing. Very occasionally, one or more members of the 3-judge panel will appear by video.

E. **Submission Without Oral Argument.** Any party to a case may request, or all parties may agree to request, that a case be submitted without oral argument. Fed. R. App. P. 34(a)(1). However, this request or stipulation requires the panel's approval. The Court may also submit a case without oral argument if it finds that oral argument would not assist its determination.

F. **Unavailability for Scheduled Oral Argument.** Once you receive a pre-calendaring notice stating the months that your case is being considered for the oral argument calendar, along with a link to upcoming court sessions (usually sent approximately 18 weeks before the argument calendar), review the dates immediately to determine if you have any conflicts. If you do, inform the Court within 3 days by completing and filing Form 32, using the electronic document filing type "Response to Case Being Considered for Oral Argument," and be sure to follow the instructions linked to that form. Form 32 is accessible at https://www.ca9.uscourts.gov/forms/. The Court discourages motions to continue after this 3-day period. Once a case has been calendared, it is extremely difficult to change the date or location of a case. The Court will change the date or location of a 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.

II. PREPARING FOR ORAL ARGUMENT

A. **File Your Acknowledgment of Hearing Notice.** Submit your Acknowledgment of Hearing Notice electronically using the document filing type "Acknowledgment of Hearing Notice" in ACMS or CM/ECF. No electronic or paper form or attachment is required unless you are requesting specific accommodation for a special need (*e.g.*, a listening assistance device or a table-height podium designed to accommodate persons in wheelchairs). If you are not already counsel of record in the case, you must first submit a notice of appearance. If you will not be the attorney arguing, do not file an Acknowledgment of Hearing Notice, even if you will sit at counsel table.

B. **Check for New Authority.** Relevant developments in case law, statutes, or regulations should be brought to the Court's attention prior to oral argument in a letter pursuant to Federal Rule of Appellate Procedure 28(j). That letter should be filed when such developments arise and, if at all possible, no later than 7 days before the date of argument. Such letters and any response are limited to 350 words.

C. **Watch Videos of Other Oral Arguments.** To help aid your preparation and familiarity with the judges assigned to your oral argument panel, you are encouraged to watch video recordings of other oral arguments, accessible at https://www.ca9.uscourts.gov/media/.

D. **Check the Amount of Time Allotted to Each Side.** This is included on the oral argument calendar—typically, 10, 15, or 20 minutes per side. Please note that if there are multiple separately represented parties on the same side, those parties may either designate a single attorney to present argument for that side, or divide their argument time among multiple attorneys. If you intend to share your argument time with counsel for parties aligned with your client, it is important to confer and agree with aligned counsel before argument on how you plan to divide issues and time. Please

be aware, however, that divided argument is not encouraged, as it often leads to confusion and inefficiency. A party's intent to share argument time among multiple counsel must be noted in the acknowledgment of hearing notice and is subject to the panel's approval. If counsel on a side cannot agree as to how to share the allotted time they will need to file a motion.

III. THE DAY OF ARGUMENT

A. **Check In with the Courtroom Clerk 30 Minutes Before the Start of the Calendar.** The Courtroom Clerk will be in the courtroom prior to arguments and will note your presence when you check in. If you will be arguing remotely, you must log in to the virtual "meeting" at least 30 minutes before the scheduled argument time. The Courtroom Clerk will note your "presence" and confirm that your video and audio links are functioning before the session begins.

B. **Be Camera Ready.** Ninth Circuit arguments are video streamed live. Bear in mind that streaming continues between arguments and conversations in the courtroom may be picked up by the microphones before and after arguments. Similarly, if sitting in the front row, you and/or your clients may be visible (and audible) to others.

C. **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. On occasion, the presiding judge will announce that the listed cases will be heard out of order, or that listed cases have been dismissed or will be decided without argument. Moreover, you need to be present at the beginning of the session because at that time the presiding judge may announce the panel's ground rules for the session.

D. Practice Tips on Executing the Argument.

1. ***Answer the judges' questions.*** If the question calls for a "yes" or "no" answer, answer "yes" or "no" *before* explaining. The most important function of oral argument is to answer any questions the judges may have after reading the briefs. Answering the questions, rather than offering a speech, is your most effective means of aiding the Court and your client. Don't dodge hypotheticals.

2. ***Know the record.*** The judges generally know the law, and are often well-prepared as to the facts, but oral argument may be an opportunity to clarify a misapprehension. You should know your factual record.

   a. If you are asked a question that you cannot answer (because you do not know), candidly admit that fact and offer to follow up with a letter to the Court. Never invent an answer or respond by saying that you were not the trial attorney.

   b. If, however, you are asked a question that you do know the answer to, but you are hesitant to answer because the fact does not appear in the record, let the Court know that your answer would fall outside of the record. Then, if the judges are receptive to your answering the question nevertheless, you may do so.

   c. Bring your record to court. The Court may ask you to "turn to page ___ in the record," and the judges expect that you will have this material on hand.

   d. Do not repeat at length the arguments made in the briefs. The primary function of oral argument is to supplement and refine those arguments, rather than to restate them.

3. ***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. Unless you are responding to a question from the panel or the presiding judge has made clear that you may exceed your time limit, when the red light turns on, quickly finish your sentence and stop talking.

4. ***Avoid visual aids.*** Visual aids are strongly disfavored and may not be permitted. If, however, you must use one, let the Clerk's Office know in advance. You may be required to file a motion. 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.

5. ***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.

6. ***Do not try to be funny.*** Jokes will generally fall flat and annoy the panel. Also, do not assume from judge questioning that you know which way the judge will ultimately rule.

7. ***Start with your key points.*** Once questions start, you may not get another chance. Appellants may not choose to address all of their arguments but only press those they believe to be strongest. Appellees generally can confine their argument to responding to Appellant's, but should address any issues—even if neglected by Appellant at argument—of concern to the panel.

8. ***Be candid but firm.*** Concede points where candor requires it. At the same time, do not make ill-considered concessions or concessions that you do not

believe appropriate, no matter how hard you are pushed.

9. ***Use an outline, not a script.*** Reading prepared material does little to advance your position and nothing to address the issues of concern to the members of the panel, and it may cause the judges to disengage from your presentation.

10. ***Maintain a steady, even pace.*** It is far better to make a few points clearly than to attempt to cram too much information into a short argument. Judges frequently ask fast talkers to slow down.

11. ***Dress appropriately.*** Appellate arguments are serious business and proper respect for the Court and the process favors professional attire. Avoid wearing anything that might be considered distracting. Also avoid any other distractions, such as pen clicking, hair adjusting, etc.

12. ***Practice.*** If possible, gather a group of your colleagues and practice your argument with a moot court. At a minimum, think about your case and identify weak or unclear points that are likely sources for the judges' questions. Put yourself in the shoes of a judge, and ask: "What would I want to know if I had to decide this case?"

13. ***Volunteer.*** Law schools frequently recruit attorneys to serve as moot judges for competitions; helping law students is a great way to gain insights into what works and does not work at oral arguments.

14. ***Never:***

    a. Interrupt a judge or your adversary. The judges may interrupt you, but it is critical that when they start talking, you stop talking. Otherwise,

you will not be able to hear the question and the panel will not hear your answer.

b. Shout or point your finger at the bench.

c. Sneer, demean your opponent or the lower court, or editorialize on your opponent's argument with head shakes or grimaces.

d. Say "I wasn't the trial attorney" as an excuse for not knowing your record.

IV. POST-ARGUMENT

A. **Correcting Misstatement.** File a letter with the Court correcting your misstatement as soon as possible.

B. **Advising Court of New Authority.** You may notify the Court of a newly issued opinion relevant to the issues in your appeal by submitting a letter pursuant to Federal Rule of Appellate Procedure 28(j).

C. **Review Oral Argument.** Video recordings of oral arguments are generally available on the Court's website within a day of argument. Live streaming of the oral argument (while it is in progress) is available through the Court's website. The same practices apply to arguments conducted remotely.

XII.
POST-DECISIONAL PROCESSES

I. OVERVIEW

An appeal does not end when the three-judge panel issues its opinion. Instead, it ends when the Court issues its "mandate" and relinquishes jurisdiction over the case. Between the panel decision and the issuance of the mandate, several more steps in the appellate process can occur—including the Court issuing a new opinion that reaches the opposite result. This chapter addresses these post-decisional processes, what actions the losing side should consider taking (and the reasons and timing for each), and what considerations the winning side should be aware of.

II. PREPARE THE CLIENT WITH GOOD COMMUNICATION

A. **Describe the Appellate Process to the Client.** From the outset of the case, counsel should prepare the client for the appellate process, including the possibility of an adverse result. Counsel should discuss with the client why the client want to appeal, the error the client believes occurred in the case, and the client's expectations for the appeal. Counsel should describe the appellate process, including the fact that the appeal entails a review of the record already made in the lower court (and not, for example, the introduction of new evidence). Counsel should make sure the client understand that victory on appeal may not mean victory outright (e.g., a directed verdict in the client's favor or an order granting asylum), but rather an opportunity to continue litigating before the lower tribunal (e.g., proceeding past summary judgment to trial, or returning to the agency for further proceedings). Also, counsel should provide the client with the appellate schedule, and explain that the Court holds oral argument in fewer than one quarter of appeals filed.

Counsel should provide the client with a reality check. It can be helpful to recite the statistic that the reversal rate is only approximately 10% in the Ninth Circuit. For some

clients, this is a negative and difficult reality to accept; other clients have stated that the chances of 1 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.

B. **Maintain Communication.** After providing the client with an overview of the appellate process, maintain communication throughout the process so that the client knows what is going on and understands the issues that will be argued in the opening brief. If the record and the law support issues the client wants argued in the opening brief, and it is strategically wise to raise them, counsel should do so. But if the record and the law do not support those issues, counsel should explain to the client that they cannot raise frivolous issues, and that raising such issues could reduce the likelihood of winning on meritorious issues. Counsel should try to minimize the possibility that the client will be shocked by an adverse decision.

