

First Circuit Internal Operating Procedures

Introduction

This publication outlines the procedures followed in this Court, and its Clerk's Office, for the processing of appeals, petitions for review and other appellate matters in this Circuit. New techniques and procedures are continually tried and, when improvements are found, such procedures are adopted so that at any given time the procedures set forth herein may be in a state of change.

Internal Operating Procedure I. Court Organization

A. Facilities. The Clerk's Office and the appellate courtrooms are located in the John Joseph Moakley United States Courthouse at 1 Courthouse Way in Boston. The staff attorneys, the Court of Appeals library, the Circuit Executive and some of the appellate judges are located in the courthouse.

B. Clerk's Office. The office hours for the Clerk's Office are from 8:30 a.m. to 5:00 p.m., Monday through Friday. In case of an emergency, the Clerk or the Chief Deputy Clerk may be contacted after hours; however, appropriate arrangements should be made with the Clerk's Office in advance.

C. Library. The Court of Appeals library is open from 8:30 a.m. to 5:00 p.m. and attorneys practicing in the federal courts may use the library, but books and materials may not be removed.

D. Staff Attorneys. The office of the staff attorneys assists the Court in many ways including research, drafting memoranda and other forms of legal assistance to the Court.

Internal Operating Procedure II. Attorneys

A. Admission. Attorneys seeking admission should obtain an application from the court's website at www.ca1.uscourts.gov or write to the Clerk's Office. The admission fee is \$50.00, payable by check or money order to Clerk, U.S. Court of Appeals. Attorneys can mail the completed application along with the admission fee to the Clerk's Office for processing and a Certificate of Admission will be returned by mail. Attorneys may also apply for admission in person at the Clerk's Office and be sworn in prior to a Court session. See Federal Rule of Appellate Procedure 46 and Local Rule 46(a).

B. Discipline. Procedures to be followed in this Court are covered by Fed. R. App. P. 46(b) and the Rules of Disciplinary Enforcement for the Court of Appeals for the First Circuit. Copies of the latter rules may be obtained at the Clerk's Office.

Internal Operating Procedure III. Initial Procedures

A. Appeals, Petitions for Review and Fees. In cases appealed from the district court the notice of appeal is filed in the district court in accordance with the Fed. R. App. P. and the docketing fees required by 28 U.S.C. 1913 are paid to the district court clerk. In administrative agency cases and petitions for mandamus, the \$100.00 docketing fee is paid to the Clerk of the Court of Appeals at the time the petition is filed in the Court of Appeals.

B. Ordering Transcripts. The transcripts must be ordered from the court reporter(s) on Transcript Order/Report Form which is available from the district court clerks and from the Clerk of the Court of Appeals. The order for the transcript must be given within 10 days after the filing of the notice of appeal and satisfactory financial arrangements must be made with the court reporter. See Fed. R. App. P. 10, 11; Local Rule 10. Counsel are required to complete these arrangements before the copy of the Transcript Order/Report is filed with the Court of Appeals. If counsel are being paid under the Criminal Justice Act (“CJA”), the CJA form must first be approved and then attached to the Transcript Order/Report Form.

C. Reporter's Duties. If the reporter cannot complete the transcript within 30 days after the order, then pursuant to Fed. R. App. P. 11(b) the reporter must file a motion in the Court of Appeals for an enlargement of time for filing the transcript. Counsel for appellants, however, would be well advised to check with the court reporter to see that the transcript will be timely filed and that the reporter is making such a request, if it will not be so completed.

Internal Operating Procedure IV. Docketing Procedures

A. Docketing. Pursuant to Fed. R. App. P. 12, appeals are docketed in the Court of Appeals upon receipt from the Clerk of the district court of copies of the notice of appeal and the district court docket entries. If the docketing fee has not been paid in the district court, the failure to pay is grounds for dismissal of the appeal pursuant to Local Rule 3. Local Rule 3 also requires the filing of a Docketing Statement within 14 days of filing the Notice of Appeal.

B. Screening. In the First Circuit a preliminary screening takes place upon the docketing of the appeal and procedural defects are often called to the Court's attention for sua sponte action by the Court including dismissal of the appeal.

C. Briefing. Upon the filing of the record on appeal, including any transcripts required to complete the record, the Clerk's Office sends to counsel a notice advising appellant of the filing dates for the statement of issues, designation of contents of appendix, the brief and the appendix. After the brief for appellant is filed, the Clerk's Office likewise gives notice to the appellee.

