HANDBOOK OF PRACTICE

and

INTERNAL PROCEDURES

UNITED STATES COURT OF APPEALS

for the

DISTRICT OF COLUMBIA CIRCUIT

As Amended Through December 1, 2018

PREFACE

The Handbook of Practice and Internal Procedures of the United States Court of Appeals for the District of Columbia Circuit was first published in 1978. That publication anticipated Section 208(a) of the Federal Courts Improvement Act of 1982, 96 Stat. 54, 28 U.S.C. § 2077, which provides, in pertinent part, "[t]he rules for the conduct of the business of each court of appeals, including the operating procedures of such court, shall be published."

The Handbook was revised in 1987 to reflect major changes in the operations of the D.C. Circuit. These changes included the implementation of the Civil Appeals Management Plan and, in August 1986, a comprehensive new program for managing the Court's entire caseload (Case Management Plan). The Court also began an appellate mediation program. In 1987 the Court issued a full revision of its General Rules — the first complete revision of those rules in nearly a decade.

The 1994 edition of the Handbook accompanied the Court's 1993 revision of its Circuit Rules. The rules were revised and renumbered to parallel more closely the Federal Rules of Appellate Procedure. Additionally, while the basic structure of the Case Management Plan remained, significant modifications were adopted, and the Court completely restructured its Appellate Mediation Program. The Handbook has been revised numerous times since then to reflect federal and local rules amendments as well as changes in court practice.

This Handbook is a practitioner's guide to the Court's rules and internal case management procedures. Counsel and litigants should bear in mind, however, that the Handbook is for guidance only. *The Federal Rules of Appellate Procedure and the Court's Circuit Rules, as well as any orders issued in a particular case, dictate the specific requirements for litigating a case in the D.C. Circuit, and counsel's first obligation is to consult and comply with those rules.*

The Court will continue to revise the Handbook periodically as necessary to reflect changes in its rules and case processing. The Court also encourages practitioners to forward their suggested revisions to the Clerk or the Court's Advisory Committee on Procedures. In publishing the Handbook, the Court seeks to facilitate the efficient disposition of its cases, while maintaining the high standards of appellate litigation and adjudication that are the tradition of the D.C. Circuit.

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I. INTRODUCTION TO THE COURT

A. PHYSICAL FACILITIES

The United States Court of Appeals for the District of Columbia Circuit is located in the E. Barrett Prettyman United States Courthouse and William B. Bryant Annex on Constitution Avenue between Third Street and John Marshall Park, Northwest, Washington, D.C. The mailing address is: E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. 20001-2866. The principal facilities of the Court are the judges' chambers, the courtrooms, the Office of the Circuit Executive, the Office of the Clerk (which includes the Legal Division), and the Circuit Library.

The United States District Court for the District of Columbia, the United States Bankruptcy Court, the United States Marshal's Office, and the United States Probation Office also are located in the Courthouse.

The Courthouse became a "smoke-free" building in 1996. Smoking is not permitted in the public areas or in any of the Courthouse offices.

1. *Chambers*

Access to the area of the judges' chambers, the Office of the Circuit Executive, and the Legal Division is limited to court personnel and others with legitimate reasons for visiting. All persons visiting these areas must be admitted through the security system on the third, fourth, and fifth floors. Visitors should make advance arrangements with the judges' chambers, the Circuit Executive's Office, or the Legal Division.

2. *Office of the Circuit Executive*

The Office of the Circuit Executive is located in Room 4712 on the fourth floor of the Prettyman Courthouse. Mediation sessions scheduled by the Chief Circuit Mediator are held in Mediation Rooms A, B, and C located on the fifth floor of the Prettyman Courthouse.

3. *Office of the Clerk*

The public Office of the Clerk is located in Room 5205. This is where the dockets — the official records of cases before the Court — are kept, all paper filings with the Court are made, and orders of the Court are issued. The file room where the public may inspect filings also is located in Room 5205. Both the file room and the public office are open between 9 a.m. and 4 p.m., Monday through Friday, except federal holidays and any other day designated by the Chief Judge. A filing depository, available 24 hours a day, 7 days a week, is located inside the William B. Bryant Annex on the Third Street side of the Courthouse. *See infra* Part II.C.2.

4. *Legal Division*

The Legal Division is located on the third floor of the Courthouse. Conferences convened by the Director of the Legal Division are held in Room 3535.

5. *Library*

The Circuit Library, located on the third floor of the Courthouse, may be used by court personnel, members of the bar of the Court of Appeals or the District Court, and any person who is counsel or a party in a case pending in this Circuit, or by the permission of a judge of this Circuit. Any person wishing to use

the government document collection will be admitted for that purpose, subject to generally applicable security and other restrictions. Library hours are 8:30 a.m. to 4:30 p.m., Monday through Friday, except federal holidays and any other day designated by the Chief Judge.

B. PERSONNEL

1. *Judges*

The Court has eleven authorized Circuit Judgeships. By statute, the administrative head of the Court is the Chief Judge, a position filled by the most senior judge under the age of 65 at the time the vacancy occurs. The Chief Judge serves until the age of 70, or for a period of 7 years, whichever occurs first.

In addition to carrying a regular caseload, the Chief Judge is responsible for the administrative business of the Court and the Circuit. The Chief Judge presides in the courtroom, at the Judicial Council meetings, at the Court's Executive Sessions, and at the Circuit Judicial Conference. The Chief Judge is also a member of the Judicial Conference of the United States.

Supplementing the judges in full-time "active" service on the Court are Senior Circuit Judges, who handle as full a caseload as they are willing and able to undertake.

2. *Judges' Staffs*

Circuit Judges are authorized to hire a total of five staff members. Typically, active judges employ one judicial assistant and four law clerks. In addition, the Chief Judge usually hires a Special Assistant for the duration of his or her term. No contact relating to court business is permitted between the judges' law clerks or judicial assistants and attorneys or other persons outside the Court. All communications must be made through the Clerk's Office.

3. *Legal Division*

The Legal Division is part of the Office of the Clerk. The Court's central legal staff consists of the Director, an Assistant to the Director, staff attorneys, and support staff. The office also occasionally hires attorneys for the Court's Legal Fellows Program; these positions are temporary and unpaid. The primary duties of the staff attorneys fall into three broad categories: (1) screening and classifying cases and pleadings filed in the Court; (2) making recommendations to panels and preparing proposed dispositions in all contested motions and emergency matters; and (3) making recommendations and preparing proposed dispositions in cases decided without oral argument, pursuant to Circuit Rule 34(j).

In addition to supervising the work of the staff attorneys, the Director and Assistant assist merits panels in managing motions practice, briefing, and oral argument in major cases designated "Complex" under the Court's 1986 Case Management Plan, and in smaller cases deemed appropriate for management. The Legal Division also screens cases for inclusion in the Court's Appellate Mediation Program.

The Director is responsible for the hiring, training, and supervision of the central legal staff. He or she also works with the Court on major projects related to the Court's overall functioning, including the development and implementation of case processing procedures, and the revision of the Court's Circuit Rules and Handbook of Practice and Internal Procedures.

4. *Circuit Executive*

The Circuit Executive is appointed by the Circuit Judicial Council and serves the United States Court of Appeals, the United States District Court, and the United States Bankruptcy Court in the D.C. Circuit. As secretary to the Council, the Circuit Executive serves as the executive officer of the Council and is responsible for implementing Council policies, developing circuit-wide programs, organizing and staffing Council committees, and other duties mandated by the Judicial Conference of the United States or Congress.

The Circuit Executive's Office is relatively new in the federal judiciary having been created in 1971 to improve the judicial process throughout the Circuit and to reduce the administrative burden on the judges. Circuit-wide responsibilities include:

> Program management for: the judicial conduct and disability program; district and appellate court mediation programs; mailroom services; special events and ceremonies; occupant emergency plan; contract for cafeteria services; temporary emergency personnel fund; security coordination; space and facilities; and the circuit rent budget.
>
> Program support for: senior judge designations; senior judge certifications; bankruptcy judge selection; federal public defender selection; and judges serving on committees of the Judicial Conference.
>
> Serves as: Secretary to the Circuit Judicial Council; Secretary to the Circuit Judicial Conference; Secretary to the Historical Society of the D.C. Circuit; and Secretary to the D.C. Circuit's Court Security Committee and Facility Security Committee.

Generally, the Circuit Executive provides support and advice to the Chief Judges of the Court of Appeals and the District Court on issues affecting the courts in the Circuit.

The Circuit Executive's Office is also responsible for coordinating nonjudicial aspects of the Court of Appeals operations such as: budget development and oversight for appropriated and non-appropriated funds; emergency preparedness coordination including the continuity of operations; IT management and systems administration; management of the employment dispute resolution program and the equal employment opportunity program; property management; and administrative support for court advisory committees. Generally, the Circuit Executive works closely with the appellate court executives and the Circuit Chief Judge on administrative matters affecting the Court of Appeals.

The Circuit Executive's Office staff includes the Circuit Executive, a Deputy Circuit Executive, an Assistant Circuit Executive for Space and Facilities, an Assistant Circuit Executive for IT, a Budget Analyst, a Space and Facilities Specialist, two Administrative Specialists, IT staff, a Chief Circuit Mediator, and a Circuit Mediator.

5. *Clerk's Office*

The Clerk's Office is composed of an administrative division, an operations division, and a legal division. *See supra* Part I.B.3. The Clerk's Office maintains the docket of the Court, the official record of all proceedings before the Court, and receives and maintains all filings in the Court, keeping them available for public inspection. It prepares and distributes the judges' sitting schedules and the Court's oral argument calendar; handles attorney admissions to the Court's bar; and prints, records, and distributes all opinions and orders of the Court. The Clerk's Office serves as the Court's liaison with attorneys, litigants, the media, and the general public.

The Clerk's Office also provides the Court with statistical, fiscal, personnel, training, and property and procurement services, as well as other administrative support services. The Clerk's Office assists with investitures, portrait ceremonies, and other ceremonies, presentations, and special events.

6. *Librarian*

The Circuit Library is administered by the Circuit Librarian and the Deputy Circuit Librarian.

C. COURT ORGANIZATION

1. *Judicial Council*

The Judicial Council of the Circuit, as established by 28 U.S.C. § 332, is composed of the Chief Judge of the Court of Appeals and an equal number of the judges of this Court and of the District Court. The Chief Judge of this Court presides. The Circuit Executive serves as the secretary and administrative officer to the Council. Most business of the Council is conducted through e-mail discussions and votes. Meetings are closed.

The Council is empowered under 28 U.S.C. § 332(d)(1) to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." Any member of the Council may place an item on the agenda by forwarding it to the Circuit Executive for inclusion.

2. *Meetings of the Court of Appeals in Executive Session*

Periodically, the judges of the Court of Appeals meet in executive session to discuss the business of the Court. The Chief Judge may also call special meetings to address specific issues. Both active and senior judges attend these meetings and vote on matters of concern to the entire Court. The Chief Judge presides; also generally present are the Circuit Executive and the Clerk. At each meeting the Circuit Executive and the Clerk report to the Court about the Court's caseload and other matters affecting Court operations. Any judge may place an item on the agenda by instructions to the Clerk, who serves as secretary at these meetings. The meetings of the Court in executive session are closed, although on occasion the Chief Judge may request an individual from outside the Court to attend to discuss a matter of concern to the Court.

Six items regularly included on the agenda of the executive sessions reflect the Court's concern with the status of its work: a report by the Circuit Executive on matters affecting Circuit and Court operations; a report by the Clerk on the Legal Division's caseload of motions, Rule 34(j) cases, and emergency matters; reports providing monthly caseload statistics such as the number of filings and dispositions; reports by each judge on the status of cases assigned to that judge for opinions; reports on cases that have been argued but not yet assigned for the writing of an opinion; and reports on motions or petitions pending before the judges.

3. *Committees*

The Court uses permanent, as well as *ad hoc*, committees in conducting its internal business. Of particular interest to the bar are the following:

(a) Advisory Committee on Procedures

Circuit Rule 47.4, in accordance with 28 U.S.C. § 2077(b), formally establishes this Committee. The Advisory Committee is composed of no less than 15 local attorneys representing all sectors of the profession

— government, private, public interest, and academic. The Committee initiates recommended rule changes and evaluates internal operating procedures in effect or under consideration. The Committee also serves as a channel of communication between the Court, and the bar and the public.

(b) Committee on Admissions and Grievances

Rule II of the Court's Rules of Disciplinary Enforcement establishes this Committee, composed of 6 members of the Court's bar. The Court may refer to the Committee, for investigation, hearing, and report, any allegation of professional misconduct by any member of the Court's bar. The Committee also advises the Court on its admission policies and practices.

(c) Criminal Justice Act Panel Committee

Rule I.(b) of the Court's Plan to Implement the Criminal Justice Act of 1964 establishes a committee to review the operation and administration on the CJA list. The Committee consists of two active Circuit Judges, the Federal Public Defender, and one experienced criminal practitioner who is on the list and one who is not on the list.

4. *Judicial Conference*

As provided in 28 U.S.C. § 333, the Chief Judge may convene biennially or annually the judges of this Court, the District Court, and the Bankruptcy Court to discuss improvements in the administration of justice within the Circuit. Public officials especially concerned with the work of these courts, deans of law schools in the District of Columbia, and a representative group of local attorneys from the public and private sectors are also invited to participate in the Conference. The Circuit also will occasionally convene a Conference including only judges and court staff. Further information on the Conference is contained in Circuit Rule 47.3.

D. THE CIRCUIT RULES

Federal Rule of Appellate Procedure 47 permits each court of appeals to make local rules not inconsistent with the Federal Rules of Appellate Procedure. To become effective, local rules must be approved by a majority of the judges in active service. In this Circuit the local rules are called the Circuit Rules (cited as "D.C. Cir. Rule ___").

Circuit Rule 47 provides for notice and an opportunity to comment on proposed changes to the Court's local rules. Proposed rule changes are posted in the Court's public office and on the Court's internet web site. Notice of proposed amendments is also published in *The Daily Washington Law Reporter* and sent to the presidents of the District of Columbia Bar, the Bar Association of the District of Columbia, the Washington Bar Association, the Women's Bar Association, and the presidents of any other organization described in Circuit Rule 47(c)(4)(E), who notify the Clerk of the Court that they wish to receive notice of proposed rule changes.

Comments on proposed changes may be submitted in writing to the Advisory Committee on Procedures. The Committee will consider them in formulating its recommendation to the Court and will transmit these comments to the Court, together with its recommendation. The comment period will ordinarily be no less than 45 days.

Circuit Rule 47(b) also provides that any person may propose a change in the rules by submitting a written request directly to the Court or to the Advisory Committee on Procedures.

II. PRELIMINARY MATTERS

A. ADMISSION TO PRACTICE

(*See* Fed. R. App. P. 46; D.C. Cir. Rules 1, 46.)

1. *When Required*

An attorney practicing before the Court must be a member of the bar of the Court, except as otherwise provided by law. Membership in the bar of another court does not confer membership in the bar of this Court. The Clerk's Office will not file briefs, motions, or other papers not signed by a member of this Court's bar. The pleading will, however, be lodged with the Court and filed once the attorney becomes a member of the bar of this Court.

There are three qualifications to this rule. First, in order to file a notice of appeal in the district court or a petition for review, an attorney need not be a member of the bar of this Court. The docketing statement and any further filing in the case, however, must be signed by a member of the bar of this Court. Second, the requirement is temporarily suspended whenever a problem of timeliness might arise. Where this is the case, the Clerk will file the pleading and immediately notify counsel of the admission requirement. Third, law students may participate in a case under the direction of a supervising attorney, as provided in Circuit Rule 46(g).

An attorney who is not a member of the Court's bar may be granted leave by the Court to present oral argument in a case. Counsel of record should advise the Clerk's Office at least 7 days in advance, at the time counsel submits Form 72, *Notification To The Court From Attorney Intending To Present Argument*, that a motion for leave to argue *pro hac vice* will be made. Permission is usually granted by the Court on the morning of oral argument. Were the Court, however, to deny the motion, counsel would be informed in advance of the argument date. The attorney who wishes to argue *pro hac vice* must arrive at the courtroom, accompanied by a sponsoring attorney who is a member of the bar of this Court, at least 20 minutes prior to the start of argument for the scheduled session and immediately notify the courtroom deputy clerk, who will furnish appropriate forms and advise counsel of the procedures for admission *pro hac vice*. Counsel who litigate regularly before the Court *may not* make repeated appearances *pro hac vice*, but must apply for admission to the bar of the Court. Similarly, counsel may not seek to appear *pro hac vice* in order to file pleadings; rather counsel must apply for admission to the bar of the Court. Counsel who are not members of the bar of the Court or who have not been granted leave to appear *pro hac vice* will not appear on the opinion heading.

2. *Obtaining Admission*

The Court admits to practice before it attorneys who have previously been admitted to the bar of the highest court of a state or to the bar of other federal courts. Applicants must fill out the forms supplied by the Clerk's Office and submit them with certification of their membership and good standing in the bar that qualifies them for admission. They must also remit the fee specified by order of the Court. Attorneys may be admitted on the written application without a personal appearance. The Clerk's Office will send the attorney a certificate of membership in the bar of the Court.

3. *Exclusion from Practice*

As a general rule, employees of the Court may not engage in the practice of law while employed by the Court. *See* D.C. Cir. Rule 1(c). No person employed by the Court, including law clerks, after leaving the employ of the Court, may practice as an attorney in any case that was pending in the Court during the person's term of service. A case is pending in the Court from the moment the appeal or petition for review is docketed until final disposition of the appeal or petition. This prohibition includes signing briefs and giving advice in connection with the case. Beginning September 1, 2016, the following restriction also applies: no former employee of this Court may appear at counsel table or on pleadings in any case in this Court for a period of one year after leaving Court employment.

Suspension or disbarment by any other court of record may result in the suspension or disbarment of a member of this Court's bar. Before any reciprocal discipline is imposed, the attorney will be afforded an opportunity to show cause why he or she should not be suspended from practice in the Court or disbarred. The Court may refer to its Committee on Admissions and Grievances this or any other suggestion of professional misconduct on the part of a member of the bar.

B. REQUESTS FOR INFORMATION

1. *Procedural Questions*

Personnel in the Clerk's Office and the Legal Division are available to answer procedural questions about matters not covered in the Federal Rules of Appellate Procedure, the Circuit Rules, or this Handbook.

2. *Court Records*

The Clerk's Office will make available, and will assist in locating, all public records in the possession of the Court. Public records consist primarily of information entered in the docket of the Court and any briefs, motions, or other filings not under seal.

3. *Electronic Public Access to Information*

The Court's internet web site provides additional court information to the public. The site is located at: **www.cadc.uscourts.gov**. The site allows on-line viewing and printing of court forms; the Circuit Rules, Handbook, and CM/ECF procedures; the oral argument calendar; court opinions that are not sealed; and other information concerning the Court. Case information is also available on the PACER web site to individuals having a PACER account. There is a fee for access to PACER. To set up an account, interested parties must call the PACER Service Center at 1-800-676-6856. The PACER web site is accessible via a link from the Court's web site.

Persons and organizations funded by federal judiciary appropriations, *e.g.*, attorneys appointed under the Criminal Justice Act, are exempt from the PACER access fee. Anyone exempt under this provision must notify the account representative when establishing an account. In addition, the Court may, for good cause, exempt persons from the PACER access fee to avoid unreasonable burdens and promote public access. Anyone seeking an exemption under this provision should complete an exemption request form and return it to the Clerk's Office.

Under the Court's CM/ECF system, attorneys and pro se litigants who have registered as ECF filers will receive electronic notification of docket activity. Only pro se parties and attorneys who have entered an

appearance and are listed on the Court's docket will receive electronic notices in a particular case. To register as an ECF filer, consult the PACER Service Center's web site at **http://pacer.psc.uscourts.gov**. Additional information on the CM/ECF system is available on the Court's web site.

4. ***Court Operations During Inclement Weather or Emergency Situations***

Counsel with filing deadlines or who are scheduled to appear for oral argument must check with the Clerk's Office when there is a possibility that the Court may be closed because of inclement weather or an emergency situation. Special announcements on closings can be obtained by calling the Clerk's Office general information number (202-216-7000) or by checking the Court's web site located at **www.cadc.uscourts.gov**.

5. ***The Appeals Management Plan; Complex Cases***

Questions concerning multi-party, multi-issue cases handled pursuant to the Appeals Management Plan, or designated "Complex" under the Case Management Plan, should be directed to the Legal Division. Questions that must be answered by reference to the dockets should be resolved by consulting the PACER web site. *See supra* Part II.B.3. For further assistance, questions can be directed to the Clerk's Office. The Legal Division will, however, advise practitioners whether a case is being managed by the Legal Division, or whether such management would be appropriate.