C. **Let the Client Know About the Decision Immediately.** Once the Court issues its decision, immediately tell the client and share the decision. This is important because the timelines for responding to the decision are short. In addition, if the appeal is one that is likely to receive media attention, the client needs to be prepared to be contacted by the media.

In criminal cases, it can be difficult to promptly communicate with incarcerated clients. Counsel 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, if the client has set up an e-mail account through CorrLinks, which is an e-mail system for Bureau of Prisons inmates, counsel 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 the attorney-client privilege.

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. Also, when conveying news of a positive outcome, counsel should advise the client that it could be several weeks or even months before the client can actually enjoy the effects of victory and to continue to obey all prison rules to avoid punishment or additional time assessed by the prison.

III. STEPS TO TAKE IF THE DECISION IS ADVERSE

A. Consult the Applicable Rules and Orders Relating to the Post-Decisional Process.

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

- Federal Rule of Appellate Procedure 40 and Ninth Circuit Rules 40-1 to 40-4 (panel rehearing and rehearing en banc);
- Federal Rule of Appellate Procedure 41 and Ninth Circuit Rules 41-1 and 41-2 (mandate);
- Ninth Circuit General Orders Chapter V (en banc procedures); and
- 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 panel rehearing or rehearing en banc is 14 days from the date of decision. Fed. R. App. P. 40(d)(1).

- For a civil case in which one of the parties is the United States, a United States agency, a United States officer or employee sued in an official capacity, or a United States officer or 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 panel rehearing or rehearing en banc from any party (even a non-federal party) is 45 days from the date of the decision. Fed. R. App. P. 40(d)(1). However, a petition for panel rehearing or rehearing en banc of a court order that does not dispose of the entire case on the merits, terminate a case or otherwise conclude proceedings in the Court must be filed within 14 days after entry of the order. *See* 9th Cir. R. 27-10(a)(2).

- A motion to extend the time for filing a petition for panel rehearing or rehearing en banc should be filed no later than 7 days before the due date for the petition. *See* 9th Cir. R. 31-2.2(b).

- A petition for certiorari is due 90 days from the date of the panel's decision or 90 days from the order denying a petition for panel rehearing or rehearing en banc (whichever is later). *See* S. Ct. R. 13.

- If no petition for panel rehearing or rehearing en banc is filed, the mandate will issue 7 days after the deadline to file such a petition. *See* 9th Cir. R. 41(b). If a petition for panel rehearing or rehearing en banc is filed and denied, the mandate will issue 7 days after the order denying the petition is filed. *See* 9th Cir. R.

41(b). If a petition for rehearing en banc is granted, the issuance of the mandate will await the completion of the en banc proceeding. A motion to stay the mandate, filed prior to issuance of the mandate, will ordinarily stay the issuance of the mandate pending resolution of that motion.

C. Decide Whether to Seek an Extension of Time to File a Petition for Panel Rehearing or Rehearing En Banc. If a party needs more than 14 days (or 45 days, in civil cases involving the federal government) to decide whether to seek panel rehearing or rehearing en banc and/or to draft such a petition, it should promptly seek an extension of time for filing the petition. The motion must be accompanied by a declaration addressing the issues set forth in Ninth Circuit Rule 31-2.2(b). Form 14 (Motion for Extension of Time) may *not* be used to seek an extension of time for the filing of a petition for panel rehearing or rehearing en banc. Requests for extensions of time are directed to the panel that decided the case. There is no guarantee that the Court will grant the extension of time.

D. Evaluate Whether to Petition for Panel Rehearing and/or Rehearing En Banc. The next step is to decide whether to seek panel rehearing or rehearing en banc. A party requesting both panel rehearing or rehearing en banc must file a single petition. Fed. R. App. P. 40(a).

1. ***When a petition for panel rehearing is appropriate.*** A petition for panel rehearing is appropriate if it appears that the panel may have overlooked or misunderstood a point of fact or law and the error affected how the panel resolved the case. *See* Fed. R. App. P. 40(b)(1).

2. ***When a petition for rehearing en banc is appropriate.*** A petition for rehearing en banc is appropriate when the panel's decision addresses significant legal issues that warrant the attention of

the full Court. En banc review may be warranted when a case conflicts with decisions of the Supreme Court or other panel decisions of this Court, creates a split among the federal courts of appeals, or is otherwise of "exceptional importance." *See* Fed. R. App. P. 40(b)(2). This is a very high bar: Typically, fewer than 15 cases are reheard en banc per year. These cases are nearly always published opinions (versus non-precedential memorandum dispositions), often in which the panel was split 2-1, that a majority of the active judges on the Court decides are not only flawed, but also involve an error worthy of convening an en banc Court to correct. Recent cases in which the Court has granted rehearing en banc can be found in the Court's regularly updated report on the status of pending en banc cases: https://www.ca9.uscourts.gov/enbanc/.

In general, if a case is resolved 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 had 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 it meets the criteria for en banc review.

The criteria for rehearing en banc are similar to the criteria for a grant of certiorari by the Supreme Court. If a case truly meets the criteria for a grant of certiorari, requesting en banc review 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 rehearing en banc can help

formulate arguments in favor of certiorari, should that step become necessary.

3. ***The rules for filing a petition for rehearing.***

   a. **Deadlines.** As noted above, in general, the due date for a petition for panel rehearing and/or rehearing en banc is 14 days from the date of decision. Fed. R. App. P. 40(d)(1). For a civil case in which one of the parties is the United States, a United States agency, a United States officer or employee sued in an official capacity, or a United States officer or 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 panel rehearing and/or rehearing en banc is 45 days from the date of a decision on the merits of the appeal that resolves or terminates the appeal.

   b. **Length.** A petition for panel rehearing and/or rehearing en banc is limited to 4,200 words or 15 pages. *See* 9th Cir. R. 40-1(b). A petition must be accompanied by Form 11 (Certificate of Compliance for Petitions for Rehearing or Responses). 9th Cir. R. 40-1(b). Form 11 may be found on the Court's website at: https://www.ca9.uscourts.gov/forms/.

   c. **Format.** The cover must indicate whether the party is seeking panel rehearing, rehearing en banc, or both. 9th Cir. R. 40-1(a).

   d. **Content.** A petition for panel rehearing should begin by explaining the point of law or fact that the panel may have overlooked or misunderstood and how the error affected how the panel resolved the case. *See* Fed. R. App. P. 40(b)(1). A petition for rehearing en banc should begin by explaining

why the case meets the criteria set forth in Federal Rule of Appellate Procedure 40(b)(2). This means that the petition for rehearing en banc must show that the panel decision conflicts with a decision of the Supreme Court or this Court, creates a split among the federal courts of appeals, and/or the proceeding involves a question of exceptional importance. The body of the petition should focus on those criteria as well, as opposed to disputing case-specific details of the panel opinion (such as its understanding of the facts) that are unlikely to present a question of exceptional importance. (Factual and case-specific arguments are more properly presented in a petition for panel rehearing.) It is also important to show not only that the case merits en banc review, but also that the issue or issues meriting review should be decided in that party's favor.

e. **Required Attachment.** A party must attach the Court's decision for which it is seeking rehearing.

4. ***The rules for responding to a petition for rehearing.*** No response may be filed to a petition for panel rehearing or rehearing en banc unless the Court orders one. *See* Fed. R. App. P. 40(d)(4). Ordinarily the Court will not grant panel rehearing or rehearing en banc without giving the other parties an opportunity to file a response. Fed. R. App. P. 40(d)(4); 9th Cir. R. 40-2. If the Court orders a response to a petition for rehearing en banc, the response should not simply argue that the panel decision was correct; it should also explain why the case does not meet the standard for rehearing en banc. 9th Cir. R. 40-2. Unless the Court orders otherwise, the opposition should not exceed 4,200 words or 15 pages, and must be accompanied by Form 11. 9th Cir. R. 40-1(b). Note

that a response to a petition for rehearing en banc may be ordered at the request of just one judge, including judges not on the three-judge panel. Fed. R. App. P. 40(c); Circuit Advisory Comm. Note to 9th Cir. R. 40-2 to 40-3. Thus, being directed to respond may indicate that at least one judge is contemplating a vote to rehear the case en banc, but does not necessarily signal a likelihood that a majority of the Court will ultimately vote to rehear the case en banc.

5. ***Amicus briefs in support of, or opposing, the petition for rehearing.*** Amicus briefs may be permitted pursuant to Ninth Circuit Rule 29-2. *See supra* Chapter IX.I.B.4.e, discussing amicus briefs.

6. ***The Court's vote on a petition for rehearing en banc.*** The time between a response to a petition for rehearing en banc and the order granting or denying the petition can be as little as a few weeks, or as long as several months. During this time, judges may be corresponding via internal memoranda about whether to grant rehearing, and, if a judge requests a formal poll, casting their votes. *See generally* General Orders 5.4-5.5.

7. ***Next steps if the Court grants rehearing en banc.*** If a petition for rehearing en banc is granted, the Chief Judge will issue an order indicating this fact. The order will vacate the three-judge panel opinion.

a. **How the en banc court is chosen.** The en banc court consists of the Chief Judge and 10 additional judges drawn by lot from the active judges of the Court. (Senior judges can elect to be eligible for the en banc court if they were on the original panel, and judges may remain on an en banc court if they take senior status while serving on the en banc court. *See* General Order 5.1.a.4.) In the absence or recusal of the Chief Judge, an

eleventh active judge is drawn by lot, and the most senior active judge on the panel presides.

b. Whether there is additional briefing or oral argument. After the en banc court is chosen, the judges on the en banc court decide whether there will be oral argument or additional briefing. Cases in which en banc review is granted typically receive oral argument. The identities of the judges drawn to serve on the en banc panel will be publicly released on the Monday of the week preceding the oral argument. In contrast to oral argument, additional briefing is unlikely unless the en banc court sees a need for the parties to address important issues that emerged after, or were not addressed in, the existing briefing. This makes it especially important for a party drafting a petition for rehearing en banc to show not only that the case merits en banc review, but also that the issue or issues meriting review should be decided in its favor.