Internal Operating Procedure V. Motion Procedures

A. General. In accordance with Fed. R. App. P. 27(d) (3), all motions must be accompanied by 3 copies, and a proof of service showing the type of service that was made, i.e., by mail or by hand delivery. The date of service establishes the due date for filing the response per Fed. R. App. P. 27(b).

B. Processing. All motions must be filed with the clerk. The single judge matters are transmitted to a single judge and the matters calling for three judge action are transmitted to a three judge panel. The motion judge and the motion panel duties are rotated among the active judges. All motions are decided without oral argument, unless the Court orders otherwise. The motions are submitted to the Court after the return times provided in the Fed. R. App. P. have run except for (1) routine procedural motions which are usually processed forthwith, and (2) emergency motions which may be handled on an expedited basis.

C. Emergencies. If counsel anticipates that a matter may arise requiring emergency action by the court outside of ordinary business hours, the court's local rules advise counsel to contact the Clerk's Office at the earliest opportunity to discuss the matter. Depending on the circumstances, the Clerk's Office, in consultation with the duty judge and the Staff Attorney's Office, may make special arrangements for after hours filings and responses, issuance of orders after hours, and similar matters.

Internal Operating Procedure VI. Briefs and Appendices

A. General. Fed. R. App. P. 32 applies to the form of briefs, appendices and other papers filed in the Court of Appeals. The new rule, adopted in December, 1998, eliminates page limitations and instead imposes type size and word or line limitations. The provisions of the rule should be consulted but, as a general matter, the following will be accepted:

1. Monospaced type : 12 point Courier or New Courier; or
2. Proportional type: 14 point Times New Roman or CG Times.

B. Modifications. The following modifications of the Fed. R. App. P. apply in the First Circuit:

1. One copy of the brief or petition must be filed on a computer generated disk. See Local Rule 32.
2. Only 10 copies, including the disk, need be filed.

C. Deferred Appendix. Note the Local Rules of this Court do not provide for the proceeding on a deferred appendix pursuant to Fed. R. App. P. 30(c). If special leave to proceed under this

method is sought, and the Court grants such leave, the leave will be conditioned upon a shorter time schedule than the Fed. R. App. P. generally allow so that the processing of the appeal will not take any longer time than it would under the regular procedure.

D. Defaults. If the appellant fails to file the brief and appendix on time, the Clerk is authorized to enter an order dismissing the appeal, and when an appellee is in default as to filing a brief, the appellee will not be heard at oral argument. The party in default may remove the default by showing special circumstance justifying the failure to comply. Any motion to set aside a dismissal should be filed within ten days. See Local Rule 45.

Internal Operating Procedure VII. Screening and Calendaring

A. General. Initially, the staff attorney reviews the briefs in the cases the Clerk has assigned for a particular session. If a panel of 3 judges, in accordance with Fed. R. App. P. 34 and after consultation with the staff attorney, is of the opinion that a case does not warrant oral argument, the Clerk so advises counsel. Shortly after the decision as to hearing is made, the amount of time to be allotted for oral argument is also set by the Court. Before the hearing list is finally established, the Clerk notifies the parties by letter of the proposed date for hearing the case so that counsel may contact the Clerk if it appears that a scheduling conflict exists.

B. Expedited Schedule. Expedited scheduling is provided automatically in those cases where it is required by statute, such as recalcitrant witness cases. In other cases a request for expedited processing may be filed, but the motion should be made shortly after the case is docketed in the Court of Appeals.

C. Dates of Sessions. In January through June, and October through December, the Court usually sits for one week starting on the first Monday of the month. In either July or August, the court sits for one week. In September the Court starts on the Wednesday after Labor Day and sits for the 3 days in that week and the 5 days in the following week. In November and March the Court sits two weeks, with one week in Boston and one week in Puerto Rico.