6. ***General Information***

Requests for information of a general nature about cases, such as whether a brief or specific pleading has been filed, or whether the Court has acted on a motion, should be directed to the Clerk's Office or obtained by accessing docket information through the PACER web site. *See supra* Part II.B.3.

7. ***Pending Cases***

It is the strict policy of the Court that telephone calls to judges' chambers, or to judges' law clerks or judicial assistants, concerning the status of any pending case or motion will not be accepted. All such calls will be immediately referred to the Clerk or to the Legal Division.

If the inquiry as to a pending case involves procedural questions or matters of public record, it should be made in accordance with the instructions above. If counsel is experiencing a more specialized problem with a case, he or she should call the Clerk, the Chief Deputy Clerk, or the Director of the Legal Division. If the problem does not require immediate attention, the Clerk will usually direct that counsel's inquiry be submitted in writing. The Clerk's Office will forward the letter or motion to the Court or Legal Division, as appropriate.

8. ***Disclosure of Panels and Dates***

(a) Merits Panels

It is the policy of the Court not to disclose the identity of the merits panel in the order setting the case for oral argument. The composition of the merits panel will be posted on the Court's internet site, usually 30 days before the date of oral argument, and will not be disclosed before that time.

When the Court determines a case will be decided without oral argument pursuant to Circuit Rule 34(j), parties will learn the identity of the panel from the order notifying them of that determination. If the case had originally been calendared for argument, the panel will be the one that was assigned to hear the case (posted on the Court's internet site 30 days before the scheduled argument date).

(b) Panels Deciding Motions

It is generally the policy of the Court not to reveal the identity of panels before whom motions are pending until the order disposing of the motion is issued.

(c) Disposition of Matters Under Submission

It is also the policy of the Court ordinarily not to reveal in advance the prospective date of disposition of any matter under submission. This policy applies to the Clerk's Office and to the Legal Division, as well as to chambers personnel. Requests for information of this nature are inappropriate. On the day an opinion designated for publication is issued, the Clerk's Office notifies counsel by telephone. Opinions are available on the Court's web site and through PACER. *See infra* Part XII.E.

9. *Press Relations*

The Circuit Executive is the designated press officer of the Court. One copy of all unsealed opinions issued by the Court is made available to the media in the press box outside the Clerk's Office.

Requests by artists to sketch court proceedings should be directed to the Clerk's Office well in advance of the scheduled argument. The Court will accommodate all requests unless the panel for reasons of security decides otherwise. Additionally, if the Court receives multiple requests, space considerations may limit the number of sketch artists that can be accommodated.

C. FILINGS

1. *Compliance with Rules*

The Clerk's Office examines all items submitted for filing to ensure that they comply with the Federal Rules of Appellate Procedure and the Circuit Rules. All filings must include the name of the attorney or party making the filing, the firm name, if any, the attorney's or party's postal address and telephone number, and e-mail address for ECF filers. The Clerk's Office has the authority to direct the correction of any filing that is not in compliance with the Federal Rules of Appellate Procedure or the Circuit Rules, or direct the filing of an appropriate motion. If a party fails to comply with the Clerk's direction, the matter will be submitted to a panel for disposition.

Pursuant to Federal Rule of Appellate Procedure 25, the Court has authorized the filing and service of documents by electronic means. *See* D.C. Cir. Rule 25. ECF filers must consult and comply with the Circuit Rules governing the CM/ECF system and with the CM/ECF procedures posted on the Court's web site. Upon motion and a showing of good cause, the Court may exempt a party from the electronic filing requirements and authorize filing by means other than use of the CM/ECF system. *See* D.C. Cir. Rule 25(c)(2).

2. *Timeliness*
(*See* Fed. R. App. P. 25(a), 26; D.C. Cir. Rules 25, 26, 27(h), 28(e).)

In computing times prescribed for filings, the day of the event from which the prescribed period begins to run is not included. All intermediate days are included. Furthermore, if the last day of the period falls on a Saturday, Sunday, legal holiday, or a day on which the Clerk's Office is otherwise closed or inaccessible, the period is extended to the next business day. Fed. R. App. P. 26(a)(1), (3); D.C. Cir. Rule 45(b). For forward-counted periods – that is, periods that are measured after an event – "legal holiday" is defined to include a day declared a holiday by the state in which the circuit clerk's principal office is located. Fed. R. App. P. 26(a)(6)(C). Because "state" includes the District of Columbia for purposes of these rules (Fed. R. App. P. 1(b)), any day that has been declared a holiday by the District of Columbia counts as a legal holiday that extends a deadline, but only when computing a forward-counted period. By contrast, if a filing is due 7 days before an event (for example, before a brief is due), that is considered a "backward-counted period," and if the 7th day falls on a District of Columbia holiday, the filing is due that day because state holidays are not legal holidays when computing a backward-counted deadline.

A document filed electronically is deemed filed on the date and at the time stated on the Notice of Docket Activity from the Court. To be considered timely filed that day, filing must be completed before midnight Eastern Time unless a specific time is set by Court order. *See* D.C. Cir. Rule 26(a). Unless the Court has ordered filing by hand or other means, ECF filers may file paper copies of non-emergency documents by first-class mail, or other class of mail that is at least as expeditious, within 2 business days of the electronic filing. *See* D.C. Cir. Rules 25(d), 32(d)(4).

For non-ECF filers, filing of a motion may be by mail addressed to the Clerk, but the papers must reach the Clerk's Office within the time prescribed. Only briefs, not motions or other pleadings, are timely if mailed on the date due. The Court, however, prefers to receive briefs on the date due. Briefs must be filed according to the schedule set by the Court.

Service by methods other than personal or electronic service extends by 3 calendar days the time for responding to the paper served (other than briefs, whose due dates are set by schedule). Papers are presumed to be served by mail unless the certificate of service indicates otherwise. In addition, upon motion for compelling reasons, the Court may extend the time prescribed for filing any papers or allow filings out of time. However, the Court lacks the authority to extend the time for filing papers that commence an appeal, such as a notice of appeal, a petition for review, or a petition filed pursuant to 28 U.S.C. § 1292(b) or Federal Rule of Civil Procedure 23(f).

Any filing or brief (with the exception of emergency, confidential, or sealed documents) may be left, on the date due, in the Court of Appeals filing depository, located inside the William B. Bryant Annex on the Third Street side of the Courthouse, unless the Court has ordered that the filing be made at a time certain. The filing depository is available 24 hours a day, 7 days a week. All filings must be enclosed in an envelope or otherwise securely wrapped. The maximum dimensions for documents deposited are 14 ½ inches by 11 ½ inches by 10 inches. Materials exceeding these dimensions must be split into separate packages and clearly marked. A form provided near the depository must be completed, date/time stamped, and affixed to each package.

Under the Court's Case Management Plan, briefing schedules are usually set after the case has been screened and classified by the Legal Division, and after all outstanding procedural and dispositive motions have been resolved. In cases classified as "Regular Merits" cases, the oral argument date is usually announced by a separate order that is issued after the order establishing the briefing schedule. In cases

classified as potential "Rule 34(j)" cases, the briefing schedule is set in the order notifying the parties that the case might be disposed of without oral argument under Circuit Rule 34(j). Finally, in cases classified as "Complex," or otherwise identified for management under the Case Management Plan, the briefing format and schedule are formulated by the special panel in conjunction with the Legal Division, in most cases based on the parties' responses to an order soliciting a proposed briefing schedule and format. The amount of time for briefing a case may vary, depending on whether it is a district court or agency case, whether there are intervenors or *amici curiae*, whether there are cross-appeals, and whether there is a deferred appendix.

Deadlines are monitored by the Clerk's Office; when the deadlines are not met, the matter is called to the party's attention by phone call, letter, or an order from the Court directing the party to show cause why certain action should not be taken. Depending on the nature of the deadline, such action could include dismissal for failure to prosecute the appeal.

The Clerk's Office has been directed to bring to the attention of the Court the names of counsel who repeatedly abuse the time limits in the rules. In extreme instances, this has led to a referral to the Court's Committee on Admissions and Grievances.

Counsel are advised that whenever there are serious settlement negotiations in progress, including post-argument settlement discussions, the parties must advise the Clerk of that fact and must notify the Clerk at the earliest possible moment if settlement is reached.

3. *Service*
(*See* Fed. R. App. P. 25; D.C. Cir. Rule 25.)

Parties or counsel filing papers must serve copies on all other parties to the case, at or before the time of filing, unless the rules provide for service by the Clerk. Service must be on counsel if a party is represented by counsel. The Notice of Docket Activity that is generated by the CM/ECF system constitutes service on all parties who are registered ECF filers but does not replace the certificate of service. Parties who are not ECF filers must be served by an alternative method of service authorized by Federal Rule of Appellate Procedure 25(c). Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on filing or sending, unless the party making service is notified that the paper was not received by the party served. All filings must contain a certificate of service. In emergency situations, upon authorization by the Clerk, papers may be filed with the Court by facsimile transmission.

4. *Dockets*

When an appeal is filed in the Court, the Clerk's Office establishes a docket using an annual sequential numbering series. Docket numbers in agency cases begin with "1000" and are prefixed by the year, *e.g.*, 09-1000, 09-1001, *etc*. Docket numbers in criminal cases begin with "3000"; docket numbers in district court civil cases in which the federal government is a party begin with "5000"; docket numbers in district court civil cases involving private parties begin with "7000"; and docket numbers in cases which have not yet been accepted for filing begin with "8000."

5. *Privacy Protection*

Litigants must be aware of the federal rules and take all necessary precautions to protect the privacy of parties, witnesses, and others whose personal information appears in court filings. Sensitive personal data must be removed from documents filed with the Court and made available to the public — whether the

document is filed electronically or in paper form. All filers must comply with Federal Rule of Appellate Procedure 25(a)(5) and Circuit Rule 25(e) and must follow the guidance on redacting personal data identifiers that is posted on the Court's web site.

D. CLERK'S FEES

(*See* D.C. Cir. Rule 45.)

The Judicial Conference of the United States prescribes certain fees to be paid for services performed by the Clerk's Office, including docketing a case on appeal, searching records and certifying the results, providing copies of records or papers, certifying copies of records or papers, and providing copies of the Court's opinions. These fees, which change periodically, are set forth in a schedule appended to the Circuit Rules and posted on the Court's web site.

E. COMPLAINTS AGAINST JUDGES

The procedure for filing complaints against judges is set forth in the Rules for Judicial-Conduct and Judicial-Disability Proceedings. A copy of these rules may be obtained from the Circuit Executive's Office or the Court's web site.

III. COMMENCING THE APPEAL

A. PRELIMINARY MATTERS — JURISDICTION

Before filing a notice of appeal or petition for review, parties should consider the following questions:

- Is there subject matter jurisdiction in this case?
- Has the district court or agency fully and finally resolved all issues in the case?
- Is the notice of appeal or petition for review timely?
- Is there a pending motion listed in Federal Rule of Appellate Procedure 4(a)(4) or 4(b)(3) that would make the filing of a notice of appeal ineffective?
- Have the points of error been properly preserved?
- Does the proposed appeal have genuine merit or is it frivolous?

It is critically important for parties to be certain that the Court has jurisdiction to entertain the appeal. In district court cases, parties should consult the relevant jurisdictional provisions of Titles 18 and 28 of the United States Code; in agency cases, parties should consult the particular statutory provisions and agency regulations bearing on jurisdiction. This Handbook does not purport to provide a complete and comprehensive guide to federal appellate jurisdiction. The following summary is intended only to identify generally the bases for the Court's review of district court and agency cases.

1. *Jurisdiction — District Court Cases*

The Court has jurisdiction over all criminal appeals and most civil appeals from the United States District Court for the District of Columbia. Ordinarily, only final judgments of the district court are

reviewable. *See* 28 U.S.C. § 1291. The question whether an order is "final" may be very complex and requires careful examination of the rules and case law. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In suits involving multiple claims or parties, parties should consult Federal Rule of Civil Procedure 54(b), which governs appeals from district court orders that do not dispose of the entire case.

There are certain interlocutory or non-final orders that also can be reviewed, some as a matter of right, and others as a matter of judicial discretion. Interlocutory civil orders reviewable as of right consist of orders granting, continuing, modifying, dissolving, or denying injunctions, and certain orders in receivership, bankruptcy, and admiralty. *See* 28 U.S.C. § 1292(a). With respect to many other interlocutory orders in civil actions, appellate review is possible only if the trial court certifies, pursuant to 28 U.S.C. § 1292(b), that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." In that case, this Court, in its discretion, may permit an appeal from the order. Similarly, the Court may permit an appeal from an order of a district court granting or denying class action certification under Federal Rule of Civil Procedure 23(f). *See* Fed. R. App. P. 5.

With respect to appeals from district court cases, parties also should bear in mind the Federal Courts Improvement Act of 1982, which transferred to the United States Court of Appeals for the Federal Circuit the jurisdiction to hear certain types of cases formerly reviewable in this Court, including appeals where the district court's jurisdiction was based "in whole or in part" on the Tucker Act. *See* 28 U.S.C. § 1295(a)(2).

2. *Jurisdiction — Administrative Agency Cases*

The Court reviews final orders of many federal administrative agencies, as well as the Tax Court of the United States. In these cases, the Court's jurisdiction often depends on whether the petitioner or appellant resides, maintains its principal place of business, or does business within the Circuit. Moreover, the statutes providing for judicial review of certain agency decisions also may specify this Circuit as an alternative or a special forum, even where the petitioner or appellant has no contacts with the District of Columbia. Because the criteria vary from agency to agency, counsel must examine the statutes governing reviewability of the particular administrative action in each instance.

3. *Original Jurisdiction*

To aid its appellate jurisdiction, the Court may entertain original proceedings pursuant to the All Writs Act, 28 U.S.C. § 1651. These proceedings are usually petitions for writs of mandamus or prohibition. *See* Fed. R. App. P. 21.

4. *Collateral Review of Local Court Decisions*

The Court has no authority to entertain direct appeals from orders of the Superior Court of the District of Columbia or the District of Columbia Court of Appeals. Only where a party first makes a collateral challenge to a local court ruling by bringing suit in the United States District Court for the District of Columbia, and the district court enters an appealable order, may the matter be reviewed by this Court on appeal from that order.

B. APPEALS FROM THE DISTRICT COURT AS OF RIGHT

1. *How Taken*
(*See* Fed. R. App. P. 3, 7.)

Appeals from district court judgments are taken by filing a notice of appeal with the *Clerk of the district court*, at which time the fees for filing and docketing the appeal must be paid to the district court Clerk. The notice must state the court to which the appeal is taken, the ruling being appealed, and the party who is appealing. The Clerk of the district court notifies the other parties when the notice of appeal has been filed. As a matter of courtesy, however, the party taking an appeal also should serve all other parties a copy of the notice of appeal. In civil cases, the district court may require a bond or other security to cover the costs of appeal.

2. *Timing*
(*See* Fed. R. App. P. 4.)

(a) General Rules

The time for noting an appeal in civil and criminal cases is set forth in FRAP 4. Upon a showing of excusable neglect or good cause, however, the district court may enlarge the time for filing a notice of appeal in civil and criminal cases, but only for limited periods. *See* Fed. R. App. P. 4(a)(5), (b)(4).

In addition, the district court may reopen the time to appeal in a civil case if (1) the district court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry; (2) the motion to reopen is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and (3) the district court finds that no party would be prejudiced by reopening the appeal period. *See* Fed. R. App. P. 4(a)(6).

(b) Civil Cases

Regardless of which party is appealing, if a party to a case in district court is the United States, one of its agencies, a federal officer or employee sued in an official capacity, or, under certain circumstances, a federal officer or employee sued in an individual capacity, the notice of appeal must be filed within 60 days after entry of the judgment or order, unless a statute provides otherwise. If no party fits into one of these categories, the notice of appeal must be filed within 30 days.

A notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order will ordinarily be treated as filed on the date of and after the entry. If any party has filed a timely motion in the district court for relief under Federal Rules of Civil Procedure 50(b), 52(b), 59, or 60(b) (if filed no later than 28 days after entry of judgment), however, the time for appeal begins to run from the entry of the order granting or denying that motion. A notice of appeal filed *before* the disposition of any of these motions has a limited effect, and a notice or an amended notice of appeal must be filed within the prescribed time measured from entry of the order disposing of the motion if the party wishes to appeal from an aspect of the judgment affected by the resolution of such a motion. *See* Fed. R. App. P. 4(a)(4).

If Federal Rule of Civil Procedure 58(a)(1) does not require the district court to set forth its judgment on a separate document, the district court's judgment or order is deemed entered for purposes of Federal Rule of Appellate Procedure 4(a) when it is entered on the civil docket under Federal Rule of Civil

Procedure 79(a). If Federal Rule of Civil Procedure 58(a)(1) does require the district court to set forth its judgment on a separate document, the district court's judgment or order is deemed entered for purposes of Federal Rule of Appellate Procedure 4(a) when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when either: (1) the judgment or order is set forth on a separate document or (2) 150 days have passed since the entry of the judgment or order in the civil docket, whichever occurs first.

The Clerk of the district court is required to provide notice of the entry of judgment to all parties not in default for failure to appear. A party also may serve an adversary with notice of entry. Lack of notice does not suspend the running of the time prescribed.

If one party files a timely notice of appeal, any other party may file a notice within 14 days thereafter if the usual time to appeal has expired. Thus, if one party files a notice of appeal on the 29th day in a case in which the federal government is not a party, another party may file a notice of appeal on the 43rd day. If one party files a notice of appeal on the 5th day, however, the other party may still wait until the 30th day to file a notice of appeal. If more than one timely appeal is filed, the 14-day period begins to run from the time the first appeal is filed.

(c) Criminal Cases

The defendant must appeal within 14 days after entry of the judgment or order being appealed or within 14 days of the government's notice of appeal. The government has 30 days to appeal in those limited situations when it is allowed to do so by statute. *See* 18 U.S.C. §§ 3731, 3742.

A timely motion for judgment of acquittal, arrest of judgment, or for a new trial on any ground other than newly discovered evidence, terminates the running of the time prescribed for appealing from a criminal conviction. A motion for a new trial on the ground of newly discovered evidence also terminates the running of time to file a notice of appeal, if the motion is made within 14 days of the entry of judgment. A new 14-day period within which to appeal from the judgment, as well as from the denial of any of the enumerated motions, begins to run after entry of the order disposing of the last such remaining motion or after entry of the judgment, whichever is later. *See* Fed. R. App. P. 4(b); Fed. R. Crim. P. 33, 34.

Absent extraordinary circumstances, direct criminal appeals will not be held in abeyance pending the filing and disposition of a postconviction motion in the district court. *See* D.C. Cir. Rule 47.5.

(d) Collateral Challenges in Criminal Proceedings

Petitions for writs of habeas corpus and motions attacking sentence under 28 U.S.C. § 2255 are civil cases for purposes of computing the time for appeal. Parties should consult appropriate authorities to determine whether other proceedings are deemed civil or criminal in nature to determine the appropriate filing period.

C. APPEALS FROM THE DISTRICT COURT BY PERMISSION

(*See* Fed. R. App. P. 5; D.C. Cir. Rules 5, 25(c)(3), 32(d)(3).)

1. *How Taken*

Currently, discretionary appeals from interlocutory decisions of the district court are authorized in two instances, under 28 U.S.C. § 1292(b) and Federal Rule of Civil Procedure 23(f). *See* 28 U.S.C. § 1292(e).

Under either provision, interlocutory appeals from the district court are taken by filing with the Clerk of this Court a petition for permission to appeal, with proof of service on all parties to the action in the district court, accompanied by a certificate of parties and *amici curiae* as described in Circuit Rule 28(a)(1)(A), and any disclosure statement required by Circuit Rule 26.1. *See* D.C. Cir. Rule 5(a). The petition is limited to 5,200 words if produced using a computer and 20 pages if handwritten or typewritten. The petition must state the facts necessary to understand the question presented, the question itself, the relief sought, and the reasons why the appeal should be allowed and is authorized by a statute or rule. The petition must include a copy of the order complained of and any related opinion or memorandum, as well as any required order stating the district court's permission to appeal or finding that the necessary conditions to appeal are met. The petition may be filed either electronically or in paper form. *See* D.C. Cir. Rule 25(c)(3). In addition to the electronic filing or the original in paper form, 4 paper copies of the petition must also be filed. *See* D.C. Cir. Rules 5(c), 32(d)(3).

Because the petition is not itself an appeal, but rather a request to the Court asking that docketing of the appeal be allowed, a docketing fee is not required unless the Court grants the petition.