If there will be oral argument, the Chief Judge (or the next most senior active judge, if the Chief Justice is absent or recused) will enter an order designating the date, time, and place of argument—usually during one of the Court's en banc sittings in January, March, June, or September, which coincide with the Court's quarterly meetings.

If no oral argument is to be heard, the Chief Judge will designate a date, time, and place for a conference of the en banc court. That date will ordinarily be the submission date of the case. If any issues have been designated for specific attention, the order may also identify those issues and direct additional briefing addressing them. A party may also file a motion requesting that

supplemental briefing be permitted, for example because there have been intervening changes in the law since the original panel briefs were filed, or because the briefs focused on how existing Ninth Circuit precedent should be applied, but the grant of rehearing en banc raises the question of whether that precedent should be overturned. As a practical matter, however, in writing the petition (or opposition), a party should not assume that it will be able to submit additional briefing. In most en banc cases, the en banc Court has before it only the original panel briefs, the en banc petition, and the response in opposition to the petition.

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 the appellee lost before the three-judge panel and petitioned for rehearing en banc. Before 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 "Archived Audio and Video" tab on the Court's website.

c. What happens after en banc oral argument. Once a case has been argued before the en banc court, there is no set date by which the Court must issue an opinion. The Court's internal guidelines state that the judge selected to write a majority opinion should be able to do so 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. *See* General Order 5.7. After the initial drafts of the opinions are circulated, they are typically revised in response to

suggestions from other members of the en banc court. Once the opinions are in final form, the Chief Judge establishes a period for voting on the opinions. Thus, an en banc opinion may not issue until many months after the argument.

d. Options if a party loses an en banc case. If a party loses an en banc case and believes the en banc court made a legal or factual mistake, it can follow the same process outlined above to seek rehearing before the 11-judge en banc court. Alternatively, the party can seek rehearing en banc by the full Court. *See* 9th Cir. R. 40-3. However, as a practical matter, these avenues of relief are unlikely to be fruitful. (The Court has never reheard a case before the full Court.) The best course at this point is usually to evaluate whether to file a petition for certiorari (which would be due 90 days from the date of the en banc decision), and request that the Court stay the mandate, if necessary, to maintain the status quo pending the certiorari process, as described below.

8. ***Alternatives to granting rehearing en banc.*** In the face of a petition for rehearing en banc, the three-judge panel may decide to simply amend its opinion to account for any concerns raised in the petition. In such a case, an order denying rehearing may be accompanied by an amended opinion, and the order will typically note whether further rehearing petitions will be entertained. Very rarely, a three-judge panel will vote to grant panel rehearing, vacate its original opinion, and set the case for re-argument before the panel.

E. **Evaluate Whether to Petition for Certiorari.** A case could be a good candidate for Supreme Court review if it creates or exacerbates a "circuit split" (i.e., a disagreement

among the federal courts of appeals) on an issue of law of substantial importance; if it creates a split of authority between federal courts of appeals and state courts of last resort on an important federal question; if it decides an important question of federal law that has not been, but should be, settled by the Supreme Court; if it decides an important federal question in a way that conflicts with relevant Supreme Court decisions; or if, in reaching the decision, this Court deviated so far from the accepted and usual course of judicial proceedings that Supreme Court intervention is warranted. *See* Sup. Ct. R. 10. For a detailed discussion of what the Supreme Court considers in determining whether to grant certiorari (and discussions of all other practical aspects of Supreme Court practice), *see* Stephen M. Shapiro *et al.*, Supreme Court Practice (11th ed. 2019).

F. Special Considerations for Legal Counsel in Criminal Appeals Regarding Petitioning for Certiorari. Ninth Circuit Rule 4-1(e) addresses the unique considerations that apply to post-appeal proceedings for counsel in criminal appeals. Counsel, whether appointed or retained, must "promptly" transmit the Court's decision to the client. If the decision is adverse to the client, 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 and whether any reasonable ground exists for filing a petition. Although the client often believes that his or her case is Supreme Court-worthy, or that legal counsel must pursue every possible remedy no matter how lacking in merit, Ninth Circuit Rule 4-1(e) allows counsel to file a motion to withdraw if counsel concludes that there are not sufficient grounds for seeking Supreme Court review.

When counsel determines that no sufficient grounds exist, but the client insists that the same be filed, counsel should send the client written correspondence notifying the client of that determination and of the application of Ninth Circuit Rule 4-1(e), and advising that counsel will have to file a

motion to withdraw. Counsel must inform the client that the client will need to file a petition for writ of certiorari on a pro se basis — if the client insists on going forward. Also, counsel must 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 judgement.

A motion to withdraw must be made "as soon as practicable," and must attest that counsel has advised the client on how to file a timely pro se petition for writ of certiorari. 9th Cir. R. 4-1(e). The motion must explain why withdrawal is warranted. 9th Cir. R. 4-1(e). The motion must set forth the efforts made by counsel to notify the client, and must be served upon the client. 9th Cir. R. 4-1(e). Unless counsel is relieved of his or her appointment, the appointment continues through resolution of certiorari proceedings. If the motion is granted, counsel must notify the client in writing within 7 days or inform the Court that counsel is unable to notify the client.

G. **Determine Whether to Move to Stay the Mandate.** The mandate officially causes the Court's decision to take effect, and transfers jurisdiction from this Court back to the district court or agency. The filing of a timely petition for panel rehearing and/or rehearing en banc automatically stays the mandate until this Court has ruled on the petition. However, the filing of a petition for certiorari does not stay the mandate. As a result, if counsel intends to seek certiorari and does not want the case to be returned to the district court or agency before the Supreme Court has ruled on the petition for certiorari, counsel must move to stay the mandate. This is generally necessary if this Court's decision would alter the status quo if it were to go into effect, and counsel wishes to maintain the status quo pending Supreme Court review. A motion to stay the mandate might be appropriate, for example, if (a) the client obtained an injunction in the district court that would be vacated if this

Court's decision were to take effect; (b) the client prevailed at trial but the judgment would be reversed and a new trial begun if the case were to be returned to the district court; or (c) this Court stayed an order of removal but the stay would dissolve upon the issuance of the mandate, possibly causing the client to be deported while a petition for certiorari is pending. A motion to stay the mandate "must show that the petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). A motion to stay the mandate will automatically stay the mandate pending disposition of that motion. Because the mandate generally issues automatically 7 days after the time to seek rehearing has passed or a petition for rehearing has been denied, however, a motion to stay the mandate should be filed *promptly* after the denial of a petition for rehearing. *See generally* Fed. R. App. P. 41(b); 9th Cir. R. 41-1; Circuit Advisory Committee Note to Rule 41-1.

IV. CONSIDERATIONS IF THERE IS A FAVORABLE DECISION

If the decision from the three-judge panel is favorable, the primary things to consider are: (1) seeking attorney's fees and costs; and (2) if counsel represents a defendant in a criminal case or the petitioner in a habeas corpus case, whether and how to effectuate the decision in the client's favor, including expeditiously obtaining the client's release, if that is the inevitable consequence of the decision.

A. Attorney's Fees and Costs on Appeal.

1. *Costs on appeal.*

a. Applicable statutes, rules and orders. The applicable statutes, rules, and order are:

- 28 U.S.C. §§ 1920 and 2412;
- Federal Rule of Appellate Procedure 39;

- Ninth Circuit Rules 39-1.1 – 39-1.5; and
- Ninth Circuit General Order 4.5e.

For legal counsel appointed under the Criminal Justice Act, see subparagraph 2(b), below.

b. Entitlement to costs. A prevailing party is presumptively entitled to costs—a limited category (defined below). Unless otherwise ordered by the Court or agreed to by the parties, costs are taxed in favor of appellee/respondent when a case is dismissed or a district court/agency decision affirmed, and costs are taxed in favor of the appellant/petitioner when a district court/agency is reversed. Fed. R. App. P. 39(a). There is a presumption that each party will bear its own costs when the district court/agency order is affirmed in part, reversed in part, modified or vacated, unless otherwise ordered by the Court or agreed to by the parties. *Id*. There are several common exceptions to the presumption of entitlement to costs by a prevailing party, including:

- Unsuccessful party of modest means raises close public policy issues. *Stanley v. University of Southern California*, 178 F.3d 1069, 1079-80 (9th Cir. 1999);
- Prevailing litigant who proceeded in forma pauperis may not obtain costs against the federal government. *See Wade v. Kijakazi*, 14 F.4th 973, 976 (9th Cir. 2021) (per curiam);
- Some statutes bar the taxation of costs against an unsuccessful litigant absent a showing of frivolity. *See, e.g., Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1189-90

(9th Cir. 2001) (Americans with Disabilities Act cases); *Ocean Conservancy v. Nat'l Marine Fisheries Servs.*, 382 F.3d 1159, 1161-62 (9th Cir. 2004) (Endangered Species Act cases); and

- Costs are unlikely to be assessed where an indigent petitioner unsuccessfully appeals the denial of a habeas corpus petition. *Sengenberger v. Townsend*, 473 F.3d 914, 914-15 (9th Cir. 2006).

c. Timelines for submitting cost bill. A party eligible for costs must submit the bill of costs on Form 10 (available at https://www.ca9.uscourts.gov/forms/), no later than 14 days after entry of judgment (i.e., the date on which the Court's opinion or memorandum is filed). Fed. R. App. P. 39(e)(3)(A). This deadline is strictly enforced. *Mollura v. Miller*, 621 F.2d 334 (9th Cir. 1980). A party objecting to the bill of costs must file a response within 14 days after service of the bill of costs. Fed. R. App. P. 39(e)(3)(B). Filing a petition for panel 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 they should be claimed. In this Court, the following costs can be claimed: cost, if any, of copying briefs and excerpts of record (actual copying costs, not to exceed 10¢ per page); the $5 docketing fee portion of the total fees paid to the district court for appeals; and a filing fee paid in the Court (for BAP appeals and petitions for review or mandamus). 9th Cir. R. 39-1.1 and 39-

1.3; Fed. R. App. P. 39(e)(1). In the district court, the following costs can be claimed: reporter's transcripts; filing fees for a notice of appeal; premiums for appeal bond; and costs of preparation and transmission of the record. Fed. R. App. P. 39(f). These costs must be claimed pursuant to the pertinent district court's procedures.

