INTERNAL OPERATING PROCEDURES
OF THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Effective 2018

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INTRODUCTION

A. Objectives.

These "Internal Operating Procedures" (I.O.P.S) cover the essential processes of this court from the distribution of the briefs to the final termination of the appeal and are designed:

(1) To insure that appeals are processed as expeditiously as possible consistent with the careful discharge of appellate responsibilities;

(2) To insure decisional stability and avoid intra-circuit conflict of decisions by providing a means for the panel system to operate efficiently and at the same time provide that a holding of a precedential opinion of the court may not be overruled without the approval of a majority of the en banc court;

(3) To insure the opportunity for contributions by every active judge to every decision of precedential or institutional significance; and

(4) To maintain the highest degree of collegiality among the judges.

B. Implementation.

These I.O.P.S implement:

(1) Statutory mandates;

(2) The Federal Rules of Appellate Procedure;

(3) The Third Circuit Local Appellate Rules (L.A.R.); and

(4) The customs and traditions of this court.

C. Citation Form.

These rules may be known as the Third Circuit Internal Operating Procedures and cited as 3d Cir. I.O.P. __._ (2018).

D. Computing Time.

Unless otherwise specified, days means calendar days. Counting time for voting on circulating opinions and rehearing petitions begins the day after the opinion or petition is circulated. Opinions and orders may be filed after close of business on the last day for voting. In addition to the procedure for extending time to vote set forth in Chapter 9, the time for voting may be extended by consent of the court to accommodate periods when large numbers of opinions are being circulated.

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CHAPTER 1. BRIEFS AND PREPARATION

1.1 Prior to Panel Sitting.

Briefs and appendices are distributed sufficiently in advance to afford at least four (4) full weeks' study in chambers prior to the panel sitting. In special circumstances, such as expedited cases, the panel may unanimously agree to a shorter reading period. Except where typewritten briefs have been permitted, two sets of briefs and one appendix, two if available, are furnished to each chambers. At the termination of the case, the briefs and appendices need not be returned to the clerk. Generally, fully briefed cases are randomly assigned by the clerk to a three-judge panel.

1.2 Responsibility of Panel Prior to Scheduled Sitting.

This court has the tradition of carefully reading briefs and reviewing appendices prior to oral argument or conference. Inherent in Local Appellate Rule 34.1 is the understanding that each judge will read the briefs and review the appendices a minimum of 11 calendar days before the first day of the panel sitting.

CHAPTER 2. ORAL ARGUMENT

2.1 Determination in Panel Cases.

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

2.2 Determination in Cases En banc.

There is oral argument in an en banc case if it is requested by at least one judge of the en banc court. No later than 11 calendar days before the en banc sitting, the chief judge or, in his or her absence, the presiding judge, furnishes the clerk with the court's determination in accordance with the maximum request, up to 30 minutes per side, of any judge. A request for oral argument beyond 30 minutes a side is determined by a majority of the en banc court. Ordinarily, 30 minutes per side will be allocated and an amicus will not argue unless at least 4 members of the en banc court vote otherwise.

2.3 Failure to Notify Presiding Judge.

Should a judge fail to notify other panelists orally or in writing of his or her views

prior to noon of the eleventh day before the panel sitting, the presiding judge assumes that the non-notifying judge agrees to be bound by the determinations of the other two judges or of the presiding judge, as the case may be.

2.4 Suggested Criteria for Oral Argument.

2.4.1 Experience discloses that judges usually find oral argument unnecessary when:

(a) The issue is tightly constrained, not novel, and the briefs adequately cover the arguments;

(b) The outcome of the appeal is clearly controlled by a decision of the Supreme Court or this court; or

(c) The state of the record will determine the outcome and the sole issue is either sufficiency of the evidence, the adequacy of jury instructions, or rulings as to admissibility of evidence, and the briefs adequately refer to the record.

2.4.2 Experience discloses that judges usually vote for oral argument when:

(a) The appeal presents a substantial and novel legal issue;

(b) The resolution of an issue presented by the appeal will be of institutional or precedential value;

(c) A judge has questions to ask counsel to clarify an important legal, factual, or procedural point;

(d) A decision, legislation, or an event subsequent to the filing of the last brief may significantly bear on the case;

(e) An important public interest may be affected.

2.4.3 The foregoing criteria shall not be construed to limit any judge's discretion in voting for oral argument.

2.5 Notice to Counsel.

No later than 10 calendar days prior to the first day of the panel sitting, the clerk communicates to counsel in each case listed the names of the members of the panel and whether the case is to be orally argued.

2.6 Posting of Oral Argument on the Court's Website.

2.6.1 Audio recordings of all arguments will be posted on the court’s internet website unless the panel directs otherwise.

2.6.2 Counsel will be provided an opportunity, either before or after argument,

to recommend or to object to the posting of video recordings of oral argument. If the panel is inclined to post a video recording, the clerk will inform counsel and direct counsel to submit any objections by close of business the next day.

2.6.3 While the Clerk will convey to the panel any suggestion from counsel or the public that video recordings be posted for public viewing, the decision on whether to post video recordings for public viewing is within the sole discretion of the panel. No opinion or order need be entered regarding a suggestion that video be posted.

2.6.4 If, after oral argument, and considering the views of counsel or the public if any, the panel unanimously agrees that an argument presents issues of significant interest to the Public, the Bar, or the Academic Community, the panel will direct that a video recording of the argument be posted for public viewing on the court's internet website.

CHAPTER 3. COMPOSITION OF PANELS AND ORDER OF PRECEDENCE

3.1 Composition of Panel.

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

3.2 Presiding Judge.

The chief judge is the presiding judge. In the absence of the chief judge, the presiding judge is that judge of this court in active service next in precedence. See 28 U.S.C. § 45(b). Other active circuit judges sit in order of precedence based on the seniority of their commissions, followed by senior circuit judges and visiting judges.

3.3 Entering Court.

The panel assembles in the robing room approximately 5 minutes prior to the opening of court. The judges enter the courtroom from the robing room in the reverse order of precedence. The next ranking judge is stationed to the right of the presiding judge facing the courtroom from the bench. All remain standing until the presiding judge sits.

CHAPTER 4. PANEL CONFERENCE PROCEDURE

4.1 Tentative Views.

After a case has been argued or submitted to a panel of the court, a conference is held to exchange tentative views as to the decision. The judges express views and tentative votes in reverse order of precedence. By unanimous agreement of the

panel, conferences in submitted cases may be held by telephone or views may be exchanged by electronic mail prior to the submission date.

4.2 Opinion Assignment.

Following discussion and tentative votes, the presiding judge assigns those cases in which opinions of the court are to be drafted to the judges of the panel for preparation of the opinion of the court. If the panel is divided in its views and the presiding judge does not concur in the decision of the majority, the assignment is made by that member of the majority who is the ranking judge of this court.

CHAPTER 5. OPINIONS

5.1 Forms of Opinions.

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

5.2 Precedential Opinions.

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

5.3 Not Precedential Opinions.

An opinion, whether signed or per curiam, that appears to have value only to the trial court or the parties is designated as not precedential and unless otherwise provided by the court, it is posted on the court's internet website. A not precedential opinion may be issued without regard to whether the panel's decision is unanimous and without regard to whether the panel affirms, reverses, or grants other relief. The first page of a not precedential opinion contains a footnote stating: "This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent."

5.4 Listing of Counsel and Judge.

Counsel are listed on all precedential opinions and on not precedential opinions if the case was argued. The name of the district judge or magistrate judge is listed on all opinions.

5.5 Preparation and Circulation of Opinions.

5.5.1 By Author. The authoring judge prepares a draft opinion in accordance with the decision of the panel at conference, but the author may express any different views reached after subsequent study of the case. The opinion will set forth the reasons supporting the court's decision.

5.5.2 Circulation Within Panel. After the draft opinion has been prepared, the authoring judge circulates it to the other two members of the panel with a request for approval or suggestions they may desire to make with respect to the draft opinion. Answering this request is given the highest priority by the other two judges, who shall communicate in writing their approval or disapproval within 8 calendar days of receipt of the opinion. This time is extended to 10 days during the month of August. Absent a request for additional time, failure to respond within that time period shall be deemed an approval of the opinion as drafted. Because it is the opinion of the court, other members of the panel are free to make any suggestions relating to the modification of, addition to, or subtraction from the proposed text. Where a textual revision or addition is suggested, the suggesting judge submits his or her modification in specific language capable of being inserted into the opinion. When one of the other two judges approves, it becomes the proposed opinion of the court. Should the other panel members disagree with the author's draft, the opinion is reassigned by either the presiding judge or the ranking judge who is a member of the panel's majority.

5.5.3 Time Schedule for Panel Drafting and Circulating Opinions; Reassignments.

(a) *60-day period for draft opinion writing*. It is the aspirational goal of the court that, except in complex cases, the authoring judge transmit to the panel a draft opinion within 60 days after assignment or after close of any supplemental briefing or other factors suspending the drafting process.

(b) *45-day period to file concurring or dissenting opinion*. If, after a second panel member approves the draft opinion, the third panel member desires to separately concur or dissent, the judge not joining in the opinion notifies the author promptly and transmits his or her separate opinion to the panel within 45 days after the second judge's approval is received. Panel opinions are not considered to be completed until each member has an opportunity to revise his or her opinion in response to those of other panel members.

5.5.4 To Non-panel Active Judges.

Drafts of unanimous not precedential opinions do not circulate to non-panel judges. Drafts of not precedential opinions that contain a dissent circulate to non-panel judges. Drafts of not precedential opinions that contain a concurrence circulate to non-panel judges if a member of the panel requests that the opinion be circulated to all judges. Drafts of precedential opinions and not precedential opinions that are not unanimous are circulated to all active judges of the court after the draft opinion has been approved by all three panel members, concurring or dissenting opinions have been transmitted, or all members of the panel have had the time set forth in I.O.P. 5.5.3 to write separate opinions. Absent a request for additional time, if the third judge has not timely responded, the draft opinion is circulated to the active judges of the court

with the notation added to the opinion that the third judge has not joined in the opinion. Non-panel active judges must notify the authoring judge within 8 calendar days if they desire en banc consideration. This time is extended to 10 days during the month of August. The circulation to non-panel active judges contains a request for notification if there is a desire for en banc consideration. Although senior judges do not have a vote en banc, senior judges may choose to receive circulating opinions.

5.5.5 En banc Cases.

The time schedule set forth in I.O.P. 5.5.2 and 5.5.3 is also followed in en banc cases, except that judges will give preparation of en banc opinions priority over preparation of panel opinions.

5.6 Filing of Opinions.

If, 8 calendar days (10 days in August) after the opinion is transmitted for circulation, insufficient votes for rehearing are received, and the authoring judge transmits the original typescript to the Clerk for filing and notifies the author of any separate opinion to do likewise. The failure of a panel member to concur or dissent or to file a timely opinion does not delay the filing of the majority opinion or the entry of the judgment of this court.

5.7 Citations.

The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing.

CHAPTER 6. JUDGMENT ORDERS

6.1 Panel Unanimity.

A case may be terminated in this court by a judgment order upon the unanimous decision of the panel.

6.2 Criteria.

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

6.2.2 A judgment order may be used when:

(a) The judgment of the district court is based on findings of fact which are not clearly erroneous;

(b) Sufficient evidence supports a jury verdict;

(c) Substantial evidence on the record as a whole supports a decision or order of an administrative agency;

(d) No error of law appears;

(e) The district court did not abuse its discretion on matters addressed thereto; or

(f) The court has no jurisdiction.

6.3 Form of Order.

6.3.1 A judgment order affirming the district court in a direct criminal appeal includes a statement of those issues raised by appellant and considered by the panel.

6.3.2 A judgment order may state that the case is affirmed by reference to the opinion of the district court or decision of the administrative agency and may contain one or more references to cases or other authorities.

6.4 Procedure.

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

6.4.2 The order writer promptly arranges for filing the original with the clerk.

CHAPTER 7. ORDERS REVERSING OR REMANDING

7.1 Retention of Jurisdiction.

When a panel deems it appropriate for this court to retain jurisdiction without disposing of the case and to remand to the district court or agency, such as for correction or modification of the record pursuant to Fed.R.App.P. 10(e) or for consideration of a settlement reached on appeal, the panel may do so and hold the appeal in abeyance. In such an instance, the panel has discretion to retain assignment of the case or return it to the clerk for reassignment upon its return.

7.2 Assignment Following Remand.

When an appeal or petition for review is filed in a case which has previously been remanded, the clerk will assign the appeal to a panel in the regular course unless the original panel retained assignment.

7.3 Reversal or Remand.

In some instances when a panel reverses or remands a case to the district court or agency and it is not feasible to write an opinion, usually because the matter requires immediate attention, the court enters a dispositive order setting forth briefly the reasons for its action. Such an order does not circulate to the non-panel judges.

CHAPTER 8. PANEL REHEARING

8.1 Petition.

A petition for panel rehearing is sent to the members of the panel, including senior judges or visiting judges, with the request that they notify the authoring judge within 10 calendar days of the date of the clerk's letter forwarding the petition whether they vote to grant the petition or desire that an answer be filed. A judge who does not desire panel rehearing or the filing of an answer is not expected to respond.

8.2 Request for Answer.

If any member of the majority timely notifies the other members of the panel that an answer is desired, the author, if an active or senior judge of this court, enters an order directing the filing of an answer within 14 calendar days. The clerk forwards the answer to the panel members with the request that they notify the authoring judge within 10 calendar days if they vote to grant the petition. A judge who does not desire panel rehearing is not expected to respond.

8.3 Disposition.

8.3.1 The author, if an active or senior judge of this court, enters an order granting panel rehearing if two members of the panel vote for panel rehearing, and vacates the panel's opinion and the judgment entered thereon. Otherwise, the author enters the order denying panel rehearing. If the author is a visiting judge or justice, the ranking active judge of this court on the panel majority receives responses to the petition, communicates with the clerk, signs the necessary orders, and has all the administrative responsibility set forth in this I.O.P. A senior judge of this court who was the authoring judge handles all administrative responsibility on matters on which that judge has a vote but may choose to request the ranking active judge on the panel majority to undertake such administrative responsibility.

8.3.2 Any member of the panel may file an opinion sur denial of the petition for panel rehearing and direct its publication. When the panel grants a petition for rehearing and a petition for rehearing en banc is also pending, the judge who entered the order following panel rehearing notifies the active judges of the disposition, and whether the petition for rehearing is moot or if any further vote is required.

CHAPTER 9. EN BANC CONSIDERATION

9.1 Policy of Avoiding Intra-circuit Conflict of Precedent.

It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so.

9.2 Hearing En banc.

Initial en banc hearing is extraordinary; it is ordered only when a majority of the active judges who are not disqualified, determines that the case is controlled by a prior decision of the court which should be reconsidered and the case is of such immediate importance that exigent circumstances require initial consideration by the full court. An active judge who does not communicate with the Chief Judge concerning initial en banc hearing within ten (10) days after the date that the clerk transmits the petition for initial en banc hearing is presumed not to desire initial en banc hearing.

9.3 Criteria for Rehearing En banc.

9.3.1 This court strictly follows the precept of Fed.R.App.P. 35(a) and Local Appellate Rule 35.4 that rehearing en banc is not favored and will not be ordered unless consideration by the full court is necessary to secure or maintain uniformity of its decisions or the proceeding involves a question of exceptional importance.

9.3.2 This court does not ordinarily grant rehearing en banc when the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

9.3.3 Rehearing en banc is ordinarily not granted when the only issue presented is one of state law.

9.4 Court Originated Rehearing En banc.

9.4.1 If, during the circulation of draft opinions pursuant to I.O.P. 5.5.2 and 5.6, a majority of the active judges who are not disqualified, votes that the case be considered en banc, the chief judge enters an order for rehearing en banc.

9.4.2 If, during the period for circulation of draft opinions, one judge has timely voted for rehearing, another judge may obtain an extension of time to consider en banc rehearing by circulating a letter asking that the time for voting be extended for a period not to exceed 5 working days beyond the 8 day (10 day in August) time period. This request results in an automatic extension. Irrespective of the number of such requests, the voting time automatically is extended this one period only, unless the chief judge, upon application, grants a further extension of time. In death penalty cases, the times set forth herein may be reduced pursuant to Local Appellate Rule

Misc. 111.7(b).

9.4.3 During the circulation of draft opinions, a judge who does not desire rehearing or who has no comment is not expected to respond. The active judge who has written a dissenting opinion is presumed to have voted for rehearing en banc absent a notification in writing to the contrary.

9.5 Rehearing En banc on Petition by Party.

9.5.1 It is presumed that a petition for rehearing before the panel or suggestion for en banc rehearing filed by a party as provided by Fed.R.App.P. 40(a) or 35(b) requests both panel rehearing and rehearing en banc, unless the petition for panel rehearing under Rule 40(a) states explicitly that it does not request en banc rehearing under Rule 35(b).

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

9.5.3 Pursuant to 28 U.S.C. § 46(c), only active judges of this court may vote for rehearing en banc. Therefore, rehearing en banc shall be ordered only upon the affirmative votes of a majority of the judges of this court in regular active service who are not disqualified.

9.5.4 An active judge who does not communicate with the authoring judge concerning rehearing within 10 calendar days after the date of the clerk's letter transmitting the petition for rehearing is presumed not to desire rehearing en banc or that an answer be filed. In death penalty cases, the times set forth herein may be reduced pursuant to Local Appellate Rule Misc. 111.7(b).

9.5.5 If, during the 10 day period for circulation of petitions for rehearing, one judge has timely voted for rehearing, another judge may obtain an extension of time to consider en banc rehearing by circulating a letter asking that the time for voting be extended for a period not to exceed 5 working days beyond the 10 day time period. This request results in an automatic extension. Irrespective of the number of such requests, the voting time automatically is extended this one period only, unless the chief judge, upon application, grants a further extension of time. In death penalty cases, the times set forth herein may be reduced pursuant to Local Appellate Rule Misc. 111.7(b).

9.5.6 If four active judges vote to request an answer to the petition or if there are a total of four votes for an answer or for rehearing, provided that there is at least one vote for an answer, the authoring judge enters an order directing such an answer within 14 calendar days from the date of the order. The clerk forwards the answer to the active judges with the request that they notify the authoring judge within 10 calendar days if

they vote to grant the petition. A judge who does not desire rehearing is not expected to respond. Copies of the answer are sent as a courtesy to any senior judge or visiting judge who was a member of the panel which heard and decided the case. In death penalty cases, the times set forth herein may be reduced pursuant to Local Appellate Rule Misc. 111.7(b).

9.5.7 The authoring judge enters an order denying rehearing before the panel, and denying rehearing en banc if a majority of the active judges who are not disqualified, does not vote for rehearing. Separate orders may be entered if appropriate. When the panel grants a petition for rehearing and a petition for rehearing en banc is also pending, the judge who enters the order granting panel rehearing notifies the active judges of the vacatur of the panel opinion, and all action on the petition for rehearing en banc is suspended. Following panel rehearing, the authoring judge notifies the active judges of the disposition and whether any further vote on the petition for rehearing en banc is required.

9.5.8 If there is a dissent from the denial of rehearing and no dissenting opinion is filed, a notation will be added to the dispositive order, at the affirmative request of the dissenting judge, that "Judge ___ would grant rehearing by the court en banc." Any active judge may file an opinion sur denial of the petition and direct its publication.

9.5.9 If a majority of the active judges of the court who are not disqualified votes for rehearing en banc, the chief judge enters an order which grants rehearing as to one or more of the issues, vacates the panel's opinion in full or in part and the judgment entered thereon, and assigns the case to the calendar for rehearing en banc.

9.6 Procedure.

9.6.1 If the author is a visiting judge, justice, or a senior circuit judge, the ranking active or senior judge of this court on the panel majority receives responses to the petition, communicates with the clerk, signs the necessary orders, and has all the administrative responsibility set forth in this I.O.P.

9.6.2 An en banc hearing is held only at a regularly scheduled en banc session of the court, unless a majority of the active judges who are not disqualified, votes to expedite.

9.6.3 The chief judge, when requested by a majority of the en banc court, directs the clerk to advise counsel to submit supplemental briefs on specific issues or to be prepared to discuss at oral argument any other relevant issues.

9.6.4 A senior judge of this court may elect, pursuant to 28 U.S.C. § 46(c), to participate as a member of the en banc court reviewing a decision of a panel on which the senior judge was a member. That election may be made by letter to the clerk, with copies to all active judges, covering all cases on which the senior judge may thereafter sit, or may be made on a case by case basis. Any judge participating in an en banc poll, hearing,

or rehearing while in regular active service who subsequently takes senior status may elect to continue participating in the final resolution of the case.

CHAPTER 10. MOTION PRACTICE

10.1 Motion Panels.

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

10.2 Distribution.

10.2.1 Insofar as possible, the clerk equalizes the number of motions and emergency motions sent to each SMP.

10.2.2 When an emergency motion is filed, the movant may be directed by the clerk to deliver by hand or by electronic transmission copies of the moving papers that day to each member of the SMP designated by the clerk at the chambers where the judge is stationed or at such other place as may be designated.

10.2.3 Motions on non-emergency matters are distributed to the SMPs as they are complete; i.e., when responses have been filed and any necessary briefing completed.

10.3 Procedure.

10.3.1 Each standing motions panel sets its own procedures for conference and disposition. The presiding judge of each standing motions panel enters the order, generally on the motion form supplied by the clerk, or requests another judge to do so. The order notes a dissenting vote on request of the dissenting judge.

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

10.3.3 A motion for reconsideration or rehearing of any standing motions panel or merits panel decision on a motion, other than a case-dispositive ruling, is referred only to that standing motions panel or merits panel and not to the court en banc. A petition for rehearing of a case-dispositive ruling is referred to the court en banc according to the procedures for petitions for rehearing. Non-case-dispositive rulings by either the merits panel or standing motion panel are referred to the court en banc only if the panel so orders.

10.3.4 The standing motions panel determines whether there shall be oral argument on a motion in the same manner as for an appeal.

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

10.3.6 A certification under 28 U.S.C. § 1292(b), or other similar statute or rule, by a motions panel does not in any manner bind or restrict the merits panel.

10.4 Motions Referred to Clerk.

The court may refer to the clerk for disposition any category of motion other than those which are case-dispositive or which by statute or rule must be decided by judges.

10.5 Single Judge Motions.

10.5.1 A single judge may entertain and may grant or deny any request for relief which, under the Federal Rules for Appellate Procedure or an applicable statute, may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding. The action of a single judge may be reviewed by a three judge panel of the court.

10.5.2 Without limiting I.O.P. 10.5.1, this court as a matter of practice refers to a single judge, the following motions:

(a) stay pending appeal or mandamus (generally only in emergency situations);

(b) motion for appointment of counsel whether pursuant to §1915 or under the Criminal Justice Act;

(c) approval of transcripts at government expense in criminal and civil cases;

(d) motions to withdraw;

(e) motions to expedite;

(f) motions to intervene;

(g) motions to compel the ordering of transcripts; and

(h) motions to unseal or seal.

10.6 Summary Action.

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

10.7 Motions Related to Cases Assigned to Merits Panels.

10.7.1 Motions related to cases assigned to merits panels are generally granted or denied by the presiding judge if they are merely administrative and unrelated to the disposition, unless the presider believes reference to the entire panel is appropriate.

10.7.2 Motions related to scheduling cases for argument are always referred to the entire panel.

10.8 Post-Decision Motions.

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

10.8.2 Inasmuch as a stay of mandate is ordinarily not a requirement for filing a petition for a writ of certiorari, it is the practice of this court not to grant a motion for stay of the mandate or to recall the mandate unless the failure to grant a stay affects a substantive right of the applicant.

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

10.8.4 A motion to extend time to file a bill of costs is determined by the clerk. An appeal from the clerk's ruling is referred to the authoring judge, unless the author was a visiting judge, in which case it is referred to the ranking active judge who voted with the majority.

10.8.5 A motion for the approval of a fee under the Criminal Justice Act is referred to the authoring judge.

10.8.6 If the author is a visiting judge, the ranking active judge of this court on the panel majority receives responses to the motion, communicates with the clerk, signs the necessary orders, and has all the administrative responsibility set forth in this I.O.P. Senior judges on this court may choose to request the ranking active judge on the panel majority to undertake the above administrative responsibilities.

10.8.7 A remand from the Supreme Court is referred to the panel which decided the matter or to the court en banc, as the case may be.

10.9 Certification of Questions of State Law.

When a panel has certified a question of state law under L.A.R. Misc. 110.0, the presider shall promptly notify all the other judges of the court by sending a copy of the question certified, and shall circulate the response received.

CHAPTER 11. RECUSAL OR DISQUALIFICATION OF JUDGES

11.1 Procedure.

11.1.1 Before cases are sent to a panel, the clerk transmits copies of the docket sheets and disclosure statements to each judge who responds promptly informing the clerk of those cases in which the judge is recused.

11.1.2 Each judge may submit to the clerk in writing those circumstances which would generally require a recusal, including names of businesses in which the judge or family members have a financial interest, names of lawyer relatives whose names may appear as counsel in the appeals, and names of law firms on whose cases the judge does not sit.

11.2 Circumstances.

11.2.1 The provisions of 28 U.S.C. § 455 and 28 U.S.C. § 144 re recusal are fully incorporated here.

11.2.2 (a) With respect to "financial interest" as used in 28 U.S.C. § 455, ownership of a small percentage of the outstanding shares of a publicly traded corporation which is a member of a trade association that is a party to the lawsuit is not a "financial interest" in the subject matter in controversy or in a party to the proceeding unless the owner has an interest that can be substantially affected by the outcome of the proceeding.

(b) Ownership of a small percentage of the outstanding shares of a publicly traded corporation that is listed as a creditor of the bankrupt who is a party to the lawsuit is not a "financial interest" in the subject matter in controversy or in a party to the proceeding unless the owner has an interest that can be substantially affected by the outcome of the proceeding.

(c) An insurance policy issued to a judge or a member of his or her

family is not a "financial interest" in the insurance company.

CHAPTER 12. PROCEDURES WHEN JUDGES BECOME UNAVAILABLE

12.1 If a judge assigned to a panel becomes unavailable for any reason, the chief judge in his or her discretion will decide whether to reconstitute the panel by naming a substitute. Unavailability includes, but is not limited to, necessity to recuse, disability, resignation, or death. If the chief judge is recused, the active judge next in precedence will act. A written order is not necessary for the reconstitution of any panel. Generally, the chief judge will exercise his or her discretion in the following manner:

(a) If after distribution of the briefs, but before the disposition date, a member of a panel becomes unavailable, the judge, or one of the remaining panel members, informs the chief judge. The chief judge will usually name a substitute and reconstitute the panel. The substituted judge on any panel is open to opinion assignments on the same basis as original panel members.

(b) If a member of a panel becomes unavailable after the disposition date but before the opinion is filed with the clerk, the two remaining judges will inform the chief judge of the status of the case, e.g. whether the remaining members of the panel agree on the disposition of the case, and whether an opinion has been drafted. The chief judge in his or her discretion will decide whether to reconstitute the panel by naming a substitute. A case may be decided without naming a substitute judge if the remaining judges agree as to disposition.

(c) If the author of an opinion becomes unavailable while the opinion is circulating to the panel or to the full court, ordinarily the opinion will be reassigned to one of the remaining panel members if they are in agreement. If the remaining panel members are not in agreement, the chief judge will name a substitute judge and reconstitute the panel.

(d) If the author of an opinion or member of the panel becomes unavailable after transmission of the opinion to the clerk, but before the opinion is filed, the chief judge may direct that the opinion be filed listing the unavailable judge on the coram, provided neither of the remaining judges has authored a concurrence or dissent. Ordinarily the opinion will be filed as a per curiam opinion but the chief judge may in his or her discretion direct that the opinion be filed with the unavailable judge listed as author. The clerk will note on the opinion that it was received in the clerk's office before the panel member became unavailable.

12.2 Judges who leave the court should endeavor to insure that opinions they have authored are circulated, approved, and filed before their departure.

CHAPTER 13. VISITING JUDGES

The circuit executive is charged with the responsibility of assisting the visiting judges and arranges for chambers, provides advance notification of these Internal Operating Procedures, arranges for a secretary, if necessary, and in general tends to the visitor's other needs.

CHAPTER 14. STAFF ATTORNEYS

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

CHAPTER 15. SENIOR JUDGE LAW CLERK VOLUNTEERS

Senior judges may volunteer use of their law clerks to assist active judges, especially in matters which can be carried out in a senior judge's chambers. Senior judges may also volunteer use of their law clerks to assist the Staff Attorneys Office in carrying out its responsibilities. A senior judge who takes an extended absence from chambers usually notifies the active judges that his or her law clerks are available, unless the law clerks will be fully occupied with court work during that period.

CHAPTER 16. DEATH PENALTY CASES

16.1 Docketing and Briefing.

Upon receipt of the required statement pursuant to Local Appellate Rule Misc. 111.2 (a), the clerk of this court shall establish a file and monitor the progress of any such case through the district court. At an appropriate time, the clerk may tentatively assign the case to a special panel. If no appeal is filed, the tentatively assigned panel will be returned to the pool of unassigned death penalty panel combinations. Upon the filing of any notice of appeal, request for certificate of appealability, 28 U.S.C. § 2253(c)(1) and/or for stay, the clerk may establish, at the direction of the panel to which the case is assigned, a schedule for briefing and disposition on the merits.

16.2 Panel Assignments.

The clerk will use a computer program to randomly select a panel from a pool of all possible three-judge combinations consisting of circuit judges in active service and those judges who have taken senior status and have indicated their willingness to hear death penalty cases. The computer program will be designed to use all possible three-judge combinations and to minimize the possibility of assignment of any judge to successive panels. The clerk will be responsible for maintaining the program and for making any adjustments necessitated by vacancies and appointments. Ordinarily, a case will be assigned to a single panel for all proceedings to final order. Separate appeals concerning the same petitioner that are filed in close proximity may be assigned to the same panel. In the event of the

unavailability or disqualification of a member of a special panel, a new member will be randomly selected. Any unused panel will be returned to the pool for future reassignment. The chief judge periodically may address any imbalance in the caseload.

16.3 Stays, Tentative Assignments.

If a stay application is filed in this court before a district court decision has been entered, the clerk shall forward the motion to a special panel. Whether or not a stay application has been filed, if no ruling has been made 10 calendar days before the time scheduled for execution of the judgment, the case shall tentatively be assigned to a panel, which will be kept advised of the status of the case, the name of the district judge before whom it is pending, and the scheduled time of execution of the judgment.

16.4 Hearings or Rehearing En banc.

Where the court has voted to grant hearing or rehearing en banc, the chief judge may specifically order briefing or schedule oral argument as necessary.

16.5 Notice to Supreme Court.

The clerk shall notify the clerk of the Supreme Court when a case involving the suspension or stay of execution of the judgment of a state or federal court is filed, and shall thereafter maintain communication with both the district court and the Supreme Court.

CHAPTER 17. SAMPLE FORMS

17.1 Judgment Order — Civil Cases.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against appellant.

By the Court,

. . . . . .
Chief Judge/Circuit Judge

Attest:

. . . . . .
Clerk
Dated:

17.2 Judgment Order — Criminal Cases.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that the court erred: (1) in refusing to charge on the testimony of an accomplice as requested by appellant; (2) in admitting hearsay testimony of a witness; and (3) in refusing to grant a motion of acquittal on the theory of insufficiency of evidence, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

17.3 Dismissal for Lack of Jurisdiction.

ORDER OR JUDGMENT ORDER

After consideration of all contentions raised by the appellant and concluding that this court has no jurisdiction because the appeal is premature, see Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982), it is

ADJUDGED AND ORDERED that the appeal be and is hereby dismissed without prejudice to the filing of a timely appeal.

Costs taxed against appellant.

17.4 Dismissal for Lack of Certification Under Fed.R.Civ.P. 54(b).

When the appeal is dismissed because of lack of certification under Fed.R.Civ.P. 54(b), an order of dismissal ordinarily contains language similar in form to:

> The appeal will be dismissed without prejudice to the right of appellant to apply to the district court for a determination and direction under Fed.R.Civ.P. 54(b). However, we express no opinion as to whether the determination and direction should be made, this being a matter within the discretion of the district court. If the determination and direction are made within 30 days, a new appeal may come before us on the present briefs and record supplemented to show subsequent proceedings.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ORDER AMENDING INTERNAL OPERATING PROCEDURES

PRESENT: SMITH, **Chief Judge**, and, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, **Circuit Judges**

IT IS ORDERED that amendments to the Court's Internal Operating Procedures having been reviewed by the Lawyer's Advisory Committee and approved by the Court are hereby adopted and published by the United States Court of Appeals for the Third Circuit. These procedures are effective immediately and supercede all prior editions and all prior orders amending the Internal Operating Procedures.

/s/ D. Brooks Smith
Chief Judge

DATED: May 22, 2018

A True Copy:

Patricia S. Dodszuweit, Clerk