The adverse party may respond to the petition within 10 days. A response may not exceed 5,200 words if produced using a computer and 20 pages if handwritten or typewritten. Any reply, limited to 2,600 words if produced using a computer and 10 pages if handwritten or typewritten, is due within 7 days thereafter. *See* D.C. Cir. Rule 5(b). There is no oral argument on the application unless the Court so orders. The Court refers these petitions to a special panel for disposition as soon as the matter has been fully briefed.

If the Court grants permission to appeal, a notice of appeal is unnecessary. This Court enters an order granting permission to appeal, and transmits a certified copy of it to the Clerk of the district court. This certified copy serves as a notice of appeal. The appellant must pay the docketing fee to the Clerk of the district court within 14 days after entry of the order granting permission to appeal. Once the Clerk is notified by the district court that the fee has been paid, the appeal will be docketed and the case transmitted to the Legal Division for screening.

2. *Timing*

The petition for permission to appeal under 28 U.S.C. § 1292(b) must be filed within 10 days after the entry of the interlocutory order containing the statement prescribed in the statute, or within 10 days after the entry of an order amending the prior interlocutory order to include the district judge's statement required by that section. The petition for permission to appeal under Federal Rule of Civil Procedure 23(f) must be filed within 14 days after entry of the order granting or denying class action certification.

D. APPEALS FROM THE TAX COURT

(*See* Fed. R. App. P. 13, 14.)

1. *How Taken*

These appeals are taken by filing a notice of appeal with the Clerk of the Tax Court in the District of Columbia. Filing by mail is permitted. The notice must identify the court to which the appeal is taken, the ruling being appealed, and the party who is appealing. The Clerk of the Tax Court notifies the other parties that a notice of appeal has been filed, but it is good practice for the party taking an appeal also to serve all other parties with a copy of the notice of appeal.

2. *Timing*

The notice of appeal must be filed within 90 days after entry of the decision of the Tax Court. If a timely notice is filed, any other party may take an appeal by filing a notice of appeal within 120 days after entry of the decision. A notice of appeal mailed and postmarked *before* the prescribed time expires, but received *after* it expires, is treated as timely under 26 U.S.C. § 7502.

A motion to vacate or revise a decision, timely filed under the Rules of Practice of the Tax Court, terminates the running of time for filing a notice of appeal from that decision. The new time begins to run for all parties from entry of an order disposing of the motion, or from entry of a new decision, whichever is later.

E. REVIEW OF ADMINISTRATIVE AGENCY ORDERS

(*See* Fed. R. App. P. 15; D.C. Cir. Rules 15, 25(c)(3).)

1. *How Obtained*

To obtain review of an administrative agency order, a party must file a petition for review (or other document prescribed by the applicable statute) with the Clerk of this Court. The petition for review must designate the party seeking relief, the respondent(s), and the order to be reviewed. The respondent is the appropriate agency or officer of that agency. Some statutes also require the United States to be named as a respondent, and some statutes require the petitioner to attach a copy of the agency order or rule for which review is sought. The petition may be filed either electronically or in paper form. *See* D.C. Cir. Rule 25(c)(3). No additional paper copies of the petition are required unless the court directs otherwise. *See* D.C. Cir. Rule 25(d). In addition, the petitioner must serve a copy of the petition on all other parties who were participants in the agency proceeding, except in informal rulemaking proceedings, such as, for example, those covered by the Administrative Procedure Act, 5 U.S.C. § 553, or other statutory authority. In these informal rulemaking cases, petitioner need serve copies only on the respondent agency, and on the United States if required by statute. Petitioner also must file a list of those served. When the number of parties filing comments in informal rulemaking proceedings is not too great to impose an undue burden, it is courteous to serve those parties with a copy of the petition for review, although a copy of the agency order need not be attached.

2. *Timing*

The time for filing the petition for review is prescribed by the statute that sets forth the procedures for obtaining judicial review of the particular agency's orders.

3. *Intervention*

Unless the applicable statute provides otherwise, a party who wishes to intervene must file a motion for leave to intervene with service on all parties to the proceeding before this Court. The motion must contain a concise statement of the party's interest in the case, and the grounds for intervention. The motion must be filed within 30 days of the filing of the petition for review and must be accompanied by any disclosure statement required by Circuit Rule 26.1. A motion to intervene in a proceeding before this Court concerning direct review of an agency action will be deemed a motion to intervene in all cases before the Court involving the same agency action or order, including later filed cases, unless the moving party specifically advises otherwise. An order granting such a motion has the effect of granting intervention in all such cases.

F. ENFORCEMENT OF ADMINISTRATIVE AGENCY ORDERS

1. *How Obtained*

(*See* Fed. R. App. P. 15(b); D.C. Cir. Rule 25(c)(3).)

When authorized by statute, a party may seek enforcement of an administrative agency order by filing an application with the Clerk of this Court. A cross-application for enforcement also may be filed by a respondent to a petition for review, if the Court has jurisdiction to enforce the order. Any application for enforcement must contain a concise statement of the proceedings in which the order sought to be enforced was entered, the party against whom the order is to be enforced, the facts upon which jurisdiction and venue are based, and the relief sought. The application for enforcement may be filed either electronically or in paper form. *See* D.C. Cir. Rule 25(c)(3). No additional paper copies of the application are required unless the court directs otherwise. *See* D.C. Cir. Rule 25(d). The Clerk's Office serves the respondents; the petitioner serves all other parties who participated before the agency.

The respondent to the enforcement petition must serve and file an answer within 21 days. Where no answer is filed, the Court will enter a judgment in favor of the moving party.

2. *Timing*

The time for filing an enforcement application is prescribed by the applicable statute.

G. ORIGINAL PROCEEDINGS

(*See* Fed. R. App. P. 21; D.C. Cir. Rules 21, 25(c)(3), 32(d)(3).)

1. *How Taken*

A party seeking a writ of mandamus or prohibition directed to a judge, or seeking any other extraordinary writ, must file a petition with the Clerk of this Court, with proof of service on the respondent judge or agency, and on all parties to the action in the trial court or to proceedings before the agency. The petition is limited to 7,800 words if produced using a computer and 30 pages if handwritten or typewritten. The petition must comply with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The petition must contain a statement of the issues, the necessary facts, the relief sought, and the reasons the writ should issue. It must include copies of any relevant order or opinion, necessary parts of the record, a certificate of parties and *amici curiae* as described in Circuit Rule 28(a)(1)(A), and any disclosure statement required by Circuit Rule 26.1. Circuit Rule 21 prescribes the manner of captioning the action. The petition may be filed either electronically or in paper form. *See* D.C. Cir. Rule 25(c)(3). In addition to the electronic filing or the original in paper form, 4 paper copies of the petition must also be filed. *See* D.C. Cir. Rules 21(c), 32(d)(3).

The Court handles petitions for extraordinary writs in the same way as dispositive motions, referring them to a special panel for disposition. *See infra* Part VII.D. If the panel finds the petition to be without merit, it may deny the petition without calling for an answer. Otherwise, the panel issues an order fixing a time within which an answer must be filed. Unless otherwise provided, there is no oral argument.

2. *Timing*

No time limits are applicable.

3. *Petitions for Writs of Mandamus Challenging District Court Transfers*

Any order by the district court transferring a case to another district is not an appealable order. Therefore, litigants seeking to challenge such a transfer frequently file petitions for writ of mandamus with this Court. *See In re Scott*, 709 F.2d 717 (D.C. Cir. 1983) (per curiam); *see also supra* Part III.G.1. Unless the case was transferred to an improper forum or there is a substantial issue whether the district court had power to order the transfer, once physical transfer of the original record takes place, jurisdiction is exclusive in the transferee court, and this Court has no power to review the transfer decision. *See In re Briscoe*, 976 F.2d 1425 (D.C. Cir. 1992); *Starnes v. McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) (*en banc*).

4. *Petitions for Writs of Mandamus Alleging Unreasonable Agency Delay*

The Court has identified a category of petitions for writ of mandamus to compel administrative agency action unreasonably delayed. *See In re GTE Serv. Corp.*, 762 F.2d 1024, 1026 n.5 (D.C. Cir. 1985); *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984). These petitions are treated in the same manner as other petitions for writ of mandamus, *i.e.*, petitions are limited to 7,800 words if produced using a computer and 30 pages if handwritten or typewritten and must comply with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), the petition is initially considered by the special panel, and no petition will be granted unless the Court orders an answer.

H. JOINT APPEALS

(*See* Fed. R. App. P. 3(b), 15(a).)

Persons entitled to appeal whose interests make joinder practicable may file a joint notice of appeal or petition for review, or they may join in an appeal after filing separate timely notices or petitions. Parties taking joint appeals must list individually each appellant or petitioner. The Court also may consolidate appeals on its own or upon motion. *See infra* Part V.A.

I. CROSS-APPEALS

(*See* Fed. R. App. P. 28.1; D.C. Cir. Rule 28.1.)

Appellees, in cases appealed from the district court, may generally, without filing a cross-appeal, defend a judgment on any ground raised in the district court, even if that ground was rejected, not considered, or raised *sua sponte* by the district court. They may not, however, attack the judgment, either to enlarge their own rights or to lessen the rights of their adversary, except by filing a cross-appeal. A cross-appeal also is necessary where appellees seek to correct an error in, or to supplement, the district court's judgment. Unless the parties otherwise agree and notify the Clerk's Office, or the designation is modified by court order, the party that files the first notice of appeal files the first brief. *See* Fed. R. App. P. 28.1(b); D.C. Cir. Rule 28.1(a). The time for taking cross-appeals is set out *supra* at Part III.B.2.(b).

J. APPEALS EXPEDITED BY STATUTE

(*See* Fed. R. App. P. 9(a); D.C. Cir. Rule 47.2.)

For several categories of appeals, the Federal Rules of Appellate Procedure and the Circuit Rules expressly prescribe special procedures. For example, the following matters are to be expedited, but this list is not exhaustive: appeals by the government from dismissal of an indictment or information or from suppression of evidence in a criminal proceeding, pursuant to 18 U.S.C. § 3731; appeals by recalcitrant witnesses from summary confinement, pursuant to 28 U.S.C. § 1826; appeals from denial or grant of pretrial

release in criminal cases, pursuant to 18 U.S.C. § 3145; appeals from habeas corpus proceedings, pursuant to 28 U.S.C. chapter 153; appeals of certain orders entered in any case brought by the Federal Deposit Insurance Corporation, pursuant to 12 U.S.C. § 1821(q)(1); and appeals from any action for temporary or preliminary injunctive relief, pursuant to 28 U.S.C. § 1657(a). Counsel should consult these statutes and the relevant rules with care. Prompt notification to the Clerk's Office by counsel intending to file such an appeal is essential to enable the Court to begin immediate preparation for prompt disposition. It is particularly important that counsel notify the Court in writing of arrangements for preparation of all necessary transcripts and for transmittal of relevant portions of the record.

Other sections of this Handbook bear on emergency motions, motions for release pending appeal, and the calendaring of emergency and expedited appeals. *See infra* Parts VIII.A, B, C.

K. CASES WITH RECORDS UNDER SEAL

(*See* D.C. Cir. Rules 25(c)(4), 47.1.)

Any portion of the record that was placed under seal in the district court or before an agency remains under seal in this Court unless otherwise ordered. Parties and their counsel are responsible for assuring that materials under seal remain under seal and are not publicly disclosed. Matters under seal may not be filed in the Court of Appeals drop box. For privacy protections that govern all cases filed in this Court, see *supra* Part II.C.5.

In any case in which the record in the district court or before an agency is under seal in whole or in part, each party must review the record to determine whether any portions of the record under seal should remain under seal on appeal. If a party determines that some portion should be unsealed, that party must seek an agreement on the unsealing. Such agreement must be promptly presented to the district court or agency for its consideration and issuance of an appropriate order. *See* D.C. Cir. Rule 47.1(b); *see also infra* Parts VIII.H (discussing motions to unseal), IX.A.10 (discussing briefs containing material under seal), IX.B.7 (discussing appendices containing matters under seal). For procedures governing disposal of sealed records, see *infra* Part XIII.A.5.

Any document containing material under seal, or containing material that a party is seeking to place under seal, may not be filed or served electronically unless the Court orders otherwise. *See* D.C. Cir. Rule 25(c)(4).

IV. DOCKETING THE APPEAL

A. CASES FROM THE DISTRICT COURT AND THE TAX COURT

1. *Preliminary Record on Appeal and Preparation of Transcripts*

(*See* Fed. R. App. P. 10.)

The preliminary record on appeal, prepared in the district court Clerk's Office or the Tax Court Clerk's Office, consists of the notice of appeal and the district court docket entries. Upon receipt of the preliminary record, a case administrator in this Court's Clerk's Office dockets the appeal, assigns it a number, and gives notice of the filing to all parties by issuing an order scheduling certain submissions. In addition, a case administrator checks to see that the docketing fee has been paid and sends appropriate notice if it has not.

The documents and exhibits filed in the district court; the transcript of proceedings, if any; and the docket entries prepared by the Clerk of the district court, constitute the record on appeal. The parties may

correct errors or omissions in the record by stipulation. In the event of a dispute, this Court has the power to require that the record be corrected or amplified, but disputes about the accuracy of the record must first be submitted to the district court.

Within 14 days of filing the notice of appeal in a civil case, or entry of an order disposing of the last timely remaining motion as specified in Federal Rule of Appellate Procedure 4(a)(4)(A), appellants must order from the court reporter a transcript of such parts of the proceedings not already on file as they consider necessary to dispose of the appeal.

It is the policy of this Court to expedite criminal appeals. Counsel has the responsibility for assuring expeditious preparation of the transcript in a criminal appeal. If any unusual problems arise with the court reporter, they should be brought to this Court's attention immediately. Where the defendant proceeded *in forma pauperis* in the district court, that court, by local practice, requires appointed counsel to order the transcript at the same time as filing the notice of appeal.

Unless the entire transcript is ordered, the appellant must file and serve on the appellee a designation of the parts of the transcript ordered, and a statement of the issues to be presented on appeal. The appellee has 14 days to file and serve a cross-designation of additional parts of the transcript. If the appellant refuses to order the additional portions, appellee should do so, or ask the district court to compel the appellant to comply.

When, as is often the case, a complete transcript has been made during the trial, and it is filed with the Clerk, no designation need be made. The parties, however, must include in the appendix to the briefs only those portions of the transcript that are pertinent to the appeal. Awards of costs and sanctions may be imposed where a party has included unnecessary material in the appendix. *See infra* Part IX.B.

If no transcript is available, the appellant may prepare and file with the district court a statement of the evidence or proceedings from the best available means, including recollection, and serve it on the appellee. The appellee has 14 days to serve objections or proposed amendments in response. The district court then approves the statement as submitted or amended, and certifies it to this Court as the record on appeal.

As with transcript designations, the parties are encouraged to agree on what exhibits are necessary to resolve the appeal, but in the absence of an agreement they may cross-designate exhibits.

In civil cases, the district court returns the exhibits to the parties who filed them. In criminal cases, the exhibits are given to the United States Attorney. If a party wants an exhibit in the courtroom during oral argument to this Court, counsel must notify the Court in writing at least 7 days before the argument date of his or her intention, and deliver the exhibit to the Clerk's Office. If the Court requests an exhibit, the parties will be notified and directed to deliver the exhibit to the Clerk's Office.

2. ***Transmission of the Record***
(*See* Fed. R. App. P. 11; D.C. Cir. Rule 11.)

The district court transmits the preliminary record in all cases a few days after the notice of appeal is filed. Counsel should keep in mind that, unlike other federal circuits, briefing schedules in this Court, where the case has been scheduled for argument, are *not* computed from the date on which the record is filed in this Court. Rather, briefing schedules are established by order. *See infra* Part IX.A.1.

3. *Docketing the Appeal*

(*See* Fed. R. App. P. 12; D.C. Cir. Rule 12.)

After an appeal has been docketed, the Clerk's Office enters an initial scheduling order that specifies the dates on which the docketing statement and initial submissions, procedural motions, and dispositive motions are due. In civil cases, the order directs the appellant to file within 30 days a docketing statement on a form provided by the Clerk's Office and to serve a copy on all other parties and *amici curiae*. The docketing statement includes information about the type of case; the district court or agency case number; relevant dates; the order sought to be reviewed; related cases; relevant statutes; and counsel's name, e-mail address, postal address, and telephone number. A copy of the district court judgment under review must be submitted with the docketing statement, as well as a preliminary statement of the issues for appeal and a transcript status report. This material assists the Clerk's Office and the Legal Division in screening and classifying all new appeals, identifying related cases in this Court, and detecting possible jurisdictional problems. The information about preparation of the transcript is especially important to ensure against delays as the case is processed. The parties also may include a stipulation to be placed in the stand-by pool for argument or a request to be included in the Court's mediation program. *See infra* Part IV.D (discussing the Court's mediation program), and Part X.E.4 (discussing the requirements to enter the stand-by pool).

Appellants must provide with the docketing statement a provisional certificate setting forth the information specified in Circuit Rule 28(a)(1), identifying parties, intervenors, and *amici* in the district court proceedings and in this Court, including a disclosure statement required by Circuit Rule 26.1. Circuit Rule 26.1 requires corporations, associations, joint ventures, partnerships, syndicates, or other similar entities appearing before the Court to file a disclosure statement that identifies all parent companies and any publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in the entity. The statement also must identify the represented entity's general nature and purpose, as relevant to the litigation, and if the entity is unincorporated and its members have no ownership interests, the statement must include the names of any members of the entity that have issued shares or debt securities to the public. No listing need be made, however, of the names of members of a trade association or professional association.

In civil cases, the provisional certificate filed with the docketing statement is necessary to enable the Clerk's Office to avoid assigning matters to a judge who would be recused because of his or her association with a party or counsel in the case.

Appellees must file, within 7 days of service of the docketing statement, or upon filing a motion, response, or answer, whichever occurs first, any disclosure statement required by Circuit Rule 26.1. *See* Fed. R. App. P. 26.1(b). Any disclosure statement required by Circuit Rule 26.1 must also accompany a motion to intervene, a written representation of consent to participate as *amicus curiae,* and a motion for leave to participate as *amicus. See* D.C. Cir. Rules 12(f), 15(c)(6). This disclosure statement and a Rule 28(a)(1)(A) certificate of parties and *amici* must likewise accompany a petition for panel rehearing or rehearing *en banc*. *See* D.C. Cir. Rule 35(c). A revised corporate disclosure statement must also be filed any time there is a change in corporate ownership interests that would affect the disclosures required under Circuit Rule 26.1.

B. CASES FROM ADMINISTRATIVE AGENCIES

(*See* Fed. R. App. P. 15, 16, 17; D.C. Cir. Rules 15, 17.)

In cases from administrative agencies, docketing occurs at the time the petition for review or notice of appeal is filed and precedes transmission of the record. The appellant or petitioner must remit the docketing fee to this Court at that time. For information the parties are required to provide with the docketing

statement, motions, and rehearing petitions, see *supra* Part IV.A.3. In addition, in cases involving direct review of administrative agency actions, the docketing statement must contain a brief statement of the basis for the appellant's or petitioner's claim of standing. *See* D.C. Cir. Rule 15(c)(2).

The record on review consists of the order sought to be reviewed or enforced; the findings or report on which it is based; and the pleadings, evidence, and proceedings before the agency. The record may later be corrected or supplemented by stipulation or by order of this Court, as in the case of an appeal from the district court.

Because of a lack of storage space, the record before the administrative agency is not transmitted to this Court at the time of docketing; only a certified index to the record is submitted by the agency. Any party to the proceeding may, by motion, subsequently request that part or all of the record be transmitted to the Court, or the Court on its own may require transmission of the record. It is the duty of the agency to maintain the record so that it can be transmitted to the Court with a minimum of delay. In most cases, however, transmission of the actual record will be unnecessary because the appendix must contain those documents necessary for the Court's review.

The administrative agency submits to this Court the certified index to the record within 45 days of the filing of the petition for review or application for enforcement, unless the statute authorizing review fixes a different time. The date of filing the certified index is deemed to be the date the record is filed.

C. ORIGINAL PROCEEDINGS

No record is prepared or transmitted to the Court in original proceedings. Any documents from the district court or agency proceedings that are necessary to understand the issues being presented must, however, be attached to the petition. An appendix may be utilized. The petitioner seeking a writ of mandamus or other extraordinary relief must remit the docketing fee to the Clerk of this Court before the petition will be accepted for filing.

D. MEDIATION PROGRAM

Program procedures are described in the Court's order establishing the mediation program, included as Appendix III to the Court's rules. Cases docketed in the Court are screened by the Legal Division, and those deemed appropriate for mediation are referred to the Director of the Appellate Mediation Program for further assessment and placement into the program. Procedures are explained to counsel when a case is selected for mediation. Counsel are advised that whenever there are serious settlement negotiations in progress, including post-argument settlement discussions, the parties must advise the Clerk of that fact and must notify the Clerk at the earliest possible moment if settlement is reached.