D. Judges and Case Assignment. In accordance with long-standing practice, cases are assigned to panels on a random basis provided, however, that a case may be assigned to a particular panel or to a panel including a particular judge in the following circumstances:

- 1) where the case is a sequel to, or offshoot of, a case previously decided by the court (e.g., following a remand);
- 2) where the case was presented to the duty panel in the regular course of duties, see, e.g., Bui v. DiPaolo, 170 F.3d 232, 238 (1st Cir. 1999) ("[a]s an administrative measure, we advise litigants that, to the extent practicable, the panel that determines whether to issue a complementary COA also will be the panel that adjudicates the appeal on the merits"), cert. denied, 529 U.S. 1086 (2000);

- 3) where a case has been assigned to a panel, but scheduling changes (e.g., postponement of oral argument) or changes in the procedural handling of the case (e.g., a case intended for summary disposition is thereafter set for oral argument) require rescheduling;
- 4) where a case has been assigned to a panel, but the subsequent recusal of a judge (or other unavailability of a judge, e.g., due to illness) makes it appropriate to transfer the case to a different panel or to find a replacement judge.

No other non-random assignments of cases shall be made except for special cause and with the concurrence of the duty judge.

E. Judges and Case Assignment in Capital Cases.

- 1) Capital Case Panel. Capital cases, as defined in Local Rule 48, shall be randomly assigned to a panel of three judges, of whom at least one is an active judge of this Court, from the capital case pool. The capital case pool of judges shall consist of all active judges of this Court and those senior judges who have filed with the Clerk a statement of willingness to serve on capital case panels.
- 2) Duties of Capital Case Panel. Notwithstanding the practices identified in Internal Operating Procedure V, the assigned capital case panel handles all matters relating to the case, including but not limited to, the merits of a direct appeal, all case management, all petitions for collateral review, motions for stay of execution, motions to vacate a stay of execution, applications for a certificate of appealability, motions for an order authorizing the district court to consider a second or successive application for habeas corpus, appeals from subsequent petitions, and remands from the United States Supreme Court.

F. Timing. The Court will hear up to six cases per day. Generally, it is the practice of this Court to schedule cases in which the brief for appellee is filed by the fifteenth day of one month, so as to have the case screened and assigned to the list for hearing or submission on the second month thereafter.

Internal Operating Procedure VIII. Oral Argument

A. General. The Court establishes the times allotted for oral argument and the Clerk so notifies the parties at least one week before argument starts. Though the calendar is not called at the beginning of the court day, counsel should be present at the opening or make arrangements to ascertain whether there is any change in the order of the cases at the opening of Court. It is counsel's responsibility to be present and be prepared should earlier cases take less time for oral argument than was anticipated. See Local Rule 34.1.

B. Disclosure of Panel in Advance of Oral Argument. The names of the judges on each panel may be disclosed for a particular session seven (7) days in advance of the session. Once the panel is made public, the Court will not normally grant motions for continuances or for a change in argument date during the same session.

C. Lights. The signal lights are located on the Clerk's desk and they are set so that an amber light turns on when there are five minutes left and it remains on until the red light turns on indicating that the time for oral argument has ended.

D. Rebuttal. Extended rebuttal is not encouraged, and the court normally expects rebuttal to be used only where an unexpected matter has been raised and then usually not more than a minute is allowed.

E. Recording. Oral arguments in all cases are tape recorded for the use of the Court. Such tape recordings are not part of the permanent record of the case and are erased for reuse of the tape six months after the issuance of the mandate. A copy of a tape recording of an oral argument may be obtained within that time frame by submitting a request in writing to the Clerk with a check for \$20.00.

Internal Operating Procedure IX. Opinions & Judgments

A. Processing. When the opinion of the Court (and concurring and dissenting opinions, if any) are completed, they are turned over to the Clerk for reproducing and release. Copies of the opinion and copies of the judgment are sent to one counsel for each side. They are also released in electronic format on the same day.

B. Publication. The manner of deciding whether an opinion is to be published and the Court's policy with respect to publication are set forth in Local Rule 36.

C. Electronic Access. The Court's dockets and opinions are available electronically through the PACER network supported by the Administrative Office for the United States Courts. Details are available in the Clerk's Office.

Internal Operating Procedure X. Petitions for Panel Rehearing and Petitions for Hearing or Rehearing En Banc

A. General. Fed. R. App. P. 40 and 35 should be consulted with respect to the procedures. Petitions for rehearing are intended to bring to the attention of the panel claimed errors in the opinion and they are not to be used for reargument of an issue previously presented.

B. No Response. Unless the court requests, no response to a petition is permitted.

C. En Banc Processing. A petition for a hearing or rehearing en banc is submitted by the Clerk to the panel that heard the case and to the other active First Circuit judges. A petition for rehearing en banc will also be treated as a petition for rehearing before the original panel.

D. Vacation of Previous Opinion and Judgment. Usually when an en banc rehearing is granted, the previous opinion and judgment will be vacated.

Internal Operating Procedure XI. Complaints Against Judges

The procedure for filing complaints against judges is set forth in the First Circuit Council Rules for Processing Complaints of Judicial Misconduct. A copy of these Rules may be obtained from the Clerk of this Court.

Internal Operating Procedure XII. Circuit Judicial Conferences

In the First Circuit, generally Circuit Judicial Conferences are conducted in two different formats. Pursuant to 28 U.S.C. Sec. 333, the Chief Judge of the Circuit summons annually the Circuit, District, and Bankruptcy Judges of the Circuit in active service. Every judge summoned shall attend and, unless excused by the Chief Judge, shall remain throughout the conference. In the last few years, all conferences have been held in the fall of the year.

One type of conference, often called a "mini-conference", is designed primarily for judicial officers and certain court personnel. In addition to the judges and bankruptcy judges, others who attend are magistrates, the circuit executive, clerks, federal public defenders and representatives (usually one each) of the Administrative Office of the United States Courts, the Federal Judicial Center and the Attorney General of the United States. These conferences are conducted by the Court of Appeals judges under the leadership of the Chief Judge, or a committee of circuit judges appointed by the Chief Judge and the Circuit Executive.

The other format of conference is the full scale conference which usually is conducted every other year. Those who attend these conferences include those listed above in connection with the limited conferences and, pursuant to Local Rule 47.1, others such as presidents of the state and commonwealth bar associations, deans of accredited law schools, and the United States Attorneys. In addition, a substantial number of lawyers are invited to attend these full scale conferences. In this Circuit, there is no formal membership other than those who are required to attend pursuant to 28 U.S.C. Sec. 333.

In the case of the full scale conference, the Chief Judge of the Circuit, in consultation with the circuit judges, selects the approximate dates for the conference and assigns one of the districts in the circuit to act as a host district for the conference. The Chief Judge of the host district appoints a Planning Committee to organize and conduct the Judicial Conference. This is

usually done at least two years in advance of the holding of the conference. Thus, in June of 1987, Rhode Island was selected as the host district for the October 1989 full scale conference.

The selection of the attorney invitees to a full scale conference is handled in the following manner. After the Planning Committee has selected a site and received the approval of the Chief Judge of the circuit, the number of invitees that the facilities at the selected site can accommodate is determined, and a specific number of slots for attendees is assigned to each district (roughly based on the proportion of the number of judges in a given district to the total number of judges in the First Circuit, plus an allotment for the Court of Appeals). The district court chief judges, in consultation with their respective judges, supply lists of nominees to receive invitations to attend. Based on these lists, invitations are then extended by the Chief Judge of the Circuit to the listed members of the Bar.

The office of the Circuit Executive assists the Planning Committees in all aspects of their work. The Circuit Executive also provides the point of contact for continuity purposes and is the custodian of the Judicial Conference Fund, as well as the secretary of the conferences.

Because of the many activities that must be planned for at a full scale conference, it is important that a Planning Committee consist of both members of the Bar and judges of the host court. Frequently, members of the Clerk's Office, as well as the judges' staffs can assist.

Internal Operating Procedure XIII. Notification of Changes or Notifications of the Court's Local Rules and Internal Operating Procedures

Changes in the Local Rules of this Court or its Internal Operating Procedures will be publicized by circulating for comment the entire text of the proposed change to the following state legal publishers:

- a. Massachusetts Lawyers Weekly, 41 West Street, Boston, Massachusetts 02111.
- b. Rhode Island Lawyers Weekly, c/o Massachusetts Lawyers Weekly, 41 West Street, Boston, MA 02111.
- c. New Hampshire Bar News 112 Pleasant Street, Concord, New Hampshire 03301.
- d. Maine Bar Journal, P.O. Box 788, Augusta, Maine 04332.
- e. Puerto Rico Bar Association, P.O. Box 1900, San Juan, PR 00903.

Notice of the changes will also be placed in all federal court bulletin boards and to all state bar associations within the Circuit. Comments should be forwarded to the Clerk's Office within thirty days from the date of the notice.