2. ***Attorney's fees on appeal.***

a. **Civil appeals.** Ninth Circuit Rule 39-1.6 governs requests for attorney's fees on appeal. In general, a request for attorney's 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 attorney's fees must be submitted no later than 14 days after 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 https://www.ca9.uscourts.gov/forms/), or a document providing substantially similar information. The fee request must also detail the work performed and the amount of time spent on each task; the reason the rates charged are legally justified; and include an affidavit attesting that the information is accurate. All fee application must contain a statement that sets forth the application's timeliness. Fee requests must be filed separately from any bill of costs. Counsel appointed through the Ninth Circuit's Pro Bono Program who represent the prevailing party may seek attorney's fees if a statute provides for recovery of attorney's fees.

Any objection to a request for fees must be filed within 10 days of service of the fee request; and any reply to a response must be filed within 7 days of service. 9th Cir. R. 39-1.7; Fed. R. App. P. 27(a)(3)(A), (4). If the Court awards fees on appeal and a party objects to the amount of fees claimed, the Court may refer the determination of the appropriate amount of fees to the Appellate Commissioner. 9th Cir. R. 39-1.9. Additionally, any party who is or may be entitled to attorney's fees on appeal may request that the consideration of fees on appeal be transferred to the district court or administrative agency from which the appeal originated. 9th Cir. R. 39-1.8. Such a request must be filed within the time limits for filing a request for attorney's fees in the Court.

b. Criminal appeals. Counsel who have been appointed under the Criminal Justice Act (18 U.S.C. § 3006A) ("CJA") to represent a criminal defendant on direct appeal, or a petitioner in a habeas corpus appeal, should submit their 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 the CJA Resources page of the Court's website (https://www.ca9.uscourts.gov/district/appellate-cja-practice-and-resources/).

B. Effectuating Favorable Appellate Decisions.

1. ***Effectuating a favorable decision.*** The decision will become effective when the mandate issues. If there is a need to immediately effectuate the decision—for example, if the reversal of a sentencing calculation error would mean that the client is likely already due to be released, or if the Court's opinion reverses an injunction that is causing the client irreparable harm

while it is in place, a party can file a motion requesting that the Court issue the mandate "forthwith" (immediately).

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. For example, criminal direct appeals often concern sentencing issues. A favorable sentencing decision by the Court may result in a reversal or vacatur of the sentence imposed, and a remand to the district court for resentencing consistent with the Court's decision. Assuming the government does not seek rehearing in the Court or review by the Supreme Court, the case will return to the district court for further sentencing proceedings.

   A favorable decision in a habeas corpus appeal generally means that the Court reverses the district court's denial of the appellant's habeas corpus petition under 28 U.S.C. § 2254 or motion under 28 U.S.C. § 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 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 defendant or 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.

XIII.
REVIEW OF IMMIGRATION DECISIONS

I. INTRODUCTION

Immigration cases have made up a significant percentage of the Ninth Circuit's docket in recent years. These cases generally arise in two procedural contexts:

- First, an individual may petition for review of certain Board of Immigration Appeals (BIA) removal decisions, and, in limited circumstances, may seek review of Immigration and Customs Enforcement (ICE) removal orders or reasonable fear determinations.

- Second, either the individual 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 individuals. Appeals from district court decisions follow the same procedure as appeals in other areas of civil law.

This chapter focuses on petitions for review of BIA removal decisions. Its purpose is to inform practitioners of some of the special provisions related to handling these petitions for review.

II. THE PETITION FOR REVIEW

A. **Petition for Review.** The petition for review, rather than a notice of appeal, is the initial document in review of BIA removal orders. The requirements for petitions for review are set out in Section 242 of the Immigration and Nationality Act (INA), 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." Fed. R. App. P. 20; 9th Cir. R. 20-1.

B. Timing and Process for Filing Petitions for Review.

The petition for review in an immigration case is filed with the circuit court, rather than with the BIA. Fed. R. App. P. 15(a)(1). It must be received by the circuit court no more than 30 days from the date of the final order of removal in the case. 8 U.S.C. § 1252(b)(1). Individuals with reinstated final removal orders or final administrative review orders should file a petition for review within 30 days of that order even while other proceedings (such as withholding-only proceedings) move forward. *See Riley v. Bondi*, 145 S. Ct. 2190, 2201-04 (2025). *Riley* also clarified that the timing requirement is not jurisdictional and can be waived by the government. *Id.*

In some cases, the individual may not have received the BIA's decision within the 30 days for filing the petition for review. If this happens, the individual may ask the BIA to rescind and reissue its decision, thereby starting a new 30-day period for filing the petition for review. To support such a motion, the individual must submit evidence demonstrating that the BIA's decision was not timely received. If the failure to timely file was based upon ineffective assistance of counsel, the individual may also consider filing a motion to reopen with the BIA, 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), available at: https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/lac_pa_042005.pdf.

C. 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. P. 15(a)(2);
- specify the order or part thereof to be reviewed, *id.*;
- name the Attorney General as respondent, *id.;* 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, INA § 242(c), § 1252(c);
- include (as a separate PDF) a copy of the final administrative order, *id.*, 9th Cir. R. 15-4;
- include the petitioner's alien registration number in the caption, 9th Cir. R. 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. Fed. R. App. P. 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 and alien registration number, rather than listing only the principal respondent before the agency or using "et al.," or "petitioners." Fed. R. App. P. 15(a)(2).

You may elect to use Ninth Circuit Form 3 (https://www.ca9.uscourts.gov/forms/) as your petition for review, or you may create your own. Sample petitions for review are also included in the American Immigration Council's Practice Advisory *How to File a Petition for Review*, (https://www.americanimmigrationcouncil.org/practice_advisory/how-file-petition-review). The Ninth Circuit also has an electronic document submission system available for individuals without lawyer (https://www.ca9.uscourts.gov/efiling/edss-document-submission/).

D. 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:

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 (https://www.ice.gov/contact/field-offices). 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 for review to that Office, as well. The mailing address is:

> Office of Immigration Litigation
> U.S. Department of Justice/Civil Division
> P.O. Box 868
> Ben Franklin Station Washington, D.C. 20044.

(The physical address is 450 5th Street N.W., 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. P. 25(d); 9th Cir. R. 25-5(g). This certificate should be included at the end of the petition for review in the same PDF, but it can reference all the motions filed with the petition for review, even though each such motion must be submitted individually as a separate PDF (including any motion to stay removal).

New petitions for review filed by an attorney must be submitted electronically, using the Ninth Circuit's Appellate Case Management System (ACMS). *See* Administrative Order regarding ACMS. For counseled cases, all pleadings filed after the petition for review is opened must also be filed electronically, using the system in which the petition was originally opened (which would be CM/ECF for cases opened in the Ninth Circuit prior to May 1, 2021). 9th Cir. R. 25-5(a). Under both systems, after the case has been opened, service upon case participants registered for electronic filing in the Ninth Circuit occurs upon filing and no certificate of service is required. 9th Cir. R. 25-5(g).

E. **Filing Fee and *In Forma Pauperis.*** The filing fee for a petition for review is currently $ 600.00 and is paid to the circuit court directly. Counsel may pay the fee online with a credit card when the petition is submitted or may submit the petition without payment. 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. Fed. R. App. P. 24(b). Any such motion submitted by counsel with the petition for review must be in a single PDF containing only the motion and supporting affidavit.

F. **Venue for the Petition for Review.** The petition for review must be filed in the judicial circuit in which the Immigration Judge (IJ) completed the removal proceedings. INA § 242(b)(2), 8 U.S.C. § 1252(b)(2).

III. EVALUATING THE RECORD ON REVIEW[6]

It is not uncommon for a petitioner in an immigration case to have additional avenues of relief available, outside of those raised in the administrative proceedings. For example, an individual removable based on a criminal removal ground may have been able to ameliorate the conviction so that it no longer carries immigration consequences. Or, a petitioner may have a U.S. citizen or lawful permanent resident relative who is now able to apply for a relative visa petition for the petitioner.

These remedies may be better, or more certain, than the relief sought through the petition for review. For this reason, it is critical to review the record and the petitioner's situation carefully for any possible alternative forms of relief.

The procedure for requesting alternative forms of relief varies upon the specific form of relief in question. Certain forms of relief, such as adjustment based on a relative visa petition or termination of removal proceedings based upon amelioration of a criminal conviction, must be adjudicated at the agency level and require a remand order or a motion to reopen before the BIA. It

---

[6] This chapter does not offer substantive legal advice. One starting point for research in their fast-evolving area of law is the Ninth Circuit's Office of Staff Attorneys' Immigration Outline (most recently updated in March 2024), *available at* https://www.ca9.uscourts.gov/guides/immigration-outline/.

may be possible to hold the Ninth Circuit proceedings in abeyance while counsel explore the possibility of alternate relief.

It is important to remember, however, that the particulars of how to proceed when an individual has possible relief outside of the context of a petition for review can be very complicated and technical. Likewise, raising these issues at the circuit level or seeking a stay of proceedings can involve complex strategy questions. Please ensure that you obtain assistance from individuals with experience in immigration law and federal court practice.

If alternative relief exists, counsel for the Office of Immigration Litigation may agree, and in some cases may propose, that the case be stayed before the Ninth Circuit or remanded to the agency for adjudicating the alternative relief. In such a case, counsel may file a joint motion to remand to the agency. The Court generally preserves any stay of removal during the remand. The Court's Mediation Program can assist the parties in exploring these other avenues. Counsel should email the Circuit Mediation Office if the Program's involvement may be helpful to the parties.

IV. JURISDICTIONAL CONSIDERATIONS[7]

As in all appeals, counsel must evaluate whether the Court has jurisdiction over the petition for review. Fed. R. App. P. 28(a)(4); 9th Cir. R. 28-2.2. Particular jurisdictional considerations apply to petitions for review of BIA decisions, however, and these requirements are often major issues in the case. While an exhaustive discussion of these considerations is beyond the scope of this guide, the following is an overview of the jurisdictional aspects of which counsel must be aware. The *Ninth Circuit*

[7] This chapter does not offer substantive legal advice. One starting point for research in their fast-evolving area of law is the Ninth Circuit's Office of Staff Attorneys' Immigration Outline (most recently updated in March 2024), which has a chapter on Jurisdiction and Standard of Review (https://www.ca9.uscourts.gov/guides/immigration-outline/).

Immigration Outline, a link to which appears above, provides a much more extensive explanation of these considerations.

It is important to be aware of these considerations because jurisdictional questions may be raised by the Court itself, through an order to show cause, *see* Note to General Order 6.4, or through a dispositive motion from the government. 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 have jurisdiction over final administrative decisions only. INA § 242(a)(1), 8 U.S.C. § 1252(a)(1).

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).

C. **Exhaustion of Administrative Remedies.** The circuit courts may review orders of removal only if the petitioner has exhausted all administrative remedies available as of right. 8 U.S.C. § 1252(d)(1).

V. REQUESTING A STAY OF REMOVAL

No automatic stay arises either within the 30-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 BIA's final order of removal. Because 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

petitioner in danger, then the petitioner will want to request a stay. In most cases, petitioners want a stay of removal.

The Ninth Circuit's Executive Committee is reexamining the Court's stay-of removal procedures. *Rojas-Espinoza v. Bondi*, No. 24-7536, -- F.4th--, 2026 WL 674370, at *1 (9th Cir. Mar. 10, 2026) (Murguia, C.J., concurring). It is therefore important to be aware that the practice outlined below could change upon decision by this Court.

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, but it *must* be submitted as a separate motion in a separate PDF, not in the body of or attached to the petition for review.

In the Ninth Circuit, filing an initial motion for a stay of removal automatically invokes a temporary stay until further order of the Court. 9th Cir. General Order 6.4(c)(1).

The electronic certified administrative record must be filed with the Court within 35 days from the filing of the petition for review. The respondent must file its response to the motion for stay within 21 days from the due date of the administrative record. Any dispositive motions respondent seeks to file should be filed at the same time the response is due. General Order 6.4(c)(3). During this time, the petitioner is covered by the temporary stay described above. The government's failure to respond within the time set is deemed a statement of non-opposition. General Order 6.4(c)(5). The petitioner may file a reply seven days from service of the response. General Order 6.4(c)(4). The grant of a stay, or the continuation of the temporary stay pursuant to government non-opposition, continues in effect during the pendency of the petition for review or until further order of the Court. General Order 6.4(c)(5). It does not operate as a stay on, or suspension of, the briefing schedule.

A briefing schedule will be established upon the filing of the petition for review, whether or not a motion for stay is filed. *See* General Order 6.4(c)(6).

Stays of removal are not granted as a matter of course. When adjudicating a motion for stay of removal, circuit courts 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, 434 (2009); *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (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).

When a motion for stay is filed, counsel should contact the Office of the General Counsel for the district where the petition for review is filed or, if the petitioner is detained, for the district where the petitioner is detained, to notify the OGC that a motion for stay has been filed, so that the petitioner may not be removed.

VI. THE RECORD ON REVIEW

The petitioner in a petition for review of a BIA decision does not prepare excerpts of record. 9th Cir. Rule 17-1. Instead, the BIA prepares a Certified Administrative Record and files it with the circuit court within 35 days of service of the petition for review

(rather than the 40 days provided in Federal Rule of Appellate Procedure 17). *See* General Order 6.4(c)(3) & (6). The record is then available on the Ninth Circuit's electronic docket report for the case.

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. P. 16(a). The parties may by stipulation supply any omission from the record or correct a misstatement. Fed. R. App. P. 16(b). If necessary, the Court may direct that a supplemental record be prepared and filed. *Id.*

Documents in immigration cases, including administrative records, are generally not filed under seal in the Ninth Circuit. However, remote electronic access to documents is limited by rule to the parties to the case, though the documents will be available for public viewing in the Clerk's Office. *See* Fed. R. Civ. P. 5.2(c), Fed. R. App. P. 25(a)(5). Under the same rule, orders and dispositions in these cases are publicly available.

VII. 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. 9th Cir. R. 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. 9th Cir. R. 27-11. Although not mentioned in Rule 27-11, motions for summary disposition also stay the briefing schedule, as a matter of court practice. *See* https://www.ca9.uscourts.gov/staff-attorneys/motions/#Effect-of-Motions-on-Briefing. The

Government should file any dispositive motions at the time its response to any motion for stay is due. General Order 6.4(c)(3).

VIII. 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 Ninth Circuit Rules. *See also supra*, Chapter IX, Drafting the Brief. The Ninth Circuit requires certain additional information in briefs on petitions for review. These are:

- whether the petitioner is in DHS custody;
- whether the petitioner has filed a motion to reopen;
- whether the petitioner has filed an application for adjustment of status

9th Cir. R. 28-2.4(b). 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. 9th Cir. R. 28-2.7.

IX. MEDIATION

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). *See, supra*, section III, on possible alternative forms of relief; Chapter VI, Mediation. 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. The Advisory Committee Note recognizes that a resolution by mediation may take into account remedies and information not present in the record.

X. POST-DECISION

Post-decision measures, such as petitions for rehearing and issuance of the mandate, are discussed *supra* in Chapter XII of this Practice Guide.

XIV.
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 confinement. Section 2241 is also available, under very limited circumstances, to federal prisoners with claims that would normally be brought in a Section 2255 motion, if Section 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 Section 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. Coram nobis relief is unavailable in federal court to attack a state court conviction.

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. *See, e.g.,* Rules Governing § 2254 Cases in the United States District Courts; Rules Governing § 2255 Cases in the United States District Courts.

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 prisoner is in state custody, and within 60 days if the prisoner is in federal custody.

Pro se litigants should always include a proof of service for the notice of appeal and for their 2254 petitions/2255 motions. The proof of service will show when the prisoner tendered the document to prison authorities, which is critical for application of the mailbox rule. Under the mailbox rule, a pro se prisoner's documents are considered filed at the time they are delivered to prison authorities for forwarding to the court. *United States. v. Winkles*, 795 F.3d 1134, 1145-46 (9th Cir. 2015).

If the Ninth Circuit issues an order to show cause on the timeliness of the notice of appeal, prisoners need to (1) respond, but more importantly (2) immediately file a motion in the *district court* for an extension of time to appeal or file a motion to reopen the time to appeal. *See* Fed. R. App. P. 4(a)(5), (6). Only the district court has jurisdiction to extend time for appeal. *See* Fed. R. App. P. 4(a)(5), 26(b); *United States ex rel. Haight v. Cath. Healthcare W.*, 602 F.3d 949, 954 (9th Cir. 2010). A separate

motion must be filed; the notice of appeal and response to the order to show cause cannot be treated as a motion for extension of time. *See* Fed. R. App. P. 4(a)(5); *United States ex rel. Haight*, 602 F.3d at 956; *Malone v. Avenenti*, 850 F.2d 569, 572 (9th Cir. 1988).

State prisoners should also be aware that the federal statute of limitations for filing a 2254 petition in the district court differs from state-law deadlines for filing a habeas petition. For example, prisoners in Oregon have two years to file a state habeas petition, but federal law allows only one year. 28 U.S.C. § 2244(d)(1). If a prisoner waits more than one year to file a habeas petition in Oregon, the federal one-year deadline will have already run by the time the state habeas petition is filed, which means that the 2254 petition will be untimely. Although the time to file a 2254 petition is tolled while the state habeas petition is pending, 28 U.S.C. § 2244(d)(2), that tolling period only pauses the federal clock while the state petition is pending; it cannot revive time that has run out.

III. CERTIFICATES OF APPEALABILITY

To appeal a district court's final decision in almost all cases involving Section 2254 petitions or Section 2255 motions, all Section 2241 cases brought by state detainees and prisoners, and some Section 2241 cases brought by federal detainees and prisoners, the petitioner or movant must obtain a "Certificate of Appealability," or "COA." Neither the federal government nor a state government needs to seek a COA to appeal from an adverse ruling by the district court.

The COA requirement does not apply in coram nobis cases. It is not uncommon, however, for pro se litigants and even practitioners to present cases as "coram nobis" when those cases do not meet the very specific requirements for that writ and are, in fact, simply Section 2255 motions. *See United States v. Kwan*, 407 F.3d 1005, 1011 (9th Cir. 2005) (describing the coram nobis requirements).

A. **Standard for a COA.** The COA may be granted as to all claims, or as to some, or denied entirely. To obtain a COA, the petitioner or movant 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.

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 or movant must also show that one or more of the underlying claims in the petition or motion meets the substantive standard for issuing a COA. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

B. **Who Decides Whether to Grant a COA.** The determination as to whether 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 or movant can file a motion in the Court of Appeals, requesting that a COA be granted.

Filing a request for a COA is not a substitute for filing a notice of appeal. Even if a petitioner or movant files a motion with this Court requesting a COA, he or she 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 to file a COA request in the Court of Appeals), he or she must still file a timely notice of appeal. The Court does, however, make an exception for pro se appellants, and routinely treats their COA requests, filed in the district court, as also being notices of appeal.

In the Ninth Circuit, 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 50 to 60 COA requests in a single session. If either one or both of the judges on the panel vote to grant the request, the COA is issued.

Although the Court will treat a notice of appeal as also being an implied motion for a COA (*see* Fed. R. App. P. 22(b)(2)) the appellant is well advised to make a separate motion setting out his or her best arguments as to why a COA should be granted.

C. **Motion for Reconsideration.** If an appellant's request is denied in the Ninth Circuit (as, again, most are), the appellant 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. An appellant denied a COA by the Court of Appeals may also seek review of that denial by filing a petition for writ of certiorari in the Supreme Court. *Hohn v. United States*, 524 U.S. 236 (1998).

A reconsideration motion should not just repeat the arguments made in the initial COA request, but should focus on what the appellant believes the panel missed when it denied that initial request.

D. **Uncertified Claims.** 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. Regardless of whether the COA is ultimately limited to less than all of the claims, the appellant may still include the other, "uncertified" claims in his or her appellate brief. He or she 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 Issues."

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 appellee is not required to address "uncertified" claims unless directed to do so by the Court. Except in the extraordinary case, 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. R. 22-1(e) & (f)). But if the merits panel – when reviewing the briefs – takes particular interest in an uncertified issue it may order additional briefing on that issue.

If the petitioner or movant has been granted relief in district court and the respondent or federal government appeals, it is generally not necessary for the petitioner or movant to file a cross-appeal or obtain a COA to preserve the right to argue alternative theories or claims rejected below. Rather, the petitioner or movant can defend the favorable judgment on the basis of any theory or claim asserted in district court – even if the district court rejected that particular claim. *Jennings v. Stephens*, 574 U.S. 271, 282–83 (2015). But the alternative claim should not entitle the petitioner or movant to greater relief than he or she was granted in the judgment. An obvious example would be if the petitioner or movant asserts a claim that the trial evidence was constitutionally insufficient – which, if successful, would bar retrial – when the judgment granting habeas relief only required that petitioner be provided a new trial.

IV. APPOINTMENT OF COUNSEL

Most appeals in habeas cases are brought by prisoners proceeding pro se. Although the Court is not required to appoint counsel in such cases, the Criminal Justice Act ("CJA") provides the Court with discretion to do so. If a COA is granted by the Ninth Circuit, and the 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 Chapter V of this guide, "The Right to Counsel on Appeal."

Indigent Section 2254 appellants are entitled to the production of transcripts at the government's expense. 28 U.S.C. § 753. However, indigent Section 2255 appellants are not; instead, they must move for the production of transcripts at government expense. *Id.* The Ninth Circuit 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 Section 2254 petitions – cases brought by state prisoners challenging their convictions and sentences on federal constitutional grounds – and, to a lesser extent, Section 2255 motions brought by federal prisoners. (AEDPA does not apply to Section 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 and exhaustion requirements, and it severely limits 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 assist the Court and is not enough to win an appeal.

A leading treatise and an invaluable resource in navigating federal habeas corpus practice is R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure, 7th Ed. (Lexis Nexis).

VI. "SECOND OR SUCCESSIVE PETITIONS/MOTIONS"

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

The "second or successive" requirements do not apply to 2254 petitions that were previously dismissed without prejudice for failure to exhaust state remedies. *Slack v. McDaniel*, 529 U.S. 473, 488 (2000).

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 Appeals, before he or she can even begin litigating the new petition in the district court. That permission is rarely given. To get it, the prisoner must file an application demonstrating that the new petition or motion 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, if proven, "would be sufficient to establish by clear and convincing evidence" that "no reasonable factfinder would have found the [petitioner] guilty . . . ." 28 U.S.C. §§ 2244(b)(2); *see also* 28 U.S.C. § 2255(h) (using a slightly different formulation for Section 2255 motions).

There is a unique procedure for considering applications for leave to file "second or successive" petitions or motions: 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.

Because of Section 2254's strict time limits, some petitioners submit the petition to the district court while the motion for leave to file the petition is still pending in the Court of Appeals, so that — if the petition is deemed not to be "second or successive" after

the time for filing a regular petition has run —the petition will still be timely. However, this practice can create confusion and runs the risk of angering the district court, the Court of Appeals, or both. An alternative is to include, within the application for permission to file a "second or successive" petition, a request that if the Court of Appeals deems the petition not to be "second or successive," the case be transferred to the appropriate district court to be treated as a regular habeas proceeding and be deemed to have been filed in the district court on the date the application was filed in the Court of Appeals.

XV.
CHEKLISTS

I. CHECKLIST FOR DRAFTING MOTIONS

A. CAPTION (Fed. R. App. P. 27(d)(1)(B); 9th Cir. R. 27-1):

- Case number.
- Name of the court.
- Title of the case.
- Brief descriptive title indicating the motion's nature and by whom it is filed (*i.e.*, "Appellant's Motion to Voluntarily Dismiss Appeal").
- Date by which relief is needed to avoid irreparable harm.

B. FORMAT (Fed. R. App. P. 27(d)(1); 9th Cir. R. 27-1):

- Motions and responses not to exceed 20 pages (if handwritten or typewritten) or 5,200 words (if produced on computer); replies not to exceed 10 pages (if handwritten or typewritten) or 2,600 words (if produced on computer).
- Include table of contents and table of authorities if motion is more than 10 pages or 2,500 words. These do not count against page or word limits.
- Text (except block quotes more than two lines in length) 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 larger, or monospaced font with not more than 10.5 characters per inch).

- Any paper-filed motions or paper copies ordered by the Court must be single-sided only, on 8½ x 11" paper that is light, opaque, and unglazed.

- Margins must be at least 1" on all sides. Page numbers, but no text, may be in margins.

C. CONTENTS (Fed. R. App. P. 27(a)(2)):

- Must state with particularity the grounds for the motion, the relief sought (and by when), and the legal argument necessary to support it. Fed. R. App. P. 27(a)(2)(A); 9th Cir. R. 27-1(3).

- If unopposed, must say so. 9th Cir. R. 27-1(2). Unless precluded by time urgency, contact opposing counsel and include opposing counsel's position or an explanation regarding the efforts taken to learn that position. Advisory Committee Note to 9th Cir. R. 27-1(5).

- 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. 9th Cir. R. 27-8.

D. 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 after 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 and it must be filed separately as a motion rather than a response. Fed. R. App. P. 27(a)(3)(B).

E. MOTIONS WITH SPECIAL RULES:

Motions to stay a district court or agency order: Must confirm that the motion was initially filed with the district court/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 be filed at least 7 days before the expiration of the time for filing the brief, and be accompanied by a declaration setting out original deadline, any previous extensions, the requested extension, substantial need for requested extension, that movant has exercised diligence, whether any other party objects or why this information cannot be supplied, and that court reporter is not in default with regard to any designated transcripts. 9th Cir. R. 31-2.2(b).

Motions to expedite: Must show good cause, and set for the status of transcript preparation, and position of all opposing parties, or explain why this information cannot be supplied. 9th Cir. R. 27-12. May include proposed briefing and argument schedule, request for stay of order, request for release of prisoner pending appeal. *Id.*

Emergency Motions: Emergency motions must include certification that relief is needed *within* 21 days to avoid irreparable harm. They must have a cover page bearing the legend "Emergency Motion Under Circuit Rule 27-3," and providing the date by which relief is needed underneath that legend, and must be accompanied by a separate "Circuit Rule 27-3 Certificate for Emergency Motion" (Form 16, found at https://www.ca9.uscourts.gov/forms/). You do not have to use Form 16; you may write your own certificate instead. But keep in mind that using Form 16 is encouraged. You must notify the Emergency Motions department of the Clerk's Office before filing any emergency motion. Call (415) 355-8020 and leave a message if your phone call is not answered or e-mail emergency@ca9.uscourts.gov.

Motions for limited remand: Must state that the district court has expressed willingness to grant motion or view that the motion raises a substantial issue, if case is remanded. Fed. R. App. P. 12.1.

Motions for a certificate of appealability: Must be filed initially with the district court. 9th Cir. R. 22-1. A notice of appeal acts as a request for a certificate of appealability if no separate document is filed. Fed. R. App. P. 22(b)(2).

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

II. CHECKLIST FOR DRAFTING BRIEFS

A. COVER (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 (or agency) below.
- Title of brief (example "Government's Answering Brief").
- Name(s) and address(es) of counsel filing the brief.

B. CONTENTS (Fed. R. App. P. 28; 9th Cir. R. 28-2; briefs in cross-appeals are governed by Fed. R. App. P. 28.1(c); capital appeals by 9th Cir. R. 32-4.):

- Table of Contents.
- Table of Authorities with page references (cases alphabetically arranged, statutes and other authorities numerically arranged).
- (Optional) Short introduction setting forth basic parameters of case and appeal.
- Jurisdiction, Timeliness, and
  - For criminal cases, Bail Status
  - For immigration cases, Detention Status and Post-Petition Filings
- Issue(s) Presented.
- Pertinent constitutional provisions, treaties, statutes, ordinances, regulations or rules, or statement that provisions are included in addendum to the brief.

- Statement of Case **with references to the excerpts of record**, with citations formatted as prescribed in Ninth Circuit Rule 30-1.6.
- Summary of Argument.
- Standard(s) of Review [*if not included within each argument section*].
- Argument with references to record and citations to case law, statutes, and other authorities.
- Conclusion.
- Signature block including date.
- Statement of Related Cases, if applicable. 9th Cir. Form 17.
- Certificate of Compliance, using 9th Cir. Form 8, if required.
- Certificate of Service, using 9th Cir. Form 15, if required.
- Addendum of orders challenged in immigration cases and/or pertinent constitutional provisions, treaties, statutes, ordinances, regulations or rules.

C. TYPEFACE AND LENGTH (Fed. R. App. P. 32(a)(5) and (a)(7) and 9th Cir. R. 32-1):

- 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): up to 14,000 words OR 50 pages (if brief handwritten or typewritten).
- Length for reply briefs: up to 7,000 words OR up to 25 pages (if brief handwritten or typewritten).

- Briefs **must** include word or line count in the Certificate of Compliance pursuant to Fed. R. App. P. 32(a)(7)(C).

D. 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 CM/ECF or ACMS system will require attorneys to verify that personal information has been redacted.

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

- Text double-spaced (headings, footnotes, and block quotations may be single-spaced).

- Pages serially paginated.

- Footnotes must be in the same font size as the body of brief (generally, 14 point font).