V. MULTI-PARTY CASES

A. CONSOLIDATION

In order to achieve the most efficient use of the Court's resources, as well as to maintain consistency in its decisions, the Court generally will consolidate, on its own motion or on motion of the parties, all appeals and cross-appeals from the same district court judgment or order, and all petitions for review of agency orders entered in the same administrative proceeding. In addition, other cases involving essentially the same parties or the same, similar, or related issues, may be consolidated. When cases are consolidated, the Clerk's

Office designates one case (usually the one with the lowest docket number) as the "lead" case but usually enters items filed in any of the consolidated cases on the dockets of all the cases.

As noted in Part III.H, *supra*, parties with common interests also may file a joint notice of appeal or petition for review.

Once cases are consolidated, they are treated as one appeal for most purposes. They generally follow a single briefing schedule, they are assigned for hearing on the same day before the same panel, argument time is allotted to the cases as a group, and they are decided at the same time. Each case retains some of its individual identity, however. For example, motions may be filed in one case and not in others, and extensions of time in one case do not necessarily extend the time in any others. Joint briefs are encouraged pursuant to Federal Rule of Appellate Procedure 28(i). Briefing by intervenors is governed by Circuit Rule 28(d). *See infra* Part IX.A.4.

B. APPEALS MANAGEMENT PLAN

The Director of the Legal Division administers the Court's plan for the management of its caseload. The objectives of this plan are: (1) to achieve an efficient and organized presentation of appeals in complex, multi-party litigation; (2) to identify early in the appellate process cases that either are not ripe for review or are appropriate for summary disposition; and (3) to enhance the Court's control of the pace of the appellate process. An important characteristic of the plan is its flexibility and informality. Although the Director of the Legal Division ordinarily determines which cases will require special attention or management under the plan, counsel for the parties are encouraged to notify the Director or the Clerk of cases that may be appropriate for such treatment.

In carrying out the plan, the Director of the Legal Division is authorized to obtain from counsel information that will assist the Court in making decisions about the appointment of lead or liaison counsel, joint briefing, briefing schedules, motions dispositions, and oral argument dates and formats. The Director may obtain this information informally by letter or telephone, by meeting with counsel, or by requesting the Clerk's Office to issue directives to counsel.

In any case pending before the Court, counsel may independently develop proposals to facilitate briefing and other matters and submit such proposals to the Legal Division. On the recommendation of the Director of the Legal Division, the Clerk's Office may issue procedural orders that reflect the agreement of counsel. Where agreement is not achieved, or where the Director believes the circumstances warrant it, the Court will issue procedural orders in cases managed under the plan.

VI. APPEALS *IN FORMA PAUPERIS* AND PURSUANT TO THE CRIMINAL JUSTICE ACT; APPOINTMENT OF COUNSEL

A. WHEN PERMITTED

(*See* Fed. R. App. P. 24; D.C. Cir. Rule 24.)

The district court and this Court are authorized by 28 U.S.C. § 1915 and Federal Rule of Appellate Procedure 24 to allow an appeal, civil or criminal, to be taken without payment of the docketing fee or costs by a non-incarcerated person who makes an affidavit of indigence. While an incarcerated litigant may also proceed *in forma pauperis,* in civil cases the prisoner will be required to pay the full amount of the filing fee — albeit in monthly installments. *See* 28 U.S.C. § 1915(b). Any non-incarcerated person who has been permitted to proceed *in forma pauperis* in the district court may proceed *in forma pauperis* in this Court,

unless the district court finds and states in writing that the appeal is not taken in good faith, or that the party is otherwise not entitled to that status. If a party wishes to claim *in forma pauperis* status for the first time in this Court, or if a prisoner seeks to appeal *in forma pauperis*, he or she must first apply to the district court and, if permission is granted, no further authorization from this Court is necessary. If that party is a prisoner, however, a fee will nonetheless be assessed by this Court.

If the district court denies permission to proceed on appeal *in forma pauperis*, or revokes *in forma pauperis* status previously granted in the district court, the party may, within 30 days of service of notice of the district court's action, move this Court for leave to proceed on appeal *in forma pauperis*. The filing of a new notice of appeal is not required. If the Court grants the motion, the docketing fee is waived for non-incarcerated parties but will be assessed for incarcerated parties in civil cases; if the Court denies the motion, the appellant must pay the docketing fee or the appeal will be dismissed.

A party to an administrative agency proceeding who wishes to take an appeal or file a petition for review *in forma pauperis* must file a motion with this Court for leave to so proceed.

B. DISTRICT COURT DISMISSAL OF SUITS BROUGHT *IN FORMA PAUPERIS*

Under 28 U.S.C. § 1915(e), the district court must dismiss a civil suit in which the plaintiff seeks to proceed *in forma pauperis* if the court concludes that the action is "frivolous or malicious." *See Denton v. Hernandez*, 504 U.S. 25 (1992) (discussing the "frivolous or malicious" standard).

In *Sills v. Bureau of Prisons*, 761 F.2d 792 (D.C. Cir. 1985), this Court established procedures to be followed by the district court in dismissing a complaint under § 1915 in order to facilitate appellate review. The district court must provide a clear statement of reasons for its conclusion that the suit is frivolous or malicious, and the court also should revoke the plaintiff's *in forma pauperis* status when it dismisses the complaint. This latter procedure permits this Court to evaluate the correctness of the § 1915(e) dismissal in the context of ruling on appellant's motion to proceed *in forma pauperis* on appeal.

C. PROCEDURAL CONSEQUENCES OF *IN FORMA PAUPERIS* STATUS

(*See* D.C. Cir. Rules 24, 31.)

Parties proceeding *in forma pauperis* who are authorized to file electronically need not provide paper copies of any motions papers; those not authorized to file electronically need file only the original of any motions papers. The Clerk's Office will make the necessary copies for the Court. Litigants proceeding *in forma pauperis* who are *not* represented by counsel are also exempt from filing the usual number of briefs; such unrepresented parties need submit only the electronic version if authorized to file electronically, or the original of the brief if not authorized to file electronically. All other parties must file the standard number of briefs required by the Circuit Rules, but appointed counsel in criminal appeals may be reimbursed for the expense of reproducing the brief by photocopy process in accordance with the Criminal Justice Act (CJA).

Represented parties proceeding *in forma pauperis* and *amicus curiae* appointed by the Court must comply with the standard requirements for an appendix. *See* Fed. R. App. P. 30; D.C. Cir. Rule 30. If an appellant or petitioner proceeding *in forma pauperis* is unrepresented, the Court may decide the appeal on the original record without an appendix. Under Circuit Rule 24, however, the pro se appellant or petitioner must file with his or her brief 1 copy of those pages of the trial transcript the appellant or petitioner wishes to call to the Court's attention, 1 copy of a list designating those pages of the transcript, and 1 copy of any other portions of the record to which the appellant or petitioner wishes to direct the Court's attention. Although the Clerk's Office will reproduce enough copies of these items to provide them to the panel,

parties are encouraged to provide the Court 4 copies of these items so as not to delay processing of the case. The appellee or respondent must furnish with the brief 4 copies of an appendix containing any additional pages of transcript or portions of the record to which the Court's attention is directed.

D. APPOINTMENT OF COUNSEL

1. *Time and Manner of Appointment*

The CJA, 18 U.S.C. § 3006A, does not provide for the appointment of counsel in non-criminal cases. Thus, even though a party in a civil appeal may be granted leave to proceed in forma pauperis, counsel will not ordinarily be provided by the Court. The appellant may file a motion for the appointment of counsel. If the Court grants the motion or elects to appoint *amicus curiae* in lieu of counsel, it may select a member of a legal aid organization or a law school clinical program, or it may appoint an attorney who has indicated a willingness to serve without compensation in non-criminal cases. The decision whether to appoint counsel or an *amicus* in a civil case is usually made by the special panel, and the Court will appoint a private attorney or *amicus* only when a panel determines it is in the interest of the Court.

Counsel who wish to be considered for appointment in civil cases should write to the Clerk, providing information about their background and experience, and listing any cases they have previously handled in this Court. Counsel and *amici* appointed in civil appeals serve without compensation. Counsel are encouraged to volunteer their services for civil matters.

2. *Withdrawal*

Appointed counsel who are unable to continue to represent an appellant in a civil or criminal appeal must promptly move this Court to withdraw, stating specific reasons.

In a criminal appeal, if counsel wishes to withdraw because of a belief there is no merit to the appeal, counsel should refer to *Anders v. California*, 386 U.S. 738 (1967), and *Suggs v. United States*, 391 F.2d 971 (D.C. Cir. 1968), for guidance. Counsel in a criminal appeal also should confer with the Office of the Federal Public Defender to help assure uniformity of practice in this regard.

Counsel must serve the appellant with the motion to withdraw. When filing a motion to withdraw because of lack of merit to the appeal in a criminal case, counsel also must submit to the Court and serve on the appellant, *but not on government counsel*, a confidential memorandum under seal setting forth the points the appellant wishes to assert, any other points counsel has considered, and the most effective arguments counsel can make on the appellant's behalf. The Court gives the appellant 30 days to respond to this memorandum; if the Court thereafter concludes there are no meritorious issues on appeal, it will grant counsel's motion to withdraw and ordinarily dismiss the appeal.

3. *Duties in Criminal Appeals*

Upon notice of appointment in a criminal appeal, counsel must so advise the defendant, and if the defendant is incarcerated, counsel must explore the possibility of obtaining release pending appeal. *See infra* Part VIII.C. Counsel also should check the district court record to ensure that the transcript has been or is being prepared. It is trial counsel's duty to order the transcript when the notice of appeal is filed, but counsel appointed on appeal must make sure that all necessary portions of the transcript have been designated. The failure of trial counsel to order the necessary transcript does not justify an extension of time for filing defendant’s brief.

Appointed counsel ordinarily should interview the defendant in person at least once if the defendant is within the jurisdiction. If the defendant is incarcerated outside the jurisdiction, the Court may authorize counsel to visit the defendant at his or her place of incarceration. Such visits must be approved in advance and must be fully justified in order for counsel to be reimbursed. Requests for such advance authorization are first to be submitted to the Federal Public Defender.

If the defendant is dissatisfied with court-appointed counsel's handling of the appeal and wishes counsel to withdraw, counsel must file a motion for leave to withdraw, and the Clerk will refer the matter to the Legal Division for presentation to a panel. *See infra* Part VII.D. The Court does not respond favorably to general complaints about counsel, only to specific grievances.

Counsel's responsibility when appointed in a criminal case extends through the filing of a nonfrivolous petition for a writ of *certiorari*. Appointed counsel must advise the defendant of the right to file a *certiorari* petition and counsel's opinion as to the merit and likelihood of success in obtaining such a writ. If the defendant asks counsel to file a petition for writ of *certiorari* and there are nonfrivolous grounds for doing so, counsel must prepare and file one. If counsel determines that there are no nonfrivolous grounds for filing a petition, counsel must, within 20 days of the entry of judgment, notify the defendant in writing that counsel will not file a petition, briefly explaining why. Counsel must also inform the defendant about the procedures both for filing a petition for *certiorari* pro se and for asking this Court to appoint new counsel to prepare a petition for *certiorari*. Counsel should caution the defendant that it is unlikely the Court will appoint new counsel and that the client should be prepared to file a petition for *certiorari* pro se within the prescribed time. Once counsel has provided this notice to the client, counsel must notify the Court that counsel's representation has ceased. (A model letter withdrawing from representation at the *certiorari* stage can be found on the Court's web site under "Attorney & Pro Se Information>Criminal Justice Act Information.") The Clerk will notify the defendant in writing of the effective date of the termination of counsel's appointment. The cost of this work is recoverable in this Court pursuant to the original appointment, and counsel may not submit his or her voucher until all work is completed. Failure to comply with the foregoing procedures may result in the Court's refusal to approve counsel's voucher.

4. *Compensation*

The CJA prescribes the rate at which appointed counsel is compensated for time spent in court, and for time spent on the case out of court. While total compensation is limited to a specific dollar amount in direct criminal appeals and collateral proceedings, the Chief Judge, or another judge designated by the Chief Judge, may authorize payments in excess of these limitations. Awards of excess compensation are not made lightly in view of budgetary constraints, and require strong justification and documentation.

Counsel also may be reimbursed for certain out-of-pocket expenses, including the cost of reproducing the briefs. General office costs are not reimbursable.

Counsel must submit claims for reimbursement within 45 days of the date after which no further action before this Court or the Supreme Court is possible. Counsel's claims must be itemized on the voucher form sent to counsel by this Court at the time of the appointment. Records of time spent on the appeal must be indicated on the standard work-sheets available from the Clerk's Office. The Clerk reviews the claim form for mathematical and technical accuracy and for conformity with applicable regulations. The completed form is then sent for approval to the judge who wrote the opinion in the case, or, if no opinion was issued, to the presiding judge of the panel.

VII. MOTIONS PRACTICE

A. FORMAL REQUIREMENTS

(*See* Fed. R. App. P. 27; D.C. Cir. Rules 27, 32.)

Motions practice in this Court has become a means of achieving early resolution of cases that would otherwise unnecessarily go the full route of briefing and oral argument. Parties are particularly encouraged to file dispositive motions where a sound basis exists for summary disposition. The result can be a major savings of time, effort, and resources for the parties, counsel, and the Court. In order to achieve this economy, however, it is essential for counsel to comply fully with the procedural requirements for motions practice. The following section discusses general motions practice; specific motions are discussed *infra* at Part VIII.

At the outset, there are two important time limits to observe: 30 days from docketing for filing procedural motions, and 45 days from docketing for filing dispositive motions. The actual dates when both types of motions are due are specified in the initial order sent out by the Clerk's Office at the time of docketing.

Procedural motions are those that may affect the progress of the case through the Court, *e.g.*, motions to intervene, motions to consolidate, motions to defer the appendix, motions to hold the case in abeyance, motions for stay, and motions to expedite.

Dispositive motions are defined in Circuit Rule 27(g) as those which, if granted, would dispose of the appeal or the petition for review in its entirety, or would transfer the case to another court. They include motions for summary affirmance or reversal, motions to dismiss (on any ground, including jurisdiction), and motions to transfer. Absent leave of the Court, dispositive motions may not be filed more than 45 days after docketing. This requirement does not apply to a motion by an appellant or a petitioner for voluntary dismissal, which may be filed at any time.

Normally, cases will not be given oral argument dates or briefing schedules until all pending motions have been resolved. Counsel can assist the Clerk's Office in processing the case by stipulating within the first 45 days that no dispositive motions will be filed. Any motions filed after the oral argument date is set are referred to the panel assigned to hear the case on the merits.

There are certain formal requirements common to most motions. Unless a party is proceeding *in forma pauperis*, or the Court directs otherwise, non-ECF filers must submit an original and 4 paper copies of any motion, except in *en banc* cases, in which event an original and 19 copies are required. ECF filers must, in addition to the electronic original, file 4 paper copies of any motion specified in Circuit Rule 32(d)(2), or 19 paper copies in *en banc* cases. These motions include dispositive motions, contested procedural motions, and motions for emergency relief.

Motions, responses thereto, and replies must be prepared in conformity with Federal Rule of Appellate Procedure 27(d)(1) and (2). Thus, all papers relating to motions must be submitted in standard typographical printing or by any duplicating or copying process that produces a clear black image on light paper, in a plain, roman style, with a proportionally spaced typeface of 14-point or larger or a monospaced typeface containing no more than 10 and one-half characters per inch. Except by permission or direction of the Court, a motion may not, under any printing method utilized, exceed 5,200 words if produced using a computer and 20 pages if handwritten or typewritten. All legal arguments must be presented in the body of the motion; a separate

brief or memorandum supporting or responding to a motion may not be filed. A copy of the trial court's opinion or agency's decision must accompany a motion seeking any substantive relief.

The front page of the motion must give the name of this Court, the title and file number of the case, and a brief descriptive title (*e.g.*, Motion for Summary Affirmance). If a case has been scheduled for oral argument, has already been argued, or is being submitted without oral argument, a motion, response, or reply must so state in capital letters at the top of the first page. Where applicable, the date of the argument also must be included.

The motion must specify the grounds and the relief sought. Parties may seek more than one form of relief in a single motion if the matters are related. For example, a single motion may be filed where, in addition to seeking dismissal, a party requests in the alternative summary affirmance. If a party seeks more than one form of relief in a single motion, the descriptive title on the front page of the motion must clearly set forth the matters presented in the pleading. If the matters are unrelated, parties should file separate motions. Requests for permission to file an untimely or overlong motion should not be included in the substantive motion but should be filed as a separate motion.

All motions must be signed by a party or by a member of the bar of the Court, with proof of service on all other parties to the proceeding before the Court. Except as prescribed by Federal Rule of Appellate Procedure 28(j), parties, other than pro se litigants proceeding *in forma pauperis*, may not plead by letter. *See* D.C. Cir. Rule 32(f). Generally, for motions, responses, and replies, filing is complete on *receipt* of the pleading in the Clerk's Office, *not* on mailing. A document filed electronically is deemed filed on the date and at the time stated on the Notice of Docket Activity from the Court. For incarcerated litigants, filing is complete upon deposit in the institution's internal mailing system in accordance with the federal rules. *See* Fed. R. App. P. 25(a)(2)(A)(iii).

Any response must be filed within 10 days after service of the motion. It may not exceed 5,200 words if produced using a computer and 20 pages if handwritten or typewritten. Any reply to the response must be filed within 7 days after service of the response and may not exceed 2,600 words if produced using a computer and 10 pages if handwritten or typewritten. The response may contain a motion for other relief. If so, the caption must clearly denote that the response includes the separate motion, and the document may not exceed 7,800 words if produced using a computer and 30 pages if handwritten or typewritten. When the response includes a motion for affirmative relief, the reply may be joined in the same pleading with a response to the motion for affirmative relief, and counsel has 10 days to file it. Such reply may not exceed 5,200 words if produced using a computer and 20 pages if handwritten or typewritten. The final reply on a combined filing is limited to 2,600 words if produced using a computer and 10 pages if handwritten or typewritten. Replies must not reargue positions presented in an opening paper and may not present any matters that are not strictly in reply to the response. After the filing of a reply, no further pleadings on a motion or petition are permitted, except by leave of the Court. The above filing times are extended by 3 days if service was effected on the responding party by a method of service authorized by Federal Rule of Appellate Procedure 25 other than personal or electronic service. *See* Fed. R. App. P. 26(c).

When a substantive motion is filed along with a motion for leave to file out of time or to exceed the length limitations, no response is required on the substantive motion until a decision is rendered on the motion to file out of time or to exceed the length limitations.

Circuit Rule 27(h) establishes the requirements for seeking extensions of time to file motions, responses, and replies, and for seeking leave to exceed the length limits. Such motions must be filed 5 days before the pleading is due. A motion to extend time for filing a motion, response, or reply must indicate in the first

paragraph when the motion, response, or reply is currently due. On a showing of good cause, the Clerk may grant a late-filed motion for extension of time if it is unopposed. Otherwise, motions for extension of time to file a pleading or to exceed the length limits, which are filed less than 5 days before the pleading is due, will be denied as untimely, absent extraordinary circumstances.

Counsel should bear in mind that the federal rules set length limits on motions, responses, and replies. *See* Fed. R. App. P. 27(d)(2). The Circuit Rules explicitly state that requests to exceed those limits are disfavored and will be granted "only for extraordinarily compelling reasons." D.C. Cir. Rule 27(h)(3).

Circuit Rule 27(h)(2) establishes requirements for consulting the opposing side to obtain consent to motions for extension of time and motions to exceed the length limit, and to inquire whether an opposition or other form of response will be filed. The opening paragraph of any such motion must recite the position taken by the opposing party, or the efforts made to obtain a response. Where the other side has indicated an intention to file an opposition or other form of response, or has not been reached after reasonable effort, the moving party must serve the motion by personal service if the opposing party is not an ECF filer or if the motion is not filed electronically. If personal service is not feasible, the moving party must give telephone notice of the filing and serve the motion by another form of expedited service authorized by Federal Rule of Appellate Procedure 25. Where the moving party is unable to effect personal service or telephone notice at the time of the filing, the opening paragraph of the motion must recite the efforts made to do so.

Finally, Circuit Rule 27(h)(4) provides for an automatic extension of the original deadline for filing motions or petitions, or to exceed length limits for such pleadings, if the motion is filed in accordance with the requirements of subparagraphs (1) and (2) of Circuit Rule 27(h) and the Court does not act on the motion by the end of the second business day before the filing deadline. If the Court thereafter denies the motion, the filing deadline will be extended automatically for 7 days. If the Court denies the motion to extend the length, it ordinarily will allow time to file a conforming document. *This automatic extension provision applies **only** to motions deadlines; there are no comparable provisions in the Circuit Rules for automatic extension of the deadline for filing briefs*. Motions to extend time or length limits for filing briefs are separately addressed in Circuit Rule 28(e).

B. PROCESSING

When counsel files a motion, it is handled in one of three ways, depending on the nature of the relief sought: by the Clerk, by a panel designated to decide motions, or by the merits panel in the case.

Motions are generally considered ripe for decision once a reply has been filed or the time allowed for a reply has expired. An exception is made for emergency motions, discussed below, and for procedural motions that reflect the consent of all parties. Motions filed in cases assigned to merits panels are delivered immediately to the judges. It is in the merits panel's discretion whether to await a response.

C. DISPOSITION BY THE CLERK

(*See* Fed. R. App. P. 27(b); D.C. Cir. Rule 27(e).)

The Circuit Rules authorize the Clerk to dispose of procedural motions of a routine character, in accordance with the Court's instructions.

Any party adversely affected by the action of the Clerk on a motion may move for reconsideration within 10 days of entry of the Clerk's order. The motion for reconsideration will be submitted to a special panel or to the merits panel, if a merits panel has been assigned.

Motions disposed of by the Clerk can be identified by the form of the order. Orders are signed by the Clerk "For the Court." Clerk's orders never carry the phrase "Per Curiam" above the signature block.

D. DISPOSITION BY A PANEL

The Clerk's Office refers dispositive and procedural motions to the Legal Division. Each motion (or all motions in a single case) is assigned to one of the staff attorneys, who reviews the motion, response, and reply, and any other papers filed; examines the record; and then prepares a confidential memorandum setting forth the issues, the facts, an analysis of the law, and a recommended disposition. The staff attorney also drafts a proposed order and, where appropriate, an accompanying memorandum disposing of the motion. Except for emergency matters and other matters requiring expedition or motions to hold a case in abeyance, matters are generally assigned chronologically by filing date, and staff attorneys work on them in that order.

Once the staff attorney has completed work on the motion, his or her recommendation, proposed disposition, and the underlying pleadings are routed either to the special panel or to the merits panel for resolution.

The special panel consists of judges who are assigned on a rotational basis throughout the year to consider and decide motions, cases recommended for disposition without oral argument under Circuit Rule 34(j), and emergency matters, presented by the Legal Division. *See infra* Part VIII and Part XI.C.2. The special panel members also are engaged in their regular merits sittings while they serve on the special panel.

The Legal Division circulates to the panel an agenda, the necessary papers, and recommendations of the staff attorneys regarding the motions that will be presented. The panel may adopt or reject the staff attorney's recommendation, request more research, take the matter under advisement, or refer the motion for disposition to the panel ultimately assigned to hear the case on the merits.

The Court does not publish or disclose in advance the names of the judges on the special panel, nor does it notify counsel or the public of the date on which a particular motion will be considered. The panel does not hear oral argument on motions, except, very rarely, in emergency matters or for extraordinary cause.

Orders of the special panel disposing of motions are usually not published, although in some cases the panel may decide that a published *per curiam* opinion will be useful to establish the law of the Circuit on a particular issue. The unpublished orders reflect the names of the panel members beneath the case caption. The order, or a separate memorandum accompanying the order, will explain the basis for the Court's disposition of the motion.

If a party disagrees with the special panel's disposition of a motion, it may move for reconsideration by the same panel or by the full Court. The Court rarely grants these motions.

E. DISPOSITION BY A MERITS PANEL

Once a case is assigned to a merits panel, everything relating to the case comes under the exclusive control of the panel. All motions filed in the case are submitted to the panel.

When a motion is filed, it is transmitted to the panel via an electronic vote sheet, which contains links to the motions papers, any supporting material, and any memorandum prepared by the Legal Division recommending a disposition. The panel members record electronically the disposition they wish to make of the motion. Once all votes are entered, an order is prepared disposing of the motion. The order usually shows the names of the panel members.

F. DISTRIBUTION OF ORDERS

The Clerk's Office files and distributes all orders. When an order or judgment is entered in a case assigned to the CM/ECF system, the Clerk's Office electronically transmits a Notice of Docket Activity to all parties who have consented to electronic service, and mails notice and a copy of any opinion or judgment to parties who are not ECF filers. *See* D.C. Cir. Rules 36(b), 45(d). The Clerk's Office maintains a record of all persons to whom copies of an order are sent.

VIII. SPECIFIC MOTIONS

A. MOTIONS FOR STAY OR EMERGENCY RELIEF

(*See* Fed. R. App. P. 8, 18; D.C. Cir. Rules 8, 18, 27(f).)

Filing a notice of appeal, or obtaining permission to appeal, generally does not automatically stay the operation of the judgment or order under review. Except in cases involving money judgments against the United States or the District of Columbia, or where the appellant posts a bond or other security in accordance with Federal Rule of Civil Procedure 62(d), the losing party must move to obtain a stay or injunction pending appeal to prevent immediate execution of the judgment or order being appealed, or immediate enforcement of an agency order under review. Such motions are procedural motions; they can be filed as soon as possible, but usually no later than 30 days after docketing.

Application for a stay or any other appropriate emergency relief must first be made to the district court or agency whose order is being appealed, or the motion filed in this Court must explain why such relief was not sought. If the district court or agency denies the relief requested, an application may then be made to this Court. A motion for a stay must describe any prior applications for relief and their outcome.

If the facts are in dispute, evidentiary material supporting the request for a stay should be furnished. Relevant portions of the record must be included with the motion. At a minimum, these include a copy of the judgment or order involved, and any explanation, written or oral, that accompanied the ruling. The motion also should contain, in a prominent place, a specific statement of the time exigencies involved.

Because many motions for stay are filed on an emergency basis, Circuit Rules 8, 18, and 27(f), which prescribe the procedures for seeking emergency relief, should be reviewed carefully. In particular, counsel or a party must identify the motion as an "Emergency Motion," and file it at least 7 days before the date on which court action is necessary, or explain why the motion could not have been filed sooner. Where counsel or a party gives only a vague or general explanation as to why it was not filed at least 7 days before the date of the requested court action, the Court may conclude that expedited consideration of the motion is unwarranted.

Counsel or a party seeking expedition of a stay application or any other matter must communicate the request for emergency consideration in person or by telephone to the Clerk's Office and to the opposing side. If the motion is not filed electronically or if the opposing party has not consented to electronic service, the motion must be served by hand or, in the case of out-of-town parties, by another form of expedited

service authorized by Federal Rule of Appellate Procedure 25. The motion must describe the efforts made to notify the opposing side.

When an emergency motion is filed in a case not yet assigned for hearing on the merits, it is referred to the Director of the Legal Division for assignment to a staff attorney and immediate referral to the special panel for disposition. The special panel does not normally grant the relief requested before receiving a response. However, it may enter an administrative stay of very short duration before receiving a response to give the Court more time to consider the matter. The administrative stay order will usually direct that responses to the motion be expedited. Alternatively, the special panel may order expedited responses without issuing a temporary stay. The judges might conclude that the matter does not require unusual expedition and take no action prior to the filing of a response, or they may deny the motion without awaiting a response.

The motion for stay or for emergency relief must specifically discuss four factors: (1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of substantial harm to other parties if relief is granted; and (4) the public interest. *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958). In seeking a stay or injunction pending appeal, counsel also should address the question whether the appeal should be expedited if a stay or injunction is granted.

A party filing or opposing a motion for stay or other emergency relief may, in addition or in the alternative, file a motion to dispose of the appeal or petition for review in its entirety. If the Court grants a motion for stay or for injunction pending appeal, it may, pursuant to Federal Rules of Appellate Procedure 8(a)(2)(E) and 18(b), condition the stay or injunction on the posting of a bond or other security in the appropriate court. No such bond is required where the federal government or the District of Columbia is the appellant. *See* Fed. R. Civ. P. 62(e); D.C. Superior Court Rule 62.

B. MOTIONS TO EXPEDITE CONSIDERATION OF THE APPEAL

(*See* 28 U.S.C. § 1657; D.C. Cir. Rules 27(f), 47.2.)

The Court accords expedited consideration to a case when required to do so by statute, or when the Court grants a motion for expedition.

Circuit Rule 47.2(a) lists many of those statutory provisions that mandate expedited appellate review: 18 U.S.C. §§ 3145, 3731; 28 U.S.C. chapter 153; and 28 U.S.C. § 1826. *See supra* Part III.J. Whenever a party takes an appeal pursuant to one of these provisions, counsel must advise the Clerk's Office of this Court immediately both orally and by letter. The district court Clerk will transmit the notice of appeal and certified docket entries forthwith to this Court, so that the appeal can be docketed and an expedited briefing and argument schedule set. Counsel must advise the Clerk of this Court in writing of counsel's arrangements to order any necessary portions of the transcript on an expedited basis, and make arrangements with the district court Clerk to send the record promptly to this Court.

When expedition is not required by statute, counsel seeking expedited review must file a motion. Like other procedural motions, motions to expedite must be filed within 30 days of the date the case is docketed. The Court grants expedited consideration very rarely. The movant must demonstrate that the delay will cause irreparable injury and that the decision under review is subject to substantial challenge. The Court also may expedite cases in which the public generally, or in which persons not before the Court, have an unusual interest in prompt disposition. The reasons must be strongly compelling.

When the Court disposes of a motion for stay or injunction pending appeal, it may at the same time expedite the case to minimize possible harm to the parties or the public. In moving for a stay or injunction pending appeal, counsel should address the appropriateness of expediting the appeal if a stay is entered.

An order granting expedition does not automatically shorten the briefing schedule. When time is a critical consideration, counsel may wish to propose a specific date for the hearing and to move for an abbreviated briefing schedule.

When counsel files a motion to expedite consideration of an appeal, the Clerk's Office refers it to the Legal Division. Staff attorneys give priority to such motions.

Parties might be able to have their appeal calendared earlier than normal by agreeing to place their case in the Court's stand-by pool of cases for oral argument. The requirements to enter the stand-by pool are discussed *infra* in Part X.E.4.

C. MOTIONS FOR RELEASE PENDING APPEAL

(*See* 18 U.S.C. § 3143; Fed. R. App. P. 9(b); D.C. Cir. Rule 9(b).)

A defendant who has filed a notice of appeal from a criminal conviction may apply for release while the appeal is pending. The defendant must apply first to the district court for release. If the district court denies the application, or imposes conditions of release, the defendant may then move this Court for release or for modification of the conditions. A new notice of appeal is not necessary. Circuit Rule 9 sets forth the required contents of this motion. Without leave of court the motion may not exceed 5,200 words if produced using a computer and 20 pages if handwritten or typewritten, it must be prepared in conformity with Federal Rule of Appellate Procedure 27(d)(1) and (2), and it must be served on opposing counsel. Staff attorneys give priority to motions for release pending appeal and send them to the special panel for disposition as soon as a recommendation is prepared.

The criteria for release are specified by statute and rule. *See* Fed. R. App. P. 9. The burden is on the defendant to show that he or she will not flee or pose a danger to others if released, *and* that the appeal is not for purposes of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

If this Court denies the motion for release, the defendant may seek Supreme Court review by submitting an application for release on conditions to the Circuit Justice for the District of Columbia Circuit, who is the Chief Justice of the United States. Counsel must file the application with the Clerk of the Supreme Court and serve the opposing party pursuant to Rule 29 of the Rules of the Supreme Court. Such motions are rarely granted.

D. MOTIONS FOR VOLUNTARY DISMISSAL

(*See* Fed. R. App. P. 42.)

An appeal from the district court not yet docketed in this Court may be dismissed by the district court. Once an appeal has been docketed, however, it can be dismissed only by this Court.

In a civil appeal or agency proceeding, the parties may stipulate that the case should be dismissed, or the appellant or the petitioner may file a motion, with service on the opposing party, requesting dismissal and indicating whether the other parties agree. Before joining in a request for dismissal, the parties also should attempt to reach an agreement as to who will pay costs, if any. A motion for dismissal or stipulation of

dismissal predicated on mootness may not be acted on by the Clerk. *See Northern California Power Agency v. Nuclear Regulatory Comm'n*, 393 F.3d 223 (D.C. Cir. 2004). And conditional motions for dismissal or stipulations of dismissal, such as those requesting that the dismissal be without prejudice, will usually be denied by the Clerk.

In a criminal case, counsel *must* submit a motion to the Court requesting dismissal, with service on opposing counsel. The motion must be accompanied by an affidavit from the appellant, stating that the appellant has been fully informed of the circumstances of the case and of the consequences of a dismissal, and wishes to dismiss the appeal. The affidavit also must recite the appellant's satisfaction with the services of counsel.

E. MOTIONS FOR REMAND

(*See* Fed. R. App. P. 12.1; D.C. Cir. Rule 41(b).)

Parties may file a motion to remand either the case or the record for a number of reasons, including to have the district court or agency reconsider a matter, to adduce additional evidence, to clarify a ruling, or to obtain a statement of reasons. The Court also may remand a case or the record on its own motion.

If the *case* is remanded, this Court does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted upon remand. *See* D.C. Cir. Rule 41(b). In general, a remand of the case occurs where district court or agency reconsideration is necessary. *See, e.g.*, *Raton Gas Transmission Co. v. FERC*, 852 F.2d 612 (D.C. Cir. 1988); *Siegel v. Mazda Motor Co.*, 835 F.2d 1475 (D.C. Cir. 1987). By contrast, if only the *record* is remanded, such as where additional fact-finding is necessary, this Court retains jurisdiction over the case. *See* D.C. Cir. Rule 41(b).

It is important to note that where an appellant, either in a criminal or a civil case, seeks a new trial on the ground of newly discovered evidence while his or her appeal is pending, or where other relief is sought in the district court, the appellant must file the motion seeking the requested relief in the district court. *See Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952); Fed. R. Crim. P. 33; Fed. R. Civ. P. 60. If that court indicates that it will grant the motion, the appellant should move this Court to remand the case to enable the district court to act. *See* Fed. R. App. P. 12.1; *Smith v. Pollin*, 194 F.2d at 350.

F. MOTIONS TO TRANSFER

Motions to transfer are dispositive motions that, pursuant to the initial scheduling order, must be filed within 45 days of the date the case is docketed.

In the context of administrative agency cases, a motion to transfer may be predicated on the Court's power under 28 U.S.C. § 2112(a) to transfer a case to any other court "[f]or the convenience of the parties in the interest of justice." In addition, where this Court concludes that it lacks jurisdiction over an appeal or a petition for review, the Court may, instead of dismissing the case outright, order it transferred to a court where jurisdiction exists. *See* 28 U.S.C. § 1631.

G. MOTIONS FOR SUMMARY DISPOSITION

Motions for summary affirmance or summary reversal must be filed within 45 days of the date the case is docketed. Parties are encouraged to file such motions where a sound basis exists for summary disposition.

Motions for summary disposition may be granted in whole or in part. Summary affirmance is appropriate where the merits are so clear as to justify summary action. *See Cascade Broadcasting Group, Ltd. v. FCC,* 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam); *Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Summary reversal is rarely granted and is appropriate only where the merits are "so clear, plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's] decision." *Sills v. Federal Bureau of Prisons,* 761 F.2d 792, 793-94 (D.C. Cir. 1985). Parties should avoid requesting summary disposition of issues of first impression for the Court.

H. MOTIONS TO UNSEAL

(*See* D.C. Cir. Rule 47.1.)

Parties or other interested persons may move at any time to unseal any portion of the record in this Court, including confidential briefs or appendices filed under Circuit Rule 47.1. *See* D.C. Cir. Rule 47.1(c). If the case arises from the district court, the motion will ordinarily be referred to that court, and, if necessary, the record will be remanded for that purpose. This Court may, when the interests of justice require, decide such a motion itself. If unsealing is ordered by this Court, the record may be remanded to the district court for unsealing. Unless otherwise ordered, the filing of a motion to unseal any portion of the record does not delay the filing of any brief under any scheduling order.

IX. BRIEFS AND APPENDIX

A. BRIEFS

(*See* Fed. R. App. P. 28-32.1; D.C. Cir. Rules 25, 28-32.1)

A well-written brief is of prime importance to success on appeal. Three precepts should guide counsel in drafting briefs:

- Be clear.
- Cite the record and legal authorities fully, fairly, and accurately and, in particular, cite to controlling D.C. Circuit law.
- Be concise.

1. *Timing*

Normally, the Clerk's Office establishes a briefing schedule after the case has been screened and classified by the Legal Division, and after any pending motions in the case have been resolved. In cases designated as "Regular Merits" cases, the date for oral argument is announced by a separate order after the briefing order has issued. Typically, the final brief will be due at least 45 days before the argument date.

If arguing counsel knows he or she will be unavailable to appear for oral argument on a date in the future, the Clerk's Office should be so advised by letter, filed electronically. The notification should be filed as soon as possible after the briefing schedule is entered and updated if a potential scheduling conflict later arises or if there is any change in availability. To the extent possible, the Clerk's Office will endeavor to schedule oral argument to avoid conflicts that have been brought to the Court's attention in advance.

In general, the appellee's or respondent's brief is due 30 days after that of the appellant or petitioner. A reply brief is due 21 days later. To avoid repetition of factual statements or legal arguments made in the principal briefs, the Clerk's Office will stagger the briefing so that intervenors and *amici curiae* file their briefs 7 days after the brief of the party they support. A briefing schedule also will contain additional time where the parties utilize a deferred appendix, as provided in Federal Rule of Appellate Procedure 30(c). *See infra* Part IX.B.3.

Once a case has been calendared, the Court strongly disfavors motions to extend the briefing schedule. Such motions will be granted only for extraordinarily compelling reasons. In those extraordinary situations where counsel must seek such an extension, Circuit Rule 28(e)(2) requires the motion to be filed at least calendar 7 days before the brief is due. Circuit Rule 28(e)(3) requires that, before filing the motion, counsel attempt to obtain the consent of other counsel, and recite in the motion the result of such an attempt. Circuit Rule 28(e)(3) also specifies the requirements for service of motions to extend time or to exceed length limits. On a showing of good cause, the Clerk may grant a late-filed motion to extend time if it is unopposed and will not affect the oral argument schedule. Otherwise, motions for extension of time to file a brief that are filed less than 7 days before the brief is due will be denied as untimely, absent extraordinary circumstances. Counsel should be aware that, while the Court will attempt to rule on the motion prior to the date on which the brief is due, submission of a motion to extend time or exceed length limits does not toll the time for compliance with the filing requirements for briefs. Under Circuit Rule 28(e)(4), movants are required to meet all filing requirements absent an express order from the Court granting a waiver.

With respect to cases that have been calendared for oral argument, the Court has instructed the Clerk to deny motions for extensions of time to file briefs (except for very modest extensions of 1 or 2 days) where no explanation for the request is provided or where the need for the extension is attributed to: (1) production difficulties such as malfunctioning equipment, delivery problems, or the lack of secretarial help; or (2) the press of other business. The Clerk may, upon an appropriate showing, grant extensions of up to 7 days.

Untimely or unwarranted motions for extensions of time may result in the imposition of sanctions. If sanctions are appropriate, the Court will consider issuing an order to show cause that requires further explanation from counsel; imposing a fine payable to the Court; assessing attorneys' fees; or referring counsel to the Court's disciplinary committee. The failure by appellant or petitioner to file a timely brief may result in dismissal of the case.

If the appellant or petitioner fails to file the opening brief within the time allowed by the Court, the appellee or respondent may move to dismiss the case, or the Court may dismiss it on the Court's own motion. If the appellee or respondent fails to file a timely answering brief, the Court may order the case submitted on the appellant's or petitioner's brief alone. Circuit Rule 34(f) forecloses oral argument by any party who fails to file a brief, except by permission of the Court.

2. ***Consolidated and Joint Appeals***
(*See* Fed. R. App. P. 3(b), 28, 32; D.C. Cir. Rules 28, 32.)

Parties with common interests in consolidated or joint appeals must join in a single brief where feasible. The Court has admonished counsel that it looks with extreme disfavor on the filing of duplicative briefs in consolidated cases. To avoid repetitious arguments, a party may adopt or incorporate by reference all or any part of the brief of another.

It is important in consolidated cases that the parties caption their briefs correctly and uniformly. Each brief cover must bear the lead docket number and corresponding case name and reflect the particular docket number and case name pertaining to that party.

3. ***Cross-Appeals***
(*See* Fed. R. App. P. 28.1; D.C. Cir. Rule 28.1.)

In cross-appeals, the first party to appeal is deemed the appellant; if cross-notices are filed on the same day, the plaintiff is deemed the appellant. These designations may be modified by the Court, or by agreement of the parties if the parties notify the Clerk's Office at the time the docketing statements are filed in civil cases, or at the time the final transcript status report is filed in criminal cases. The brief of the appellee serves both as the response brief to appellant's appeal and as the main brief on appellee's appeal. For length limitation purposes, both appellant's opening and response/reply briefs are treated as principal briefs. They are limited to 30 pages each unless the briefs comply with the type-volume limitation of 13,000 words or use a monospaced face and contain no more than 1,300 lines of text. *See* Fed. R. App. P. 28.1(e). The appellee's opening brief is limited to 35 pages unless it complies with the type-volume limitation of 15,300 words or uses a monospaced face and contains no more than 1,500 lines of text. *See id.* The appellee may file a second brief, but only in reply to the appellant's answer on the appellee's cross-appeal. That brief is limited to half the type-volume of appellant's principal brief or 15 pages. *See* Fed. R. App. P. 28.1(e)(2)(C); *see also* Part IX.A. 6, 7. Further briefing requires permission of the Court. *See* Fed. R. App. P. 28.1(c)(5). The cover of appellant's opening brief must be blue; appellee's opening brief, red; appellant's second brief, yellow; and appellee's reply brief, gray. *See* Fed. R. App. P. 28.1(d).

4. ***Amici Curiae and Intervenors***
(*See* Fed. R. App. P. 29; D.C. Cir. Rules 28(d), 29, 32, 35(f).)

A brief of an *amicus curiae* may be filed only by consent of all the parties or by leave of the Court, unless the *amicus* is the United States or an officer or agency thereof, a state, a territory, a commonwealth, or the District of Columbia, or has been appointed by the Court. A motion for leave to file an *amicus* brief must set forth the movant's interest, the reason why briefing is desirable, and why the matters asserted are relevant. Motions for leave to participate as *amicus curiae*, or written representation of the consent of all parties to such participation, must be accompanied by any disclosure statement required by Circuit Rule 26.1. Parties seeking leave to participate as *amicus curiae* after the merits panel has been assigned or at the rehearing stage should be aware that the Court will not accept an *amicus* brief where it would result in the recusal of a member of the panel or recusal of a member of the *en banc* Court.

The Court encourages those who wish to participate as *amici*, including governmental entities, to notify the Court as soon as practicable after a case is docketed in this Court, by filing a notice of intent to participate, a representation of consent, or a motion for leave of court when necessary. Prompt notification will enable the Court to accommodate *amici* briefs in setting the briefing format and schedule in each case, and assist the Court in the early identification of potential recusals caused by the participation of *amici*. An *amicus* brief will be due as set by the briefing order in each case; in the absence of provision for such a brief in the order, the brief must be filed in accordance with the time limitations of FRAP 29(a)(6).

FRAP 29(a)(4)(E) requires an *amicus* (other than the United States or its officer or agency, or a state) to disclose whether a party's counsel authored the *amicus* brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief, and to identify every person (other than the *amicus*, its members, and its counsel) who contributed money that was intended to fund the brief's preparation or submission.

The brief of an *amicus curiae* not appointed by the Court may not exceed one-half the maximum length authorized by the Federal Rules of Appellate Procedure for a party's main brief. *See* Fed. R. App. P. 29(a)(5). The brief of an *amicus* appointed by the Court is usually subject to the length limitations set forth in Federal Rule of Appellate Procedure 32(a)(7).

This Court's rules define an "intervenor" as an interested person who has sought and obtained this Court's leave to participate in an already instituted proceeding. *See* D.C. Cir. Rule 28(d). The principal brief of an intervenor is limited to 19 pages unless the brief complies with the type-volume limitation of 9,100 words or uses a monospaced face and contains no more than 813 lines of text. *See* D.C. Cir. Rule 32(e)(2).

The briefs are due approximately 7 days after the brief of the party that the intervenor or *amicus* supports, and the briefs may not repeat facts or legal arguments made and adequately elaborated upon in the parties' briefs. Circuit Rule 28(d)(4) requires consolidated briefing by intervenors on the same side, to the extent practicable. Similarly, Circuit Rule 29(d) requires *amici curiae* on the same side to join in a single brief, to the extent practicable. Where an intervenor or *amicus* files a separate brief, counsel must certify in the brief why a separate brief is necessary. Grounds that are *not* acceptable as reasons for filing a separate brief include representations that the issues presented require greater length than allowed under the rules, that counsel cannot coordinate filing a single brief because of geographical dispersion, or that separate presentations were permitted in the proceedings below. When a governmental entity is an *amicus curiae* or an intervenor, it is not required to file a joint brief with other *amici* or intervenors. For this purpose, a governmental entity includes the United States or an officer or agency thereof, a state, a territory, a commonwealth, and the District of Columbia.

An intervenor supporting an appellant or petitioner may file a reply brief when the appellant's or petitioner's reply brief is due, but an *amicus*, other than one appointed by the Court, may not file a reply brief unless otherwise directed by the Court. An intervenor's reply brief is limited to half the type-volume of the intervenor's opening brief or 9 pages.

5. ***Number of Copies***
(*See* Fed. R. App. P. 31(b); D.C. Cir. Rule 31.)

Except when an unrepresented party is proceeding *in forma pauperis*, the original and 8 copies of each brief must be filed and 2 copies served on each party separately represented. Parties who are not represented by counsel and are proceeding *in forma pauperis* need file only the original brief, and the Clerk's Office will duplicate the necessary copies. If a deferred appendix is used (*see infra* Part IX.B.3), the parties are required to file only one copy of the initial briefs. ECF filers should submit the initial brief in electronic format only, unless the Court requests paper copies.

6. ***Format***
(*See* Fed. R. App. P. 32(a); D.C. Cir. Rules 28(a), 32.)

Briefs may use either a proportionally spaced or a monospaced face and must be set in a plain, roman style, although italics and boldface may be used for emphasis. Case names must be italicized or underlined. If a brief uses a proportionally spaced face, the typeface must be at least 14-point and must include serifs, but sans-serif type may be used in headings and captions. If a brief uses a monospaced face, it may have no more than 10 ½ characters per inch. *See* Fed. R. App. P. 32(a)(5), (6). Briefs must be double-spaced and printed on one side of the page only. Evasion of the length limitations may result in the Court's rejection of the brief.

Briefs other than those submitted by unrepresented parties proceeding *in forma pauperis* must have colored covers as follows: appellant - blue; appellee - red; intervenor or *amicus curiae* - green; appellant's reply - gray; supplemental brief - tan. In cases designated "Complex," the cover of the briefs and the first page of motions and other pleadings should indicate the designation "Complex." In cases being considered for disposition without oral argument under Circuit Rule 34(j), the cover of the briefs and the first page of motions and other pleadings should indicate "Case being considered for treatment pursuant to Rule 34(j)."

The front cover of the brief must set forth the following: (1) the name of this Court; (2) the docket number of the appeal and the caption of the case, including the docket number and caption of the lead case in a consolidated appeal; (3) the nature of the proceeding and the name of the court or agency below (*e.g.*, Appeal from the United States District Court for the District of Columbia; Petition for Review of an Order of the Federal Communications Commission); (4) the title of the document (*e.g.*, Brief for Appellant); (5) the names, postal addresses, and telephone numbers of an unrepresented party or counsel representing the party filing the brief, and e-mail addresses for ECF filers; and (6) the date on which the case has been scheduled for oral argument. One of the attorneys designated on the cover must be a member of the bar of the Court, except as otherwise provided by law.

The Federal Rules of Appellate Procedure require that briefs and appendices be bound in a manner that permits the document to lie reasonably flat when open. The following types of binding ensure that the brief will lie flat when open: spiral (also known as coil), comb, and wire binding. The following types of binding do *not* permit a brief to lie flat when open: velo (also known as strip) binding, metal fasteners or posts, and staples. Accordingly, the use of such methods is not acceptable for a brief, nor is the use of a three-ring binder.

If a brief does not conform to the Federal Rules of Appellate Procedure or to the Circuit Rules, the party will be notified and directed either to file a conforming brief (if the problems are numerous) or an errata to the brief (if the problems are minor). If the brief exceeds the page, line, or word limitations, the party will be directed to submit either a corrected brief or a motion for leave to exceed the limits on length.

7. *Length*
(*See* Fed. R. App. P. 32(a); D.C. Cir. Rules 28(c), 28(e), 32.)

Briefs may not exceed the word, line, or page limitations set forth in the Federal and Circuit Rules absent the Court's permission. A principal brief is limited to 30 pages unless the brief complies with the type-volume limitation of 13,000 words or uses a monospaced face and contains no more than 1,300 lines of text. *See* Fed. R. App. P. 32(a)(7). A reply brief is limited to half the type-volume of the principal brief or 15 pages. The length limitations for briefs in cross-appeals are set out in Federal Rule of Appellate Procedure 28.1. *See* Part IX.A.3. These limits do not include the table of contents; table of citations; statement with respect to oral argument; certificate of parties, rulings, and related cases; the glossary; any addendum containing statutory material, regulations, or evidence supporting the claim of standing; and certificates of service and compliance with type-volume limitations. *The summary of argument, footnotes, and citations are included for purposes of computing the word or page limits.*

Parties submitting briefs under the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) must include in the brief a certificate, signed by counsel of record or, in the case of parties filing briefs pro se, by the party, stating the number of words in the brief or the number of lines of monospaced text. The person preparing this certificate may rely on word or line counts reported by word processing systems provided the word processing system counts words in footnotes and citations. Parties using word

processing systems that do not count words may use the page limitations of 30 pages for principal briefs and 15 pages for reply briefs.

Parties wishing to submit a brief that exceeds the length limitations must, not less than 7 days before the brief is due, file a motion requesting permission to exceed the length limitations. Such motions are granted only for extraordinarily compelling reasons, and motions filed less than 7 days before the brief is due will be denied as untimely, absent exceptional circumstances. *See* D.C. Cir. Rule 28(e).

8. ***Contents***
(*See* Fed. R. App. P. 28, 32.1; D.C. Cir. Rules 28, 32.1.)

Briefs must contain the following in the order indicated. Note, however, that intervenors and *amici* might not be required to include each of the specified items in their briefs.

(a) A "Certificate as to Parties, Rulings, and Related Cases" immediately inside the cover of the brief and preceding the table of contents. Three items must be included in this certificate:

i. The certificate must identify by name all parties, intervenors, and *amici* who appeared before the district court and all parties, intervenors, or *amici* in this Court. The appellee or the respondent may omit from the certificate those listed by the appellant or the petitioner but must identify the briefs in which the lists are set forth. The certificate also must include the name of any parent company and any publicly-held company that has a 10% or greater ownership interest in the certifying party. Circuit Rule 26.1 specifies precisely what must be included as to corporate entities, and counsel should consult that provision for greater detail.

ii. The certificate must identify the rulings under review, including the date, the name of the district court judge, the place in the appendix where the ruling is reproduced, and any official citation to the ruling, the Federal Register or other citation when the ruling is an agency decision, or a statement that no such citation exists. In briefs filed after the opening brief, the certificate may incorporate by reference the opening brief's certificate of rulings under review, but must so indicate.

iii. The certificate must indicate whether the case was previously before this or any other court, and, if so, identify it by court number and caption. The certificate also must identify "related cases," as defined in Circuit Rule 28(a)(1)(C), or state that there are none.

(b) A table of contents, with page references.

(c) A table of cases, statutes, and other authorities cited, arranged alphabetically and referring to the pages of the brief where they are cited. The table may include asterisks in the left margin to denote those authorities upon which the brief chiefly relies. All sources listed in the table of authorities must refer to the specific pages of the brief on which a source is cited; *passim* or the use of similar terms is prohibited.

(d) A glossary defining abbreviations and acronyms, other than those that are part of common usage. *See* D.C. Cir. Rule 28(a)(3). In briefs the use of acronyms other than those that are widely known should be avoided.

(e) A statement indicating the basis for this Court's jurisdiction and the basis for the district court's or agency's subject matter jurisdiction, with statutory citations and, if necessary, relevant case citations. *See*

Fed. R. App. P. 28(a)(4); D.C. Cir. Rule 28(a)(4). Only appellant's or petitioner's brief must contain this statement; any party, intervenor, or *amicus* may include a counter statement regarding jurisdiction. If the basis of the district court's or agency's subject matter jurisdiction or this Court's jurisdiction is in dispute, the parties should so state and should reference the pages in the brief that address this issue. In cases involving direct review of administrative actions, the petitioner or appellant must also recite in a separate section the basis on which it claims standing. *See* D.C. Cir. Rule 28(a)(7); *Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002).

(f) A section containing pertinent statutes and regulations. *See* D.C. Cir. Rule 28(a)(5). If these are extensive, they may be included as an addendum, which must be bound separately from the brief if the addendum exceeds 40 pages. If the statutes and regulations are contained in another party's brief, they may be incorporated by reference.

(g) A statement of the issues presented for review, which appellee or respondent may omit if satisfied with appellant's or petitioner's statement.

(h) A statement of the case setting out the facts relevant to the issues presented for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record. *See* Fed. R. App. P. 28(a)(6). Appellee or respondent may omit or shorten the statement of the case if satisfied with that of the appellant or petitioner.

(i) A summary of argument that contains a succinct, clear statement of the arguments made in the body of the brief. The summary must not merely repeat the argument headings.

(j) The argument, which contains the contentions of the parties on the issues presented, with citations to authorities, statutes, and portions of the record upon which the parties rely, and the standard of review for each issue. The appellee or respondent may omit this statement if satisfied with that of the appellant or petitioner.

(k) A succinct conclusion setting forth the precise relief sought.

(l) A certificate of compliance if required by Federal Rule of Appellate Procedure 32(g).

Citation requirements for briefs are set out in Federal Rule of Appellate Procedure 32.1 and Circuit Rule 32.1. Counsel must cite D.C. Circuit decisions to the Federal Reporter and state court decisions to the National Reporter System. Parallel citations to the U.S. App. D.C. for D.C. Circuit decisions are not required. All federal statutes, including those applicable to the District of Columbia, must be cited by the current official code or its supplement, or, if there is no current official code, to the current unofficial code or its supplement. Citation to the official session laws is not required unless there is no code citation. When citing to the record, authorities, or any other material, citations must refer to specific pages of the source; *passim* or similar terms may not be used.

Unpublished orders, judgments, sealed dispositions, or explanatory memoranda entered by this Court before January 1, 2002, may not be cited as precedent. An unpublished disposition may, however, be cited for its *res judicata*, law of the case, or preclusive effect.

Unpublished dispositions of the D.C. Circuit entered on or after January 1, 2002, may be cited as precedent. Unpublished dispositions include any order, judgment, explanatory memorandum, or other disposition, including interlocutory rulings and summary orders (but not sealed dispositions). (As before,

an unpublished disposition of this Court may always be cited for its *res judicata*, law of the case, or preclusive effect.)

Unpublished dispositions of other federal courts entered before January 1, 2007, may be cited where they are relevant for purposes of *res judicata*, law of the case, or their preclusive effect. Otherwise, unpublished dispositions of other courts of appeals entered before January 1, 2007, may be cited only in the circumstances and for the purposes allowed by the court issuing the disposition, and unpublished dispositions of district courts entered before that date may not be cited. Unpublished dispositions of other federal courts entered on or after January 1, 2007, may be cited in accordance with Federal Rule of Appellate Procedure 32.1.

If unpublished dispositions cited in a brief are not available in a publicly accessible electronic database, a copy of each must be included in an appropriately labeled addendum to the brief. The addendum may be bound together with the brief, but it should be separated from the body of the brief and any other addendum by a distinctly colored separation page. Any addendum exceeding 40 pages must be bound separately from the brief. If the addendum is bound separately, it must be filed and served concurrently with, and in the same number of copies as, the brief itself.

It is important to understand an important caveat in connection with reliance upon unpublished dispositions of this Court. For example, counsel are permitted to argue that an unpublished disposition is binding precedent on a particular issue; they may also argue that an unpublished disposition establishes an intra-circuit conflict in decisions warranting a rehearing *en banc*. On the other hand, counsel are reminded that the Court's decision to issue an unpublished disposition means that the Court sees no precedential value in that disposition. *See* D.C. Cir. Rule 36(e)(2). Indeed, unpublished dispositions contain language to that very effect. Thus, counsel should recognize that the Court believes its published precedents already establish and adequately explain the legal principles applied in the unpublished disposition, and that there is accordingly no need for counsel to base their arguments on unpublished dispositions. (See generally Circuit Rule 36, which sets out the criteria for published and unpublished opinions.)

Counsel should avoid use of designations such as "appellant" and "appellee." In the interest of clarity, it is preferable to use the designations in the court or agency below, the actual names of the parties, or terms descriptive of them, such as "the employee." In addition, parties are strongly urged to limit the use of acronyms. While acronyms may be used for entities and statutes with widely recognized initials, such as FERC and FOIA, parties should avoid using acronyms that are not widely known.

The excessive use of footnotes also should be avoided. The Court prefers that substantive arguments not be made in footnotes. Footnotes should be used primarily for citations.

Finally, counsel may not refer this Court to sections of pleadings filed in the district court to support those contentions upon which it relies on appeal in lieu of addressing such arguments in the brief.

9. ***Citation of Supplemental Authorities***
(*See* Fed. R. App. P. 28(j); D.C. Cir. Rule 28(f).)

When pertinent and significant authorities come to a party's attention after briefing or oral argument but before decision, a party may promptly advise the Clerk by letter, limited to 350 words, with copies to all other parties as provided in Federal Rule of Appellate Procedure 28(j). Other parties may file a response to the letter, but any response must be similarly limited.

10. ***Briefs Containing Material Under Seal***
(*See* D.C. Cir. Rule 47.1(d).)

If it is necessary to refer in a brief to material under seal, two sets of briefs must be filed. The briefs are to be identical except for references to sealed materials. One set of briefs must bear the legend "Under Seal" on the cover, and each page containing sealed material must bear the legend "Under Seal" at the top of the page. The second set of briefs must bear the legend "Public Copy — Sealed Material Deleted" on the cover, and each page from which material under seal has been deleted must bear a legend stating "Material Under Seal Deleted" at the top of the page. The original and 6 copies of the sealed brief plus the original and 8 copies of the public brief must be filed, and 2 copies of the public brief and 2 copies of the brief under seal served on each party, if such party is entitled to receive the material under seal. *See, e.g.*, Fed. R. Crim. P. 6(e). Both sets of briefs must comply with the remainder of the rules, including Federal Rule of Appellate Procedure 32(a)(7) and Circuit Rule 32(e), on the length of briefs. Litigants proceeding *in forma pauperis* must file 1 copy of the sealed brief and 1 copy of the public brief. Briefs filed with the Court under seal are available only to authorized court personnel and are not made available to the public.

B. APPENDIX

(*See* Fed. R. App. P. 30; D.C. Cir. Rules 25(c)(5), 30, 32.)

1. *Contents*

While the original record is available to the judges, it may contain far more than is necessary to a proper disposition of the case. To reduce the record to a manageable size, counsel must prepare an appendix, reproducing those parts of the record that are relevant to the issues on appeal. The Court does not require unrepresented parties proceeding *in forma pauperis* to file an appendix. *See* D.C. Cir. Rule 24.

The appendix must include the relevant docket entries in the proceeding below; the relevant portions of the pleadings, charge, findings, or opinion; the judgment or order in question; and any other parts of the record to which the parties intend to direct the Court's attention. The relevant portions of all pleadings, transcripts, and exhibits that are cited in the brief must also be included. Exhibits may be reproduced in a separate volume of the appendix. *See* Fed. R. App. P. 30(e). Memoranda of law must not be included in the appendix unless there is an issue as to which arguments were raised in the district court or some point that was admitted below. Failure to include relevant parts of the record in the appendix does not preclude the Court or the parties from relying on that material.

The appendix must contain a table of contents describing each item included, with the page of the appendix on which it can be found. This is followed by the relevant docket entries, and then by the other items from the record, set out in chronological order. All the material in the appendix must be consecutively paginated to facilitate citation to the appendix in the briefs.

2. *Preparation*

The appellant or the petitioner bears the burden of preparing the appendix, but the parties are encouraged to agree informally on the contents. If the parties do not agree, the appellant or the petitioner must, not later than 14 days after the date on which the record is filed, serve on the appellee or the respondent a designation of the parts of the record the appellant or petitioner intends to include in the appendix. If the appellee or the respondent wishes to direct the Court's attention to parts of the record not designated by the appellant or the petitioner, the appellee or the respondent must, within 14 days after receipt of the designation, serve upon the appellant or the petitioner a designation of those parts. The appellant or the petitioner must include in

the appendix the parts thus designated with respect to the appeal and any cross-appeal. In designating parts of the record for inclusion in the appendix, the parties should have regard for the fact that the entire record is always available to the Court for reference and examination, and the parties should not engage in unnecessary designation.

The appellant or the petitioner pays for the appendix but may be reimbursed when costs are taxed at the conclusion of the case. Appointed counsel in criminal appeals may be reimbursed for the expense of reproducing the appendix by photocopy process in accordance with the Criminal Justice Act. If the appellant or the petitioner believes that opposing counsel is designating material that is unnecessary, the appellant or the petitioner may request the appellee or the respondent to advance the cost of reproducing the materials. If either party causes the inclusion of unnecessary material in the appendix, the Court may require that party to bear the cost of reproducing it, and the Court also may impose sanctions.

Parties to a joint appeal file a joint appendix. In consolidated cases where there are several appellants, the parties must designate someone to assume the primary responsibility for preparing the joint appendix. Intervenors may ask the appellant or the petitioner to include certain material in the appendix, or intervenors may include that material as an addendum to their brief or submit it as a separate volume of the appendix. Any addendum exceeding 40 pages must be bound separately from the brief.

If anything material to the appeal is omitted from the appendix, the Clerk, on the written request of any party, may allow the appendix to be supplemented.

3. ***Timing; Deferred Appendix***
(*See* Fed. R. App. P. 30; D.C. Cir. Rule 30.)

Federal Rule of Appellate Procedure 30 authorizes either of two timetables for preparing the appendix, and the appellant or petitioner must notify the Court as to which method will be utilized. Under one method, the appendix is complete and available to the parties as they prepare their briefs. In the absence of informal cooperation, the appellant or the petitioner serves the appellee or the respondent with a designation of the proposed contents of the appendix, plus a statement of the issues that the party intends to present for review. The appellee or the respondent then has 14 days to respond with a cross-designation. The appellant or petitioner thereafter files and serves the appendix at the time of filing the brief.

The alternate method allows preparation of the appendix *after* the briefs are filed. Absent informal cooperation, each party serves its designation of the proposed contents of the appendix at the time of filing that party's main brief. *See* Fed. R. App. P. 30(c)(1); D.C. Cir. Rule 30(c). The deferred appendix then must be filed in accordance with the briefing schedule issued by the Court. If a party objects to the use of a "deferred appendix," the matter will be submitted to the Court for resolution.

When parties file their briefs before the appendix has been prepared, they must nonetheless clearly cite to the record, and may do so in one of two ways. *See* Fed. R. App. P. 30(c)(2). They may cite in their briefs to the original pagination of the record (*e.g.*, "Tr. 1154"), in which case the original page numbers also must be indicated on the material reproduced in the appendix. The second and preferred procedure is to file an initial version of the briefs containing references to the original record. Thereafter, the parties must, in accordance with the briefing schedule, serve and file their briefs in final form, inserting references to the appendix. *See* Fed. R. App. P. 30(c); D.C. Cir. Rule 31. No changes other than citations to the deferred appendix and correction of typographical errors may be made in the final briefs filed under this method.

4. ***Format***
(*See* Fed. R. App. P. 32(b); D.C. Cir. Rule 30(a).)

Unlike the brief, the appendix may be duplicated on both sides of each page. If the appendix is separately produced, it must have a white cover. The Federal Rules of Appellate Procedure require that briefs and appendices be bound in a manner that permits the document to lie reasonably flat when open. The following types of binding ensure that the appendix will lie flat when open: spiral (also known as coil), comb, and wire binding. The following types of binding do *not* permit an appendix to lie flat when open: velo (also known as strip) binding, metal fasteners or posts, and staples. Accordingly, the use of such methods is not acceptable for an appendix, nor is the use of a three-ring binder. If an appendix is submitted that does not conform with these requirements, the party will be notified and directed to file an appendix that is properly bound.

5. ***Number of Copies***
(*See* Fed. R. App. P. 30(e); D.C. Cir. Rule 30(a).)

The appellant or the petitioner must file 8 copies of the appendix, and serve 1 copy on counsel for each party separately represented. When an appendix is filed electronically, 7 paper copies must be filed in addition to the electronic version. If exhibits are reproduced in a separate volume, only 4 copies of that volume need be filed.

6. ***In Forma Pauperis Appeals***
(*See* D.C. Cir. Rule 24.)

An unrepresented appellant or petitioner proceeding *in forma pauperis* is not required to file an appendix. The appellant or petitioner may instead furnish, with the brief, 1 copy of the transcript pages he or she wishes to call to the Court's attention; 1 copy of a list setting forth the page numbers of the transcript so furnished; and 1 copy of other portions of the record to which the appellant or petitioner directs the Court's attention. Pro se parties, however, are encouraged to submit 4 copies of these materials if they can. An appellee or respondent must furnish, with the brief, 4 copies of an appendix containing any pages of transcript or other portions of the record not furnished by appellant or petitioner to which the appellee or respondent directs the Court's attention.

7. ***Appendix Containing Matters Under Seal***
(*See* D.C. Cir. Rule 47.1(e).)

If it is necessary to include material under seal in an appendix, the appendix must be filed in two segments. One segment must contain all sealed material and must bear the legend "Supplement — Under Seal" on the cover, and each page of that segment containing sealed material must bear the legend "Under Seal" at the top of the page. The second appendix segment must bear the legend "Public Appendix — Material Under Seal in Separate Supplement" on the cover; each page from which material under seal has been deleted must bear the legend "Material Under Seal Deleted" at the top of the page. Seven copies of the sealed segment and 7 copies of the public segment of the appendix must be filed, and 1 copy of the public segment of the appendix and 1 copy of the sealed segment served on each party, if such party is entitled to receive the material under seal. *See, e.g.*, Fed. R. Crim. P. 6(e). Segments of appendices filed with the Court under seal are available only to authorized court personnel and are not made available to the public.

X. THE COURT'S CALENDAR

The Court usually hears cases in 8 sitting periods consisting of 3-4 weeks each. Except when it is sitting *en banc*, the Court hears cases in panels of three judges. The Court usually does not hear cases on Wednesdays. Judges are usually assigned to no more than 4 sitting days during a calendar month.

A. SCHEDULING SITTING PERIODS

The sitting periods ordinarily begin in September and end in May. While there are usually no formal sitting periods in June, July, and August, panels of the Court are available throughout the summer to hear appeals in which there is an urgent need for immediate consideration. These summer panels also continue to decide motions and cases submitted without argument pursuant to Circuit Rule 34(j).

The sitting periods for each term are scheduled the preceding winter. The Clerk prepares a proposed schedule and submits it to the Court in executive session. The Court accepts the schedule as prepared by the Clerk or modifies it, if necessary.

B. MERITS PANELS

The Clerk assigns the judges in panels of three to the sitting weeks for which they are available for an entire term. The Clerk attempts to pair each active judge with each other active judge an equal number of weeks during the year, insofar as availability permits. If a judge becomes unavailable, he or she may arrange to switch sitting dates with another judge. Depending on their availability, senior judges of this Court also serve on panels.

C. CASELOAD AND CASE MIX

The Clerk's Office usually schedules at least three cases for each day of a panel's sitting period. The "mix" of cases (criminal appeals, private civil appeals, civil appeals where the federal government is a party, and administrative agency cases) in a given sitting period reflects roughly the proportions of the Court's overall caseload.

D. SCHEDULING CASES FOR ARGUMENT

Most appeals screened by the Legal Division are classified as "Regular Merits" cases. Normally, the Clerk's Office sets a briefing schedule in these cases after all pending motions have been resolved. Thereafter, the parties are notified by separate order of the date and time of oral argument. Scheduling is done by a computer program, which automatically checks for known recusals and makes certain that the case mix both for a specific date and for that week's sitting is acceptable. As a general rule, once they become ready, cases are calendared in order of age, with the oldest cases set first.

Typically, the argument date will be a minimum of 45 days after briefing is completed. If arguing counsel knows he or she will be unavailable to appear for oral argument on a date in the future, counsel should so advise the Clerk's Office by letter, filed electronically. The notification should be filed as soon as possible and updated if a potential scheduling conflict later arises or if there is any change in availability. To the extent possible, the Clerk's Office will endeavor to schedule oral argument to avoid conflicts that have been brought to the Court's attention in advance. Counsel will not be notified of the argument date until it is established by Court order. *See infra* Part XI. A. Notification, B. Postponements.

Counsel are advised that whenever there are serious settlement negotiations in progress, the parties must advise the Clerk of that fact and must notify the Clerk at the earliest possible moment if settlement is reached.

From time to time a judge must recuse himself or herself from consideration of a particular case. *See* 28 U.S.C. § 455; Canon 3C, Code of Conduct for United States Judges, Judicial Conference of the United States. The judge is not required to state the reasons for recusal. The provisional certificate of parties filed with the docketing statement, pursuant to Circuit Rules 12(c) and 15(c), or with a petition for permission to appeal or a petition for an extraordinary writ, pursuant to Circuit Rules 5 and 21, affords the Clerk's Office the opportunity to determine in advance of briefing those judges who would be recused. In most cases, this ensures that the case will not be set for hearing on a day when the recused judge is sitting. In some cases, however, a judge discovers the basis for recusal only after the case has been scheduled before a particular panel. In those cases, a replacement judge is assigned to hear the case on that date.

E. SCHEDULING IN PARTICULAR CASES

1. *Special Panel*

From time to time in deciding motions, the special panel may have considered in great detail a matter that is closely related to the merits of a case; this consideration may have included oral argument. If that panel determines that judicial efficiency would be served by the panel retaining the case, it will so advise the Clerk. The special panel then controls the case from that point on to disposition.

2. *Related Cases*

Most related cases are consolidated before they are calendared, as described *supra* in Parts III.H and V.A. Occasionally, however, a case is identified after a related case has been scheduled for argument or even argued. In these and other instances in which the cases would normally have been consolidated, or at least joined for hearing before the same panel, the Clerk's Office advises the panel to which the earlier case has been assigned. If the panel determines, in the interest of judicial economy and consistency of decisions, to take the new case, it will so advise the Clerk.

3. *Cases on Remand to this Court*

When the Supreme Court remands a case to this Court for further proceedings, the case is assigned to the same panel that previously considered it.

4. *Stipulated Stand-by Pool*

Parties may agree to enter the Court's stipulated stand-by pool, which would allow the case to be used as a replacement for cases that are removed from the calendar too close to the argument date to be replaced in the normal course. Utilization of the stand-by pool may result in significant expedition.

In order to enter the stand-by pool, parties must: (1) stipulate that they do not object to inclusion in the stand-by pool; (2) stipulate that they will not file any dispositive motions; and (3) agree to an expedited briefing schedule. Usually, counsel will be given at least 45 days' notice of the argument date and that date will be no earlier than 45 days after the last brief is due. If counsel is unavailable for the selected date, every effort will be made to calendar the case so that consideration is not delayed. Parties should note that the

Court will not ordinarily include in the stand-by pool cases that are inappropriate for oral argument, *see* Circuit Rule 34(j), or cases that require special internal management pursuant to this Court's Appeals Management Plan.

XI. ORAL ARGUMENT

A. NOTIFICATION

(*See* Fed. R. App. P. 34(b); D.C. Cir. Rule 34(c).)

In civil cases, the Court's practice is to issue an order after the briefing schedule has been entered, announcing the date for oral argument. In criminal cases, the Clerk's Office ordinarily gives notice of the date for oral argument after the briefs have been filed. Generally, the members of the panel of judges who will hear the case are not named in the order setting the date for oral argument. The composition of the merits panel will be posted on the Court's internet site, usually 30 days before the date of oral argument, and will not be disclosed before that time.

The Clerk's Office does not confer with counsel before the calendaring order is released. Accordingly, counsel are urged to notify the Clerk's Office in advance of any potential scheduling conflicts and should do so by letter, filed electronically. The notification should be filed as soon as possible after the briefing order is entered and updated if a potential scheduling conflict later arises or if there is any change in availability. Counsel are also advised that whenever there are serious settlement negotiations in progress, the parties must advise the Clerk of that fact and must notify the Clerk at the earliest possible moment if settlement is reached.

The calendaring order will contain an electronic link to Form 71 – a memorandum that provides important information on the requirements and logistics for oral argument. Subsequently, in the order allocating the amount of argument time, there will be an electronic link to Form 72, which counsel must complete and file no less than 7 days before oral argument, giving the name of the attorney or attorneys who will present the argument to the Court.

Requests by artists to sketch court proceedings should be directed to the Clerk's Office well in advance of the scheduled argument. The Court will accommodate all requests unless the panel for reasons of security decides otherwise. Additionally, if the Court receives multiple requests, space considerations may limit the number of sketch artists that can be accommodated.

B. POSTPONEMENTS

(*See* Fed. R. App. P. 34(b); D.C. Cir. Rule 34(g).)

Once a case has been calendared, the Clerk's Office cannot change the argument date, and the Court will not ordinarily reschedule it. Any request to reschedule must be made by motion, which will be presented to a panel of the Court for disposition. The Court disfavors motions to postpone oral argument and will grant them only upon a showing of "extraordinary cause." Unless the panel that grants a motion to postpone argument is prepared to retain the case and hear it outside its normal sitting period, the case will have to be rescheduled for the first available date on the calendar — possibly months later than the original date. Accordingly, it is in counsel's interest to avoid seeking to postpone argument.

C. ARGUMENT TIME

(*See* D.C. Cir. Rule 34(b).)

1. *Screening by the Panel*

When cases are assigned to panels, the Clerk designates one judge of the Court on the panel for each day to have primary responsibility for screening cases for that day. The screening function is concerned with alignment of parties and issues, and allotment of times for the arguments. Senior judges of this Court do not serve as screening judges. The name of the screening judge is not made public.

The Clerk's Office distributes the briefs, appendices, and other relevant materials to the judges. In addition, the panel has before it any motions for allotment of argument time. The screening judge reviews the assigned cases and then sends a memorandum to the other judges on the panel containing his or her screening decisions.

There is no standard length of oral argument time, although the allotment of 15 minutes per side is perhaps the most common. The screening judge determines the amount of argument time and may set a particular format for oral argument. The argument may be limited to certain issues, counsel may be advised that the panel wishes additional questions to be addressed at oral argument, and the usual order of presentation contemplated by Federal Rule of Appellate Procedure 34(c) may be altered. The screening judge also advises the Clerk of the order in which cases set for a particular day will be heard.

When the screening judge allots time for argument, that decision is automatically effective, and no concurrences are necessary from the other members of the panel. If the screening judge recommends instead that the case be submitted without oral argument, pursuant to Circuit Rule 34(j), it is necessary that the other two members of the panel concur in this recommendation. After receiving the judge's screening memoranda, the Clerk's Office issues orders that reflect the screening decisions.

Parties allotted less time than they believe is warranted may move promptly for additional time. The Court rarely grants such motions. If the Court orders a case to be submitted without argument pursuant to Circuit Rule 34(j), counsel has 10 days from the date of the screening order within which to move to restore the case to the argument calendar. The Court rarely grants these motions. On the other hand, a party in a case that has been set for argument may wish to move to submit the case on the briefs alone. Counsel should file such a motion as soon as possible after receiving the argument date and briefing schedule.

If a case is screened and then postponed before oral argument, the screening decision will be subject to redetermination when the argument is rescheduled.

2. *Rule 34(j) Dispositions*

Pursuant to Federal Rule of Appellate Procedure 34(a)(2), the Court may, under certain circumstances, decide a case without oral argument. Among the factors the Court considers are: (1) whether the appeal is frivolous; (2) whether the dispositive issue has previously been authoritatively decided; and (3) whether the facts and legal arguments are adequately presented in the briefs and record so that oral argument would not significantly aid the decisional process. The decision to dispense with oral argument must be unanimously made by a three-judge panel.

The Court's Case Management Plan is designed to identify early in the appellate process cases suitable for disposition without oral argument under Circuit Rule 34(j). When a staff attorney screens a new appeal

and concludes that Rule 34(j) treatment might be appropriate, that screening recommendation goes to the Clerk's Office, and a briefing schedule (but no oral argument date) is set. The staff attorney then reviews the briefs, and if he or she concludes that the case should be disposed of without oral argument, the staff attorney recommends to the special panel that it decide the case on the merits, pursuant to the Rule. The staff attorney also proposes a disposition, embodied in a draft judgment and, where appropriate, an accompanying memorandum. If the special panel accepts the recommendation for Rule 34(j) disposition, the panel issues an order advising the parties that the case will be decided without oral argument. Counsel may move within 10 days for reconsideration of that order. In the absence of a successful motion to reconsider, the special panel will decide the case on the merits, usually by an unpublished *per curiam* judgment.

The second way in which a case may be submitted for decision without oral argument is if the screening judge, with the concurrence of the other two members of the merits panel, determines that a case, originally set for argument as a "Regular Merits" case, should be removed from the calendar and handled pursuant to Rule 34(j). The Clerk's Office issues an order notifying counsel of that decision, and counsel has 10 days to move for reconsideration. The Court rarely grants such motions.

The merits panel discusses cases submitted without oral argument at a conference following oral argument on the day on which the case was originally scheduled to be heard. The disposition is usually in the form of an unpublished *per curiam* judgment.

D. NUMBER OF COUNSEL

(*See* D.C. Cir. Rules 34(c), (d).)

There is generally a limit of two counsel per side who may argue in cases allotted more than 15 minutes per side. In cases allotted 15 minutes or less per side, only one counsel may argue. This rule applies to consolidated cases, and it may be waived only by leave of the Court.

An intervenor may argue only to the extent that counsel whose side the intervenor supports is willing to share argument time. If counsel wishes to share time with an intervenor in a case in which at least 15 minutes per side has been allotted for argument, no leave of the Court is necessary. Counsel should inform the Clerk's Office of such arrangements no less than 7 days before the date of argument. The counsel for the intervenor will be counted as one of the two counsel per side permitted under the rules.

Counsel on the same side should make their own apportionment of time among themselves; otherwise the Court will do so. The courtroom deputy should be advised of the arrangement before the case is called; the attorney making the opening presentation should announce the arrangement to the Court. Each attorney is thereafter limited to the time specifically allotted, unless the Court permits otherwise.

E. ARGUMENTS BY *AMICI CURIAE*

(*See* D.C. Cir. Rule 34(e).)

An *amicus curiae*, other than one appointed by the Court, may not present oral argument without permission of the Court, and such permission is sparingly granted. If counsel for the party supported by the *amicus* consents to share oral argument time with the *amicus*, no motion is necessary, subject to the limitation in Circuit Rule 34(c) that no more than two attorneys may argue. Otherwise, an *amicus* seeking leave to argue must file a motion no later than 14 days prior to the date oral argument is scheduled.

F. FORM AND CONTENT OF ARGUMENT

(*See* Fed. R. App. P. 34; D.C. Cir. Rule 34.)

The appellant is entitled to open and conclude the argument. If the case involves a cross-appeal, the first party to file a notice of appeal is deemed the appellant, unless the parties agree or the Court orders otherwise. *See* Fed. R. App. P. 28.1(b). In cases in which separate time is allotted to a number of parties, the screening order will indicate the order of presentation of argument to be followed by those parties.

The opening argument should include a brief introductory statement of the case and the issues presented. Counsel may not read from a prepared text, nor should counsel read at length from briefs, records, or authorities. *See* Fed. R. App. P. 34(c); D.C. Cir. Rule 34(a). Counsel should be prepared to answer questions from the bench, and attorneys on the same side should take care not to duplicate their arguments.

If counsel wishes to use any exhibits in the courtroom, counsel must make arrangements with the Clerk's Office and advise the Court and all other counsel by letter at least 7 days prior to the argument. The letter must set forth the justification for the use of the exhibits. After the argument, counsel should remove the exhibits, unless directed otherwise by the panel. *See* D.C. Cir. Rule 34(i).

In this Circuit, the judges will always have read the briefs prior to the hearing. Counsel should keep this in mind when preparing and presenting argument.

Argument for the day usually begins at 9:30 a.m. As a general rule, the panel will hear all cases scheduled for that day, even if it is necessary to recess for lunch and reconvene.

G. COURT CLOSINGS

As noted in Part II.B.4, if there is any possibility that the Court will not be in session because of inclement weather or an emergency situation, counsel should call the Clerk's Office at 202-216-7000 (Option 2, Special Announcements), or check the Court's web site located at **www.cadc.uscourts.gov**, to determine whether the Court is open. In the absence of official notice *from the Court* to the contrary, counsel should assume that the Court *will* be in session. A general announcement by the media that the "government" is closed does not necessarily include this Court.

H. PROCEDURES FOR ORAL ARGUMENT

Counsel must arrive at the courtroom at least 20 minutes before the start of argument for the scheduled session. The identity of the panel and the order in which the cases will be heard will be posted outside the courtroom. Counsel also may call the Clerk's Office in the afternoon of the day before argument to find out the order in which the cases will be heard or consult the Court's web site. If more than one panel is sitting that day, the notice also will disclose the other hearing location. The presiding judge may alter the order in which the cases are to be heard from the schedule posted. Counsel must sign in with the courtroom deputy upon arrival. Except as stated below, counsel must remain in the courtroom, or arrange with the courtroom deputy to be on call in the attorney waiting room next to the courtroom. Counsel scheduled to appear in the third and subsequent cases on the calendar, however, may be excused by the courtroom deputy after signing in, unless the panel directs otherwise. Prior to leaving the courtroom, excused counsel must inform the courtroom deputy of the places and, if available, telephone numbers, where they can be reached in the interim.

All counsel who have not remained in the courtroom must return to the courtroom 15 minutes before their cases are due to be heard, based on the time set for each preceding case.

The courtroom deputy will explain the warning light system used to signal the time remaining during the oral argument. Counsel for the appellant or petitioner also must inform the courtroom deputy whether he or she wishes to reserve time for rebuttal.

The presiding judge of the panel is the member of the panel in active service who is first in seniority. The presiding judge sits in the center of the bench, and the next ranking judge is seated to his or her right. The names and seating arrangement of the panel for the day are marked on the lectern.

Facing the bench, counsel for the appellant or the petitioner sits at the table to the right of the lectern, and counsel for the appellee or respondent to the left. Additional counsel may sit at the tables or elsewhere in the well of the courtroom.

Three lights — green, amber, and red — are on the lectern in front of counsel. The lectern lights also are visible to the Court. If counsel does not wish to reserve rebuttal time, the courtroom deputy will flash the amber light when there are 2 minutes remaining in the allotted time. The red light will be turned on when all the allotted time is used. Counsel wishing to reserve time for rebuttal must observe the timer and preserve the time he or she has reserved for rebuttal.

When the questioning has been extensive, the presiding judge in his or her discretion may grant counsel additional time for argument. The Court also may terminate the hearing before the allotted time is up, if further argument appears unnecessary.

I. RECORDINGS AND TRANSCRIPTS OF ARGUMENTS

All arguments are recorded for future reference of the Court. Audio recordings of oral arguments will be available on the Court's internet site free of charge, usually by 2:00 p.m. on the same day of the oral argument. Any person may request that a transcript of the oral argument be made. Information on how to order a transcript and current pricing is available on the Court's web site. In addition, copies of oral argument recordings may be purchased upon written request *after the case has been completely closed*. This means all appeals, remands, or additional proceedings must be concluded before the recording will be reproduced.

XII. MAKING THE DECISION

A. FORMS OF DECISION

(*See* Fed. R. App. P. 32.1, 36; D.C. Cir. Rules 32.1, 36.)

Four possible forms for disposing of cases that have been considered by a merits panel are currently used: a published signed opinion, a published *per curiam* opinion, an unpublished judgment or order with memorandum, and a judgment or order without memorandum. The first two forms are familiar to all attorneys. An unpublished judgment or order with memorandum is addressed primarily to those immediately concerned with the case. The memorandum usually is fairly brief, stating only the facts and law necessary for an understanding of the Court's decision. A judgment or order without memorandum indicates affirmance or reversal, or grant or denial of a petition for review, with a brief explanation, such as citation of a governing precedent. With the exception of orders filed under seal and some scheduling orders generated by the Court's docketing system, all orders and judgments, including Clerk's orders, issued

on or after June 1, 2001, are available over the internet via PACER, the Judiciary's electronic public access service. A small document icon appears next to the docket entry for any order or judgment that can be viewed online. A PACER account is required (available from the PACER Service Center), and a per page fee applies. The PACER Service Center can be accessed through a link at the Court's web site, **www.cadc.uscourts.gov**.

Circuit Rule 36(c)(2) sets out the criteria the Court employs in determining whether to publish an opinion. The Court's policy is to publish an opinion or memorandum if it meets one or more of the following criteria: (1) the opinion resolves a substantial issue of first impression generally or an issue presented for the first time in this Court; (2) the opinion alters, modifies, or significantly clarifies a rule of law previously announced by the Court; (3) the opinion calls attention to an existing rule of law that appears to have been generally overlooked; (4) the opinion criticizes or questions existing law; (5) the opinion resolves a conflict in decisions within the Circuit or creates a conflict with another circuit; (6) the opinion reverses a published district court or agency decision, or affirms it on grounds different from those in a published opinion of the district court; or (7) the opinion warrants publication in light of other factors that give it general public interest.

An unpublished disposition will be used where the Court's decision does not satisfy the criteria for publication under Circuit Rule 36(c). Citation of unpublished dispositions is governed by Federal Rule of Appellate Procedure 32.1 and Circuit Rule 32.1(b). Although Circuit Rule 32.1(b)(1) permits citation, as precedent, of unpublished dispositions of this Court issued on or after January 1, 2002, Circuit Rule 36(e)(2) makes clear that the Court's decision to issue an unpublished disposition means that the Court sees no precedential value in that disposition, *i.e.*, the order or judgment does not add anything to the body of law already established and explained in the Court's published precedents.

B. CASE CONFERENCES

In this Circuit, cases decided on the merits are generally discussed at a case conference. If the case was argued, the conference generally takes place later the same day; if the case was submitted without argument, it is usually discussed at the same conference as the cases with which it was originally scheduled. This Court does not ordinarily decide argued cases from the bench.

At the conference, the members of the panel reach agreement on the form as well as the substance of the decision. If the panel decides to issue an opinion or memorandum, the presiding judge assigns the responsibility for writing it, unless he or she is in the minority, in which event the senior member of the panel in the majority designates the author. When a case has been submitted without oral argument, the screening judge usually prepares the opinion or memorandum.

C. PREPARATION OF OPINIONS

If the case is to be decided with an opinion or memorandum, the author circulates a draft to the other members of the panel. The other judges are free to suggest changes in the proposed text, or they may draft and circulate concurring or dissenting opinions. These may lead to further changes in the majority opinion.

Final drafts of all opinions to be published also are circulated to all judges on the Court. Following circulation of the drafts to the panel and the Court, the opinion is printed in house.

D. TIMING OF DECISIONS

Each month there is a report on the status of every case that has been argued but not yet assigned, and each judge reports on the status of every opinion assigned to him or her that either has not been circulated or is awaiting clearance by other members of the panel.

Occasionally, a panel defers decision of a case pending disposition of another case in this Court or before another tribunal. The Clerk's Office usually notifies the parties by an order holding the case in abeyance pending a decision or some other event.

Counsel are advised that whenever there are serious post-argument settlement negotiations in progress, the parties must advise the Clerk of that fact and must notify the Clerk at the earliest possible moment if settlement is reached.

E. NOTICE OF DECISIONS

When an order or judgment is entered in a case assigned to the CM/ECF system, the Clerk's Office electronically transmits a Notice of Docket Activity to all parties who have consented to electronic service, and mails notice and a copy of any opinion or judgment to parties who are not ECF filers. For printed copies of opinions, each party (including ECF filers) will receive 2 paper copies of the decision without charge. *See* D.C. Cir. Rules 36(b), 45(d) and (f).

Opinions will be posted on the Court's web site, which can be accessed from a computer terminal in the public office of the Clerk's Office. Members of the bar should call the Clerk's attention to typographical or other errors in slip opinions.

Dockets and other Court records are available on the PACER web site. *See supra* Part II.B.3. Opinions issued since September 1997 are available on the Court's web site and PACER in PDF format.

Opinions are added to the Court's web site soon after they are publicly released. Docket sheets and opinions posted on the PACER web site provide case information in real time.

Although certain decisions are not published, all unsealed judgments and memoranda are available to the public upon proper application to the Clerk's Office, and those issued since June 2000 are posted on the Court's web site.

XIII. POST-DECISION PROCEDURES

A. TERMINATING THE CASE

1. *Enforcement Judgments*
(*See* Fed. R. App. P. 19.)

After the Court files an opinion directing entry of judgment enforcing in part an agency order, the agency within 14 days must submit a proposed judgment to the Court. If a party disagrees with the agency's proposal, that party has 10 days thereafter to file an alternative judgment. The panel will then either settle the judgment and direct its entry, return the matter to the agency for redrafting, or craft its own judgment.

2. *Mandates*
(*See* Fed. R. App. P. 41; D.C. Cir. Rule 41.)

The Court will enter its judgment in a case on the same date its decision is issued. Ordinarily, the Clerk's Office will issue a formal mandate 7 days after the period for seeking rehearing has expired or a petition for rehearing has been decided. The Court, however, retains discretion to direct immediate issuance of its mandate in an appropriate case, and any party may move at any time for expedited issuance of the mandate on a showing of good cause. Counsel should not confuse the mandate with the judgment itself because the time for filing a petition for a writ of *certiorari* with the United States Supreme Court runs from the date of this Court's judgment or disposition of a timely petition for rehearing or for rehearing *en banc*.

A motion for stay of the mandate must set forth facts showing good cause. Unless the motion recites that the other parties do not object to a stay, the motion will not be acted upon until the response time has expired. Subject to these limitations, the Clerk has been given authority to grant unopposed motions for stays for a period of up to 90 days. In his or her discretion, the Clerk may instead submit the motion to the panel that decided the case. Motions to reconsider a decision by the Clerk are referred to the panel that decided the case. If a motion to stay issuance of the mandate is denied, the mandate ordinarily will be issued 7 days thereafter. Stays ordinarily will not extend beyond 90 days from the date the mandate otherwise would have issued.

If the party who obtained a stay of the mandate files a petition for a writ of *certiorari* during the term of the stay issued by this Court, and so notifies the circuit Clerk in writing, the stay will continue until the Supreme Court's final disposition. A petition for a writ of *certiorari* filed under any other circumstances has no effect on the mandate.

3. *Remands*
(*See* Fed. R. App. P. 12.1; D.C. Cir. Rule 41(b).)

When the Court remands the *record* in any case to the district court or to an agency, the Court retains jurisdiction over the case. When the Court remands the *case*, the Court does not retain jurisdiction, and a new notice of appeal or petition for review is required if a party seeks review of the proceedings conducted on remand.

4. *Costs*
(*See* Fed. R. App. P. 39; D.C. Cir. Rule 39.)

Costs, when requested, are usually charged to the losing party or to an appellant who withdraws the appeal. When the government is a party to a suit, costs are governed by statute. Costs are not taxed for briefs of *amici curiae* or intervenors or separate replies thereto except on motion granted by the Court.

The items allowed as costs are set forth in Circuit Rule 39(a). Reimbursable printing costs are limited to the cost of the most economical means of reproduction. In addition to the docketing fee, costs are allowed for reproducing the number of copies of briefs and appendices that must be filed with the Court and served on parties, intervenors, and *amici curiae*, plus 3 for the submitting party.

Counsel has 14 days after entry of judgment to submit the bill of costs with service on opposing counsel. Printing and reproduction costs must be itemized and verified to show the charge per page. Opposing counsel may file objections. The Clerk's Office provides forms for itemizing bills of costs, and parties that

submit bills not presented on these forms (or reasonable facsimiles thereof) will be directed to provide a conforming request.

The Clerk reviews the bill for compliance with the rules and then prepares a statement of costs. Ordinarily, the directions as to costs are issued at the same time as the mandate. If the matter of costs has not been settled by that time, the Clerk's Office will at a later date send a supplemental statement to the district court or agency.

Once a party is ordered to pay costs, there is usually no further action on the matter in this Court. Any action to enforce an award of costs is brought in the district court. In addition, various expenses incidental to the appeal must be settled in the district court. Among these are the costs of the reporter's transcript, the filing fee for the notice of appeal, the Clerk's fee for preparing and transmitting the record, and the premiums paid for any required appeal bond. The successful party on appeal must apply for recovery of these expenses in the district court after issuance of the mandate of this Court.

5. ***Disposal of Sealed Records***
(*See* D.C. Cir. Rule 47.1(f).)

In any case in which all or part of the record has been maintained under seal, the Clerk will order the parties to show cause why the record should not be unsealed, unless the nature of the materials themselves (*e.g.*, grand jury material) makes it clear that unsealing would be impermissible. This order will be entered in conjunction with the issuance of the mandate. If the parties agree to unsealing, the record will be unsealed by Clerk's order. Otherwise, the matter will be referred to the Court for disposition. Counsel to an appeal involving sealed records must promptly notify the Court when it is no longer necessary to maintain the record or portions of the record under seal.

B. RECONSIDERATION

1. ***Rehearing by the Panel***
(*See* Fed. R. App. P. 32, 35, 40; D.C. Cir. Rule 35.)

Very few petitions for rehearing are granted. Sanctions may be imposed as a penalty for filing a petition for rehearing found to be wholly without merit.

A party seeking rehearing must file a petition within 45 days after entry of the judgment in any case in which a party is either the United States, one of its agencies, a federal officer or employee sued in an official capacity, or, under certain circumstances, a federal officer or employee sued in an individual capacity. If no party fits into one of these categories, the petition must be filed within 30 days. These time limits will not be extended except for good cause shown. The petition must state with particularity the errors that the panel is claimed to have made. An original and 4 copies must be filed. A copy of the panel's opinion, a Rule 28(a)(1)(A) certificate of parties and *amici*, and any disclosure statement required by Circuit Rule 26.1 must be attached as an addendum to the petition. *See* D.C. Cir. Rule 35(c). The form of a petition for rehearing is governed by Federal Rule of Appellate Procedure 32, and the petition may not exceed 3,900 words if produced using a computer and 15 pages if handwritten or typewritten. *See* Fed. R. App. P. 35(b)(2), 40(b); D.C. Cir. Rule 35(b). Motions to exceed this length limitation are viewed with disfavor and will be granted only for extraordinarily compelling reasons.

A response to the petition is not permitted unless the panel requests one. A petition for rehearing, however, will not ordinarily be granted, nor will an opinion or judgment be modified in any significant respect, in the absence of a request by the Court for a response.

The Clerk does not send the mandate to the district court or agency until a timely petition for rehearing has been decided, unless the Court expressly so orders. The Clerk also will delay issuing the mandate when a party moves for an extension of the time within which to petition for rehearing or rehearing *en banc*. A timely petition for rehearing or rehearing *en banc* extends the time for petitioning the United States Supreme Court for a writ of *certiorari*.

The Clerk's Office transmits the petition to the panel members via an electronic vote sheet. When voting is complete, the Clerk enters an appropriate order for the Court. If a petition for rehearing *en banc* also has been filed, the Clerk will withhold entry of an order denying rehearing by the panel until the *en banc* question has been resolved. If rehearing *en banc* is granted, the panel's judgment, but ordinarily not its opinion, is vacated, but the panel may act on the petition for rehearing without waiting for final termination of the *en banc* proceeding. On termination of the *en banc* proceeding (including when the *en banc* Court divides evenly), a new judgment will be issued.

Prior to either a decision by the court to grant rehearing en banc or issuance of the court's mandate, a panel may reconsider or amend its decision *sua sponte*, or on consideration of a petition for panel rehearing, or upon consideration of a petition for rehearing en banc. If a panel decides to reconsider or amend its decision, voting may be deferred on any pending petition for rehearing en banc or the en banc petition may be dismissed as moot with notice to the parties that a new period for seeking rehearing en banc will begin to run after the panel concludes its reconsideration of its decision. The panel may order new or supplemental briefing and oral argument. If the panel reconsiders the case, it may issue a new opinion along with a new judgment.

2. *Rehearing En Banc*
(*See* Fed. R. App. P. 35; D.C. Cir. Rule 35.)

Like petitions for rehearing by a panel, petitions for rehearing *en banc* are frequently filed but rarely granted. Federal Rule of Appellate Procedure 35(a) expressly states that *en banc* hearings are not favored and ordinarily will not be ordered except to secure or maintain uniformity of decisions among the panels of the Court, or to decide questions of exceptional importance.

The timing requirements for a petition for rehearing *en banc* are the same as those for panel rehearing. The formal requirements partly duplicate, and partly differ from, those for a petition for rehearing by the panel. The petition must begin with a section that sets forth why the case is of exceptional importance or cites the decisions with which the panel judgment is claimed to be in conflict. An original and 19 copies must be filed. As with panel rehearing petitions, a copy of the panel opinion, a Rule 28(a)(1)(A) certificate of parties and *amici*, and any disclosure statement required by Circuit Rule 26.1 must be attached as an addendum to the petition. *See* D.C. Cir. Rule 35(c). The petition may not exceed 3,900 words if produced using a computer and 15 pages if handwritten or typewritten. Motions to exceed this limitation are viewed with disfavor and will be granted only for extraordinarily compelling reasons.

If a party is submitting both a petition for rehearing by the panel and a petition for rehearing *en banc*, the two should be combined in the same document, in which event an original and 19 copies must be filed. The combined pleading may not exceed 3,900 words if produced using a computer and 15 pages if

handwritten or typewritten. If the two pleadings are filed separately, they may not, combined, exceed this length limitation.

As in the case of petitions for panel rehearing, the rules do not provide for a response to a petition for rehearing *en banc*, except by request of the Court. If any member of the Court wishes a response, the Clerk will enter an order to that effect. There is no oral argument on the question whether rehearing *en banc* should be granted.

The Clerk's Office transmits a vote sheet and the petition for rehearing *en banc* electronically to all members of the original panel, including a senior judge of this Court, and to all other active judges of this Court. A vote may be requested by an active judge of the Court, or by any member of the panel. If no judge asks for a vote within a specified time, and none requests more time to consider the matter, the Clerk will enter an order denying the petition.

If a judge calls for a vote on the petition for rehearing *en banc*, the Clerk's Office transmits electronically to the full Court a new vote sheet, along with any response to the petition ordered by the Court. The question now is whether there should be a rehearing *en banc*. On this question only active judges of the Court may vote, and a majority of all active judges who are not recused must approve rehearing *en banc* in order for it to be granted.

When rehearing *en banc* is granted, the Clerk enters an order granting the rehearing *en banc* and vacating the judgment by the original panel, either in whole or in part, as circumstances warrant. This order is posted on the Court's web site and is published in the federal reporter system. An order granting rehearing *en banc* does not indicate the names of the judges who voted against rehearing, but an order denying rehearing *en banc* does indicate the names of the judges who voted to grant rehearing *en banc*, if they wish.

The Court has followed a variety of procedures in conducting rehearing *en banc*. On occasion, only the original briefs have been considered; in other cases, the Court has requested supplemental briefs. The Court almost always hears oral argument in considering a case *en banc*.

The Court sitting *en banc* consists of all active judges, plus any senior judges of the Court who were members of the original panel and wish to participate. When the Court sits *en banc* with an even number of judges, and the result is an evenly divided vote, the Court will enter a judgment affirming the order or judgment under review, and it may publish the *en banc* Court's divided views.

In the absence of a request from a party, any active judge of the Court, or member of the panel, may suggest that a case be reheard *en banc*. If a majority of the active judges who are not recused agree, the Court orders rehearing *en banc*.

In addition, a party may move for initial *en banc* consideration. Such a petition must include a concise statement of the issue and its importance and conform to the other requirements of Federal Rule of Appellate Procedure 35(c). If a party wishes a case to be heard initially *en banc*, counsel ideally should file the petition within the first 30 days after docketing, but in no event later than the date on which the appellee's or the respondent's brief is due. A judge also may suggest *en banc* consideration prior to the panel decision; on occasion this has been done by the panel itself.

C. REVIEW BY THE SUPREME COURT OF THE UNITED STATES

In general, a party has 90 days from the entry of judgment or the denial of a timely petition for rehearing, whichever is later, in which to petition for a writ of *certiorari*. A circuit court cannot enlarge this period; application for an extension must be made to the Supreme Court. Counsel should be mindful that the judgment is entered on the day of the Court's decision and not when the mandate is issued.

Because of a problem of space, the Clerk of the Supreme Court has asked this Court not to transmit any record, or portion of a record, unless specifically requested by the Clerk or Deputy Clerk.

Federal Rule of Appellate Procedure 41(d) provides that a stay pending application for *certiorari* must not exceed 90 days, unless the period is extended for good cause or the Supreme Court extends the time for filing a petition and the party who obtained the stay so notifies the Clerk of this Court in writing within the period of the stay. When, however, a party files a petition for a writ of *certiorari* before the mandate of this Court is issued, the mandate is stayed until the Supreme Court disposes of the case *if* the party first obtained a stay of the mandate, filed the petition within the period the stay was in effect, and so notified the Clerk of this Court. Upon receipt of a copy of the Supreme Court order denying the petition, this Court will issue the mandate immediately, unless extraordinary circumstances exist.