Practice Guide: How to Appeal a Case to the United States Court of Appeals for the Ninth Circuit

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This article addresses the basic procedure for handling an appeal before the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit is the largest of the federal appellate courts. It covers federal trial courts in nine states (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) plus the territories of Guam and the Northern Mariana Islands. Because of its size and the breadth of issues that arise within it, the Ninth Circuit has developed many distinctive local rules and procedures. Some differ noticeably from those in other circuits.

Let's say you recently lost a civil lawsuit in one of the federal district courts in the Ninth Circuit. You may consider challenging that loss through an appeal. There, a panel of three judges will consider the trial court's ruling and decide whether any legal errors require correction.

But while filing a compelling brief is essential, it won't be enough to simply point out the mistakes made by the trial court to win. There are many other important procedural steps a party must take before the Ninth Circuit will even consider the merits of the case. The failure to follow those steps could have dramatic consequences, including dismissal of the appeal. It is just as important to satisfy all these procedural hurdles to have a chance of winning on the merits.

Let's walk through those steps.

Notice of Appeal

To initiate an appeal, the party (usually called an "appellant") must file a Notice of Appeal. This is a short, straightforward document that provides basic information about the case and what type of appeal will be at issue. Indeed, the Ninth Circuit includes a fillable Notice of Appeal form on its website (Form 1).

Even though it is a simple document to prepare, the Notice of Appeal is a critical one and comes with strict deadlines. In most civil cases, the appellant must file a Notice of Appeal within 30 days of entry of the judgment or appealable order. See Fed. R. App. P. 4(a)(1)(A). When the United States or a federal officer or agency is a party, that deadline extends to 60 days. See Fed. R. App. P. 4(a)(1)(B).

The Notice of Appeal is filed in the district court where the case was originally heard, not in the Ninth Circuit. See Fed. R. App. P. 3(a)(1); 9th Cir. R. 3-1. The district court clerk will then transmit the notice to the Ninth Circuit, which dockets the case and assigns it a case number.

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Do not miss this deadline! Failure to file a timely Notice of Appeal will likely result in the dismissal of the appeal, with no further remedy.

For a more detailed discussion, you can read our article about calculating the deadline for the Notice of Appeal in Federal Court here.

Representation Statement

Along with the Notice of Appeal, the appellant must file a Representation Statement (Form 6) that identifies all parties to the action (not just the parties to the appeal), along with the names, addresses, and telephone numbers of their respective counsel, if known. See Fed. R. App. P. 12(b); 9th Cir. R. 3-2(b). To the extent possible, the statement should identify appellate counsel for all parties, even if appellate counsel is different from counsel below. See 9th Cir. R. 3-2 (Advisory Committee Note).

The Representation Statement is the Court's primary tool for determining the caption, the appellate docket, who receives notice of the appeal and initial schedule, and who may submit filings. As the Advisory Committee Note puts it, when any party or counsel is not accurately listed, "significant problems, such as lack of notice or waiver of arguments, can result." Confirm the parties and counsel before filing and notify the Court immediately of any updates.

Mediation Questionnaire

In most civil appeals, the appellant must file a Mediation Questionnaire within 5 days of the case being docketed. See 9th Cir. R. 3-4(a). (Appellees may also file one but are not required to.) This is a fast turnaround, and it is easy to miss while focusing on other matters in the early days of the appeal.

(Note that the deadline was 7 days until the Ninth Circuit amended Rule 3-4 effective December 1, 2024 to shorten it to 5 days. Older guidance, including some forms and court webpages, may still say 7 days.)

The Mediation Questionnaire is a fillable form (Form 7) that provides the Ninth Circuit's Circuit Mediators with information about the appeal to help them assess whether the case is a candidate for the Court's settlement program. See Fed. R. App. P. 33; 9th Cir. R. 33-1. Counsel need not worry about preserving issues in the Mediation Questionnaire. The form's sole purpose is to inform the Mediation Office. But failure to file the questionnaire on time can result in dismissal of the appeal under 9th Cir. R. 42-1, so it should not be ignored.