III. CHECKLIST FOR PREPARING EXCERPTS OF RECORD

If a pro se appellant or petitioner files no Excerpts of Record, and you are counsel for the appellee or respondent, you must file Supplemental Excerpts of Record that contain the documents cited in the pro se litigant's opening brief, any other documents required to be in the Excerpts of Record by Ninth Circuit Rule 30-1.4, and any further documents cited in your brief.

A. **COVER** (9th Cir. R. 30-1.5(d)):

- Identical to the brief cover prepared pursuant to Fed. R. App. P. 32(a), except "Excerpts of Record" (or "Supplemental Excerpts of Record" or "Further Excerpts of Record") is substituted for "Brief of Appellant" (or "Answering Brief" or "Reply Brief").

- White cover for any paper copies ordered by the court.

- Include volume number (or Index) in title.

- Each volume must contain a cover page with the case caption.

B. CONTENTS (9th Cir. R. 30-1.4):

- Complete index that lists the name (and brief description) of each document in order, including a citation to where the document may be found in the lower court record, and the volume and page number where it may be found in the excerpts. If the entire Excerpts of Record, counting all pages, including the caption (cover) page and the Index, does not exceed 300 pages and does not contain any sealed filings, the Index may be included in a single volume with the remainder of the Excerpts of Record. If the entire Excerpts of record exceeds 300 pages, or if you have sealed or provisionally sealed filings that must be submitted in a separate sealed volume, file the Index in a single, separately bound Index Volume referencing all of the documents contained in all volumes of the Excerpts of Record, and do not include an index in any other volume of the excerpts.

- Volume 1 must include all decisions (written or oral) being appealed, reviewed, or collaterally challenged, and no other material, unless the entirety of the Excerpts of Record will be submitted in a single volume of no more than 300 pages.

- The last documents in the Excerpts of Record should generally be the notice of appeal and complete trial court docket sheet. 9th Cir. R. 30-1.4(f).

- Other documents that should be included:

    - Documents and transcript pages pertinent to the decision being challenged.

- All parts of the record cited in the brief, plus sufficient pages on either side to provide context.
- Copies of all written exhibits or affidavits cited in the brief. If copies cannot be produced, explain why in your brief. (*See* 9th Cir. R. 27-14 for instructions for transmitting physical, non-documentary, exhibits.).
- In a criminal appeal, or an appeal from the grant or denial of a 28 U.S.C. § 2255 motion, the final indictment or charging document.
- In a civil appeal, the final pretrial order, or, if the final pretrial order does not set out the issues to be tried, the final complaint and answer, petition and response, or other pleadings setting out those issues.
- In a capital appeal, Ninth Circuit Rule 32-4 requires that the Excerpts of Record include all final orders and rulings of all state courts in appellate and post-conviction proceedings, and all final orders involving the conviction or sentence issued by the Supreme Court of the United States.
- Where the appeal is from the grant or denial of a motion, the specific portions of any affidavits, declarations, exhibits or similar attachments submitted in support of or in opposition to the motion that are essential to the resolution of an issue on appeal.
- Where the appeal is from a district court order reviewing an agency's benefits determination, the entire reporter's transcript of proceedings before the administrative law judge, if such transcript was filed with the district court.

- Sealed and provisionally sealed documents must be contained in separate, sealed, final volume(s). This does

not include Presentence Reports and sealed sentencing memoranda, which are submitted electronically by selecting the ACMS or CM/ECF electronic filing types relating to sealed documents and filing presentence reports under seal. The ACMS and CM/ECF systems will automatically seal documents filed in this manner.

Documents to include in any Supplemental Excerpts of Record:

- Anything from the record that you rely upon in your brief and that is not in the initial Excerpts of Record.
- Anything that should have been, but was not, included in the initial Excerpts of Record, which must be submitted by appellee when the appellant is not represented.

Documents to include in any Further Excerpts of Record:

- Anything from the record that you rely upon in your brief and that is not in the initial or any supplemental Excerpts of Record.

C. MULTIPLE VOLUMES (9th Cir. R. 30-1.4):

If the excerpts are less than 300 pages, including the Index and caption (cover) page, and there are no sealed filings, one volume may be used. If the excerpts exceed 300 pages, the following requirements apply:

- Each volume must be no more than 300 pages, including the cover, blank pages, and any certificates. However, each volume is not *required* to contain exactly 300 pages, and you may break the volumes up where appropriate.
- The first volume must contain only the decisions being appealed, reviewed, or collaterally challenged, whether oral or written, final or interim. 9th Cir. R. 30-1.4(a). Where such decisions were rendered orally, this may

include transcripts. In view of this limitation, the first volume will often be shorter than other volumes.

- All additional documents, including the notice of appeal and district court docket sheet (which are placed at the end of the last non-sealed volume), should be included in subsequent volumes.

- Number the pages consecutively across all volumes (e.g., if Volume 1 ends with page 84, Volume 2 should begin with page 85). However, if you file a separate Index Volume pursuant to 9th Cir. R. 30-1.5(a), number its pages separately from the remaining volumes. Be sure to assign a number to *all* pages, including covers, blank sheets, and certificates (even if you don't print the number on each of those pages), so that the page numbers of the electronic and paper versions will match.

D. MISCELLANEOUS

- Paper copies of the excerpts should be bound securely on the left.

- Paper copies of the excerpts should be printed on letter-sized, light-colored paper with black ink (or colored ink where appropriate).

- Paper copies of the excerpts may be printed on both sides of the paper, but only if (i) the method of binding allows each volume to lie completely flat when open, such as comb, spiral, coil, or wire binding, and (ii) the weight of the paper is sufficient to prevent bleeding through when marked on one side in ink or highlighter.

- Normally, transcripts and documents should be arranged in reverse-chronological order, such that the transcript or document with the most recent filing date appears first. For this purpose, transcripts should be placed by hearing date, except that hearings or trials that span multiple

dates or sessions should appear in chronological order for that hearing or trial, using the first day of the hearing or trial as the relevant date. Alternative organization of the excerpts is acceptable if better suited to a particular case.

- Page numbers should be prominently displayed on the bottom right corner of the page. Make sure that page numbers are not obscured by other text or images; if necessary, move the page number to another location on the page to ensure that it is clearly visible. This will prevent judges and their staff from having to hunt to find the applicable page number.

TIPS FOR COLLECTING AND COMPILING DOCUMENTS

- Create a new folder entitled "ER," "SER," or "FER." You will add all items that need to be included in the excerpts to that folder.
- Compile district court records and transcripts into the folder.

Option I Copy and paste

If you have kept PDF copies of the district court documents, paste the ones you need into the 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 folder. *See* Pacer User Manual: (https://www.pacer.gov/documents/pacermanual.pdf).

Option III Using Lexis/Nexis Courtlink

STEP 1 Log into Lexis/Nexis Courtlink.

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

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

- Enter 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 folder.

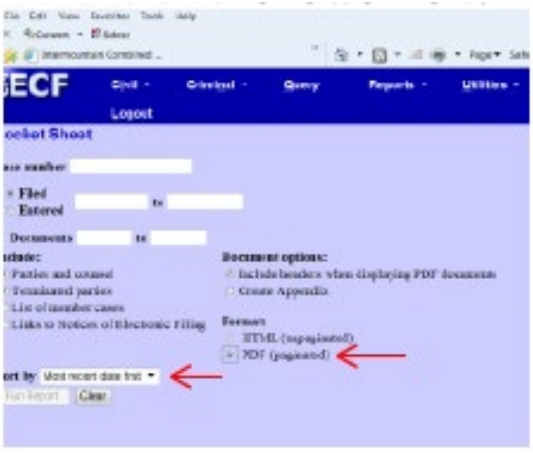
- **Create PDF copy of docket report**

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 Enter 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:

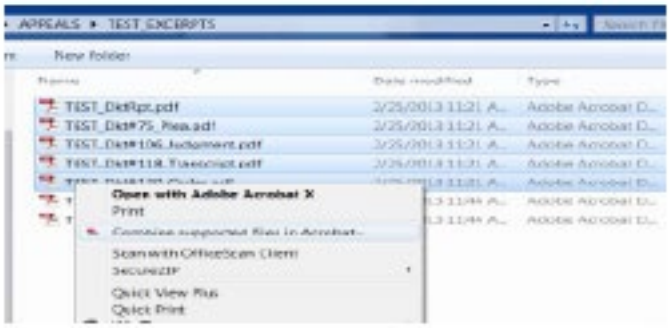


STEP 5 When the report opens, save it to the folder.

- **Put it all together**[8]

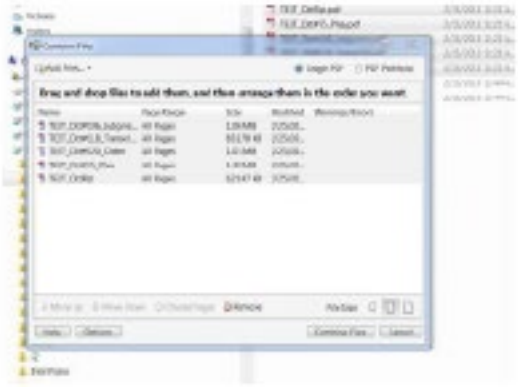
  STEP 1 Using Adobe Acrobat Pro, combine all documents into one PDF with decisions of the district court on review first, the docket sheet last, the notice of appeal and all the other documents in between in reverse chronological order.

  - From your folder, click and hold "Ctrl" and click to select all of the documents you want to include in Volume 1. 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:

[8] For more guidance on creating PDFs that will be accepted by the Court, please consult the Court's Technical Guide for Working with PDFs: https://cdn.ca9.uscourts.gov/datastore/uploads/guides/Electronic%20Filing%20Guide%20(2020).pdf.



- 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 1. 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 1 already in it. Click the “Add Files” box in its upper left corner and click on “Add Files.” If the directory that comes up is not the one where the rest of the excerpts documents are, navigate to the excerpts folder.

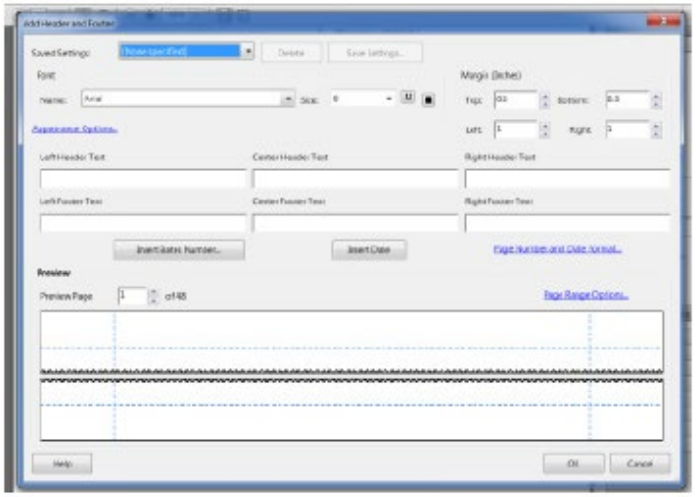
Control-click the other files you want to add. Then click "Add Files." Then arrange the files, combine, save, and name as above.

STEP 2 Number the pages (and add header or footer text, if any) to Volume 1.

- Open (or leave open) your Volume 1 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 may be under the "View" tab.
- Click "Pages" and under "Edit Page Design," click the "Bates Numbering" drop-down arrow and select "Add Bates Numbering . . ."

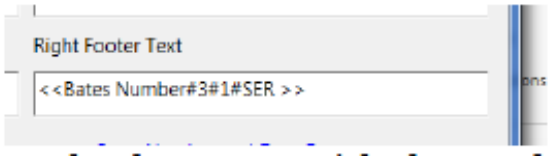
- Acrobat's "Bates Numbering" window will now open.
- Click the "Add Files" button, and then select "Add Files."
- Select your combined documents file (yes, even though you already have it open).
- Click "Add Files."
- Click "OK."

- 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. (Keep in mind that any headers will probably be obscured by the circuit court’s docket stamp once the excerpts are filed.)
- To enter page numbers using the 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. Make sure your file name does not include any special characters, including periods.
  - 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 if necessary. You can do this by giving the (now shrunken) document a different name.

- **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, in 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 (if required)**

  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 number references.

  STEP 3: Prepare a certificate of service (if required) for each volume of excerpts.

  STEP 4: Convert all caption pages 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 1, index, the combined ER documents for Volume 1, and the certificate of service (if required) for Volume 1.

  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 1
  2. Combined ER documents for Volume 1
  3. Certificate of Service (if required) for Volume 1

  STEP 4: Click "Combine Files," then name as FullLastNameFirstIntitial_**ER_Vol 1final** and save the volume in the ER folder. Make sure your file name does not have any special characters.

  STEP 5: Repeat for each subsequent volume.

Your volumes are now ready to be e-filed.

See filing instructions: Filer's Checklist for Excerpts of Records
Excerpts of Record Frequently Asked Questions:
https://www.ca9.uscourts.gov/cmecf/faqs/er/

IV. CHECKLIST FOR FILING BRIEFS AND EXCERPTS OF RECORD

A. APPELLATE FILING FUNDAMENTALS

- Briefs and excerpts must be filed via CM/ECF or ACMS in separate transactions. Do not attach excerpts to a brief.
- All documents must be in PDF format; briefs must be in native PDF format and searchable.
- The Court strongly prefers excerpts to be in searchable PDF format, produced by using optical character recognition (OCR) technology whenever this can be accomplished without distorting the documents.
- In consolidated cases and cross-appeals, keep all consolidated/cross-appeal case numbers selected, even if counsel is on only one of the case numbers. All consolidated/cross-appeal case numbers must be on the covers of the brief and excerpts.

B. BEFORE FILING

- Make sure you have a username and password and that you have registered for MFA (multi-factor authentication).
- Make sure that signature lines in briefs have "s/" followed by the typed name of the attorney.
- Convert briefs, any certificate of service (if required), 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. Scanning a paper brief to create the PDF file is **prohibited**. The Court strongly prefers the brief and its certificates and addenda to consist of a single PDF file.

- Make sure each PDF document is searchable.

- Check whether PDF attachments exceed the permitted size of 100 MB. If they do, break them up into smaller PDF files and indicate that in the description when you upload the files by adding a part number – for example, "ER Vol 1 Part 1."

C. FILING THE BRIEF

Detailed instructions for filing briefs and other documents via ACMS are available at:
https://www.ca9.uscourts.gov/efiling/acms/

Detailed instructions for filing documents in cases opened before October 1, 2023, on CM/ECF are available at:
http://cdn.ca9.uscourts.gov/datastore/uploads/cmecf/ecf-user-guide.pdf.

Follow the Court's instructions for the document descriptions you give in CM/ECF for each PDF you upload (this is not the same as the file name of your document). (In ACMS you will select the correct description of each document from the drop down menu as you upload each PDF.)

- In the Description field for the brief, accept the default description (Main Document).

- In the Description field for each volume of excerpts, change the default description to "ER Vol" followed by the volume number (for example, "ER Vol 1"). If you need to upload a single volume by breaking it up into separate PDF files, indicate that in the description by adding a part number, for example, "ER Vol 1 Part 1."

For more detailed step-by-step instructions, see the Ninth Circuit's CM/ECF User Guide at :
http://cdn.ca9.uscourts.gov/datastore/uploads/cmecf/ecf-user-guide.pdf.

D. NOW WHAT?

The Court will review the brief and excerpts and generally order their filing within 24-48 hours of submission. If the Court finds deficiencies in the brief or excerpts, it will send an email or post a deficiency notice describing the errors and instructing you to submit a corrected brief or excerpts. You should not submit paper copies of the brief or excerpts until or unless directed to do so by the Clerk. Paper copies of briefs submitted to the Court must be accompanied by a certification (or Form 18, https://www.ca9.uscourts.gov/forms/) attached to the end of each copy of the brief stating that the brief is identical to the version submitted electronically.

XVI.
RESOURCES

I. THE FEDERAL RULES OF APPELLATE PROCEDURE, THE NINTH CIRCUIT RULES, AND GENERAL ORDERS

Appellate counsel should consult, in the first instance, the Federal Rules of Appellate Procedure (Fed. R. App. P. or "FRAP"), the Ninth Circuit Rules (9th Cir. R.), and General Orders (G.O.). 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 Appeal for the Ninth Circuit (www.ca9.uscourts.gov). The Circuit website contains the Federal Rules of Appellate Procedure, the Ninth Circuit Rules, and the Court's General Orders. The Circuit website also contains links to Ninth Circuit Model Civil and Criminal Jury Instructions, outlines regarding certain specific legal topics prepared by members of the Ninth Circuit staff, including standards of review, and immigration law and procedure, and social security law. These outlines are a useful starting point for legal research. The website provides downloadable fillable forms needed for processing civil and criminal appeals. The website also contains some guidance to the rules, namely a form entitled "After Opening a Case." The "Attorneys" page provides information about the Court's pro bono program, which is an excellent way to gain experience handling federal appeals, and information relating to court-appointed "CJA" counsel in criminal appeals. And for attorneys who are new to federal appellate practice, the "Attorneys" page also includes a link to a mentoring program that will match new lawyers with experienced federal appellate attorneys who may be able to assist with research guidance, writing, editing, and/or preparing a case for oral argument.

B. **The 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. **The American Bar Association (www.americanbar.org/).** The American Bar Association provides on-line merits briefs of cases pending before the Supreme Court. This valuable 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) 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, https://az.fd.org, www.nvx.fd.org.

E. **Cornell Law Library.** Includes free access to published opinions, statutes and regulations: https://law.library.cornell.edu/

F. **Findlaw.** Free public access to federal Supreme Court and Ninth Circuit opinions: https://caselaw.findlaw.com/

G. **The Federal Bar Association.** Hosts a website that includes articles about federal practice, judicial profiles, and local chapter membership and activity information: http://www.fedbar.org/

H. **Lawprose.org.** Hosted by Bryan A. Garner, offers legal writing tips along with videotaped interviews about

appellate advocacy with the Supreme Court justices, and many appellate judges. http://www.lawprose.org/

III. TREATISES

A. 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.

B. 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.

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

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

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

F. 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.

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

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

IV. ARTICLES

A. Appellate Practice Tips from Ninth Circuit Judges – (Practice Tips From Judges Hug, Rawlinson, and Bybee) Nevada Lawyer Magazine https://www.nvbar.org/wp-

content/uploads/NevLawyer_Oct_2012_Appellate_Tips-1.pdf

B. "Keep the Briefs Brief, Literary Justices Advise," by Adam Liptak, New York Times, May 21, 2011 https://www.nytimes.com/2011/05/21/us/politics/21court.html

C. Kozinski, Alex, The Wrong Stuff, 1992 Brigham Young University Law Review 325

D. Ninth Circuit Judge Richard Clifton's Practice Pointers and Other Tips on Brief Writing and Oral Arguments https://www.recordonappeal.com/record-on-appeal/2013/04/ninth-circuit-judge-richard-cliftons-practice-pointers-and-other-tips-on-brief-writing-and-oral-argu.html

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

F. 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 or the motions page of the court's website, contact the Ninth Circuit's Motion Unit at motions@ca9.uscourts.gov. For questions involving emergency matters, or to notify the court that you will be filing an emergency motion, e-mail: emergency@ca9.uscourts.gov.

B. **Procedural Matters and General Questions.** If your question or problem is not resolved by consulting the rules, contact the Clerk's Office at questions@ca9.uscourts.gov or call 415-355-8000.

C. **Appellate Lawyer Representatives' Mentoring Program.** This program offers general assistance regarding federal appellate practice, as well as special focus on two substantive areas of practice – immigration law and habeas corpus petitions. Mentors are volunteers who have experience in immigration, habeas corpus, and/or appellate practice in general. This program is limited to counseled cases. Interested lawyers should contact the Court at mentoring@ca9.uscourts.gov.

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.