The Ninth Circuit's mediation program is robust and unusually active for a federal appellate court. The Court may direct, sua sponte or on a party's request, that the parties and counsel attend a settlement conference, whether in person or by telephone. See 9th Cir. R. 33-1(b); 9th Cir. R. 33-1 (Advisory Committee Note (a)). Where attendance is ordered, it is mandatory. In practice, the Circuit Mediators screen incoming appeals through the Mediation Questionnaire and reach out to counsel in cases that appear amenable to settlement. Telephonic conferences are informal and typically last 30 to 60 minutes, with the goal of assessing whether the appeal might benefit from formal mediation. Counsel may also affirmatively request a conference, confidentially if desired, by contacting the Chief Circuit Mediator. See 9th Cir. R. 33-1 (Advisory Committee Note (a)).

Even if you think your case is not a good candidate for settlement, plan to participate in good faith. The Court takes mediation seriously, and the program has settled thousands of appeals. Communications during the mediation process are confidential, and the Circuit Mediators do not disclose mediation communications to the judges. See 9th Cir. R. 33-1(c). The Circuit Mediators can also help with things like informal extension requests if the parties are making progress towards settlement.

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One distinctive option worth knowing about appears in 9th Cir. R. 33-1(d). Where parties have otherwise settled the case, they may stipulate to submit one or more remaining issues to an Appellate Commissioner for a binding determination. The matter then proceeds with abbreviated briefing, a guaranteed opportunity for oral argument before the Commissioner, and a final, nonreviewable decision. Cases are ordinarily referred to the Appellate Commissioner through the Court's mediation program, so counsel interested in this path should raise it with the Circuit Mediators. See 9th Cir. R. 33-1 (Advisory Committee Note (c)). This is a streamlined, lower-cost path that most other circuits do not offer, and it can be valuable where settlement has stalled on a discrete legal point.

Record and Transcripts

An important aspect of any appeal is the "record," which consists of the materials from the district court that the appellate court will consider in deciding the case.

After the Notice of Appeal is filed, the district court clerk will transmit the docket entries to the Ninth Circuit. See Fed. R. App. P. 11(e). The appellant must then take two important steps. First, ensure that all necessary transcripts of proceedings before the district court have been ordered. Second, prepare the appellant's Excerpts of Record, discussed in the next section.

Transcripts. Within 14 days of filing the Notice of Appeal, the appellant must either order transcripts of all relevant proceedings not already on file or file a certification stating that no transcript will be ordered. See Fed. R. App. P. 10(b)(1); 9th Cir. R. 10-3. Filing the certification is common, typically because either (i) all transcripts have already been ordered (and thus prepared) while the parties were litigating in the district court, or (ii) no hearings were held and thus no transcripts would exist (for example, when a complaint was dismissed on a motion to dismiss without a hearing).

A note on late transcripts. Court reporters do not always deliver transcripts on time, and when they do not, the Ninth Circuit places the burden on the appellant to act. Under 9th Cir. R. 11-1.1, the transcript must be filed in the district court within 30 days of the Transcript Designation/Ordering form (or as set by the Court's scheduling order, whichever is later). Reporters often request extensions, which the Ninth Circuit routinely grants. But if the reporter misses the deadline and has not obtained an extension, the appellant must file a Notice of Reporter Default within 21 days after the transcript due date. See 9th Cir. R. 11-1.2. The notice must state when the transcripts were designated, when financial arrangements were made, the hearing dates for which transcripts have not been prepared, and the name of the reporter assigned to those hearings. Importantly, before filing the notice, the appellant must contact the court reporter and the reporter's supervisor in an effort to cause preparation of the transcripts and must include an affidavit or declaration describing those contacts. A copy of the notice and the affidavit must be served on the supervisor. The Court treads carefully when dealing with reporters, as should practitioners, so including all of the required recitals is important. One useful safety valve appears in the Advisory Committee Note to Rule 11-1.2: if the reporter has filed a motion for an extension, the appellant is relieved of the notice obligation as to that reporter (though notice is still required for any other reporter in default).

Excerpts of Record: A Distinct Ninth Circuit Feature

Here is one of the most important differences between practice in the Ninth Circuit and most other federal appellate courts. The Ninth Circuit does not require parties to prepare a joint appendix under Federal Rule of Appellate Procedure 30. Instead, the parties prepare Excerpts of Record under 9th Cir. R. 30-1.

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The Excerpts have a specific structure under the rule. There are up to three types, each filed alongside a corresponding brief.

Excerpts of Record are filed by the appellant with the opening brief. See 9th Cir. R. 30-1.2(a).
Supplemental Excerpts of Record are filed by the appellee with the answering brief, but only if the answering brief refers to documents not included in the appellant's Excerpts. See 9th Cir. R. 30-1.2(b).
Further Excerpts of Record are filed by the appellant with the reply brief, but only if the reply brief refers to documents not already in the Excerpts or Supplemental Excerpts. See 9th Cir. R. 30-1.2(c).
The structure of the Excerpts also matters. Under 9th Cir. R. 30-1.4(a), Volume 1 must contain all decisions being appealed (whether oral or written, final or interim), arranged in reverse chronological order by file date. Unless the entire Excerpts will be a single volume of no more than 300 pages, Volume 1 should contain only those decisions and nothing else. Additional volumes contain the other portions of the record that are relevant to deciding the appeal, also arranged in reverse chronological order. See 9th Cir. R. 30-1.4(b). Sealed documents go in a separate, final volume. See 9th Cir. R. 30-1.4(d).

The Excerpts also require a separately bound Index Volume. Under 9th Cir. R. 30-1.5(a), every set of Excerpts must be accompanied by an Index Volume listing each document in order, including a citation to where the document appears in the lower court record and its volume and page number in the Excerpts. The Court asks that the Index use descriptive labels. The Advisory Committee gives a useful example: "Exhibit 12 – 2018 Deposition of Jeanne Smith" is more helpful than "Exhibit 12 to motion for summary judgment." With the Index Volume in place, the individual numbered volumes no longer include their own tables of contents.

One related mechanical limit: no volume of Excerpts may exceed 300 pages. See 9th Cir. R. 30-1.5(b). If the entire set, including Index and caption pages, is 300 pages or less, the whole submission may be filed as a single volume. Otherwise, plan for multi-volume Excerpts and structure pagination accordingly.

Four other points are worth highlighting:

Citations. Every assertion in the briefs regarding matters in the record, with the narrow exception of "undisputed facts offered only for general background," must be supported by a citation to the Excerpts of Record, not directly to the district court docket. See 9th Cir. R. 28-2.8. The Advisory Committee Note is blunt. "The parties should not expect the Court to search through the district court record for the documents that support their arguments on appeal." The citation format is prescribed by 9th Cir. R. 30-1.6: [volume]-ER-[page], omitting the volume number if there is only one volume. So, a citation might read 2-ER-12 or 4-ER-874–76. Supplemental Excerpts use SER in place of ER. Further Excerpts use FER. Where multiple parties on the same side submit separate Excerpts, include a unique identifier such as 1-JonesER-59. Plan ahead so the citations and the Excerpts are built in tandem.

Scope. Include the judgment or order appealed from, any other orders sought to be reviewed, any pertinent jury instructions, and the portions of the record cited in the briefs. Legal memoranda and briefs from the district court ordinarily are not included unless waiver, forfeiture, or procedural history is at issue. See 9th Cir. R. 30-1.4 (Advisory Committee Note).

Filing mechanics. The Excerpts are filed separately from the brief, submitted electronically at the same time as the brief, and not in paper unless the Court specifically requests paper copies. See 9th Cir. R. 30-1.2(e) and (f).

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End of the last unsealed volume. Two items must appear at the very end of the last non-sealed volume of the initial Excerpts of Record: the Notice of Appeal and the lower court docket sheet. See 9th Cir. R. 30-1.4(f). If the appeal includes trial exhibits capable of submission in PDF format, those exhibits go immediately before the Notice of Appeal and docket sheet at the end of the final unsealed volume, or, if appropriate, in the final sealed volume. See 9th Cir. R. 30-1.4(c). This ordering convention is easy to overlook and is one of the more common compliance errors in Ninth Circuit Excerpts.

The Court enforces these requirements. Non-compliant Excerpts can be rejected, and counsel can be sanctioned under the Court's general sanctions authority. See 9th Cir. R. 46-2. The Excerpts are not a perfunctory submission.

Appellant's Opening Brief

The parties submit substantive briefing on the relevant law and facts to assist the Court in deciding how to rule on the merits of the appeal. There are specific requirements about timing, length, and contents that each brief must adhere to.

The appellant goes first, filing an opening brief. The Clerk of Court will set a briefing schedule after the appeal is docketed, though the opening brief is typically due 40 days after the record is filed. See Fed. R. App. P. 31(a)(1).

Length. Here is another Ninth Circuit quirk worth noting. When the Federal Rules were amended in 2016 to reduce the word limit for principal briefs from 14,000 to 13,000 words, the Ninth Circuit opted out of the reduction. Under 9th Cir. R. 32-1(a), the appellant's opening brief and the appellee's answering brief may each be up to 14,000 words. A brief whose length is calculated by word count must be accompanied by Form 8, the Ninth Circuit's certificate of compliance form. See 9th Cir. R. 32-1(e).

Form. Briefs must be on 8½ by 11 inch paper, double-spaced, with at least 1-inch margins on all four sides. See Fed. R. App. P. 32(a)(4). Long quotations of more than two lines may be indented and single-spaced, and headings and footnotes may also be single-spaced. The text must use either a proportionally spaced face of 14 points or larger (with serifs in the body, though sans-serif may be used in headings and captions), or a monospaced face with no more than 10½ characters per inch. See Fed. R. App. P. 32(a)(5). Case names must be italicized or underlined. See Fed. R. App. P. 32(a)(6).

Contents. The Federal Rules require the appellant's brief to "contain, under appropriate headings and in the order indicated" the following items:

- a disclosure statement if required by Rule 26.1;
- a table of contents, with page references;
- a table of authorities (cases, alphabetically arranged, statutes, and other authorities) with references to the pages of the brief where they are cited;
- a jurisdictional statement, setting out the bases for district court and appellate jurisdiction, the filing dates establishing the timeliness of the appeal, and an assertion that the appeal is from a final, appealable order;
- a statement of the issues presented for review;
- a concise statement of the case, including the relevant facts, procedural history, and rulings presented for review, with appropriate references to the record;
- a summary of the argument;

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- the argument itself, including a concise statement of the applicable standard of review for each issue (which may appear in the discussion of the issue or under a separate heading placed before it);
- a short conclusion stating the precise relief sought; and
- a certificate of compliance under Rule 32(g)(1).

See Fed. R. App. P. 28(a).

The Ninth Circuit's Rules add several additional requirements. Three deserve particular attention.

First, the brief must include a Statement of Related Cases on the last page identifying any known related case pending in the Ninth Circuit. See 9th Cir. R. 28-2.6. Cases are deemed related if they: (a) arise out of the same or consolidated cases in the district court or agency; (b) raise the same or closely related issues; or (c) involve the same transaction or event. For each related case, the statement must include the name and docket number and describe the relationship. The statement is treated as a certificate of counsel and does not count against the 14,000-word limit. See 9th Cir. R. 28-2.6; 9th Cir. R. 32-1(c). The Advisory Committee Note adds a useful carve-out: where counsel knows of a large number of related cases (for instance, a flood of similar immigration or class-action appeals), counsel need not list all of them if doing so would not assist the Court or other parties. If there are no related cases, no statement is required. But check before filing, because the Ninth Circuit handles many related-issue appeals in coordinated fashion.

Second, under 9th Cir. R. 28-2.7, the brief must contain a Statutory Addendum with the verbatim text of "pertinent constitutional provisions, treaties, statutes, ordinances, regulations or rules." The addendum may follow the statement of issues or be bound separately. If bound with the brief, it must be separated from the body of the brief by a distinctively colored page. (Note: if the statutory addendum is included in the brief it counts against your word limit; if it is separate, it does not count.) If the same statutes or authorities were already submitted with a previous brief or addendum in the appeal, counsel need not resubmit them. A simple cross-reference suffices: "Except for the following, all applicable statutes are contained in the brief or addendum of [party]." The Advisory Committee Note emphasizes that the addendum is meant to provide the Court with convenient access to the authority that is actually disputed or not commonly known, not every authority cited in the brief. Keep it focused.

Third, the brief must include record citations and a standard-of-review statement that goes beyond what Rule 28 requires. Under 9th Cir. R. 28-2.8, every assertion about matters in the record, except for undisputed facts offered only for general background, must be supported by a citation to the Excerpts of Record, not directly to the district court docket. The Advisory Committee Note to Rule 28-2.8 is explicit that direct citations to the underlying record are otherwise prohibited. Separately, under 9th Cir. R. 28-2.5, the appellant must, as to each issue, state where in the record the issue was raised and ruled on and identify the applicable standard of review. Where the ruling on appeal is one that required an objection at trial to preserve review (a typical example is the admission or exclusion of evidence, or the giving or refusal of a jury instruction), the brief must also state where in the record the objection and the ruling appear.

Counseled briefs in the Ninth Circuit are filed electronically through the Court's Appellate Electronic Filing System. The system is separate from the district courts' CM/ECF and requires a separate registration. Paper copies are not submitted unless the Court specifically requests them. See 9th Cir. R. 25-5(a) and (c); 9th Cir. R. 31-1.

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One last point worth noting on briefing in 2026. The Ninth Circuit added a new Advisory Committee Note to Rule 32-1 effective December 1, 2025. It does not impose generative-AI-specific requirements, but it confirms that "the signature is an attestation that the signer has reviewed the filing and is responsible for the accuracy of its contents," regardless of whether the filing was prepared by the signer personally, a subordinate, or with the assistance of generative AI. The Ninth Circuit, like all courts, expects counsel to verify everything before signing, including AI-assisted citations and quotations.

Appellee's Answering Brief

After the appellant serves its brief, the appellee must serve and file its answering brief within 30 days after the appellant's brief is served. See Fed. R. App. P. 31(a)(1). One nuance is worth knowing. Under 9th Cir. R. 31-2.1(a), if the appellant files its brief before the due date, the appellee's deadline does not move forward. The scheduled due date controls. Rule 31's default 30-day calculation governs only where the Court has not set specific due dates.

If an appellee fails to file an answering brief, the appellee "will not be heard at oral argument unless the court grants permission." Fed. R. App. P. 31(c).

As with the opening brief, the appellee's answering brief may not exceed 14,000 words. See 9th Cir. R. 32-1(a). The form requirements are otherwise the same.

The contents requirements are similar to those for the opening brief. The appellee's brief "must conform to the requirements of Rule 28(a)(1)–(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement: (1) the jurisdictional statement; (2) the statement of the issues; (3) the statement of the case; and (4) the statement of the standard of review." Fed. R. App. P. 28(b). In practice, most appellees do submit at least a brief restatement of jurisdiction, the issues, and the case, because the appellant's framing is rarely the appellee's preferred framing.

The Ninth Circuit's Local Rules add the same additional requirements that apply to the opening brief: the Statement of Related Cases under 9th Cir. R. 28-2.6 (though where the appellee has no related cases to add beyond those already identified by the appellant, the appellee need not include a statement), the Statutory Addendum under 9th Cir. R. 28-2.7 (where the appellee relies on additional authority not already provided), and the record-citation and preservation requirements under 9th Cir. R. 28-2.5 and 28-2.8.

The appellee should also file Supplemental Excerpts of Record at this time if there are additional record materials the panel should see that were not included in the appellant's Excerpts.

Appellant's Reply Brief

The appellant may serve and file a reply brief within 21 days after service of the appellee's answering brief. See Fed. R. App. P. 31(a)(1); 9th Cir. R. 31-2.1(a). One floor on this deadline: a reply brief must be filed at least 7 days before oral argument, unless the Court for good cause allows a later filing. See Fed. R. App. P. 31(a)(1). This compresses the 21-day window when the Court has scheduled an early argument. Check the Notice of Argument promptly after it is issued and recalculate the reply deadline accordingly.

The reply brief may not exceed 7,000 words, half the length of the principal briefs. See 9th Cir. R. 32-1(b).

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Reply briefs in the Ninth Circuit, as everywhere, are most effective when they are tightly focused on the specific arguments the appellee actually advanced rather than re-arguing the opening brief.

The appellant should also file Further Excerpts of Record at this time if the reply brief refers to record materials that were not included in either the appellant's initial Excerpts or the appellee's Supplemental Excerpts. See 9th Cir. R. 30-1.2(c).

Extensions of Time: The Streamlined 30-Day Extension

One practitioner-friendly feature of Ninth Circuit practice is the streamlined extension of time under 9th Cir. R. 31-2.2(a). Where a party has not previously obtained an extension by written motion to file a particular brief, the party may obtain a single streamlined extension of up to 30 days to file that brief, without filing a written motion and without making any showing of diligence or substantial need. The eligibility limitation runs brief-by-brief, not appeal-by-appeal. The Clerk's approval of a streamlined extension for the opening brief does not preclude that party from later obtaining streamlined extensions for the answering, reply, or cross-appeal brief. See 9th Cir. R. 31-2.2 (Advisory Committee Note).

Parties registered for electronic filing simply request the extension online through the Court's Appellate Electronic Filing System using the "File Streamlined Request to Extend Time to File Brief" event. (It's so easy even an attorney can do it!) Parties not registered may complete Form 13 and mail it to the Clerk. See 9th Cir. R. 31-2.2(a). In either case, the request must be made on or before the brief's due date. There is no advance-notice or lead-time requirement. The Clerk approves requests that comply with the rule and provides a revised schedule. The Clerk also informs parties who are not eligible for the streamlined mechanism how to obtain relief through other means.

The streamlined extension is not available in: (1) cases that have been previously expedited; (2) cases in which a Notice of Oral Argument has issued; or (3) any brief filed in a Preliminary Injunction Appeal under 9th Cir. R. 3-3, an Incarcerated Recalcitrant Witness Appeal under 28 U.S.C. § 1826 and 9th Cir. R. 3-5, or a Class Action Fairness Act appeal under 28 U.S.C. § 1453(c). See 9th Cir. R. 31-2.2(a)(1) to (3). The streamlined event is also limited to opening, answering, reply and cross-appeal briefs. Any other deadline (for example, a petition for rehearing or a response to a motion) requires a written motion.

Any further extension beyond the streamlined 30 days, or any extension where the streamlined mechanism is unavailable, requires a written motion supported by a showing of diligence and substantial need. See 9th Cir. R. 31-2.2(b). Two timing points are worth flagging. First, the written motion must be filed at least 7 days before the brief is due. This is a meaningful change of pace from the streamlined extension's no-lead-time rule, and it is easy to miss for counsel who used the streamlined mechanism on an earlier brief and then turn to written motions on a later one.

Second, the motion must be supported by a declaration covering seven specified items, including (1) when the brief is due and was first due, (2) the length of the extension requested, (3) the reason for the extension, (4) the movant's representation of diligence, (5) opposing counsel's position, and (6) a certification that the court reporter is not in default with regard to any designated transcripts. See 9th Cir. R. 31-2.2(b)(1) to (7). That last item ties the extension process to Rule 11-1.2's reporter-default mechanism.

The Local Rule itself makes the bar plain: "a conclusory statement as to the press of business does not constitute a showing of diligence and substantial need." 9th Cir. R. 31-2.2(b). Multiple motions are disfavored, and the bar rises with each successive motion. See 9th Cir. R. 31-2.2 (Advisory Committee Note). Plan accordingly.

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Motions Practice

Motions practice in the Ninth Circuit is governed by Federal Rule of Appellate Procedure 27 and 9th Cir. R. 27-1 through 27-14. The Court allocates motions across three primary decision-makers, with the Clerk acting under delegated authority. The Appellate Commissioner handles routine procedural motions such as appointment, substitution, and withdrawal of counsel and motions for reinstatement, and may deny (but generally not grant) dispositive relief. Single judges may grant or deny most motions not otherwise excluded but may not dismiss or determine an appeal. Motions panels of three judges, assigned by the Clerk on a rotating monthly basis, decide substantive motions including motions to dismiss, motions for summary affirmance, motions for bail, and similar motions. A single motions panel is appointed for the entire circuit. See 9th Cir. R. 27-1 (Advisory Committee Note). There is no oral argument on motions unless the Court orders it. See Fed. R. App. P. 27(e).

Three practical points are worth flagging.

Position of opposing counsel. Unless precluded by extreme time urgency, counsel must make every reasonable attempt to contact opposing counsel before filing any motion and must either advise the Court of opposing counsel's position or explain the efforts made to obtain it. See 9th Cir. R. 27-1 (Advisory Committee Note (5)). This is the Ninth Circuit's analogue to a meet-and-confer requirement and is easy to miss by counsel new to the Circuit.

Motions for stays pending appeal are governed by Fed. R. App. P. 8 and 9th Cir. R. 27-2. Under Rule 8(a)(1), a party must ordinarily seek a stay from the district court first before asking the Ninth Circuit to grant one. The motion must satisfy the familiar four-factor test from Nken v. Holder, 556 U.S. 418 (2009): (i) likelihood of success on the merits, (ii) irreparable harm absent a stay, (iii) the balance of equities, and (iv) the public interest. One Ninth Circuit-specific timing rule: where the district court issues its own stay to permit an application to the Court of Appeals, the application must be filed in the Court of Appeals within 7 days after issuance of the district court's stay. See 9th Cir. R. 27-2.

Emergency motions are governed by 9th Cir. R. 27-3 and apply where "a movant needs relief within 21 days to avoid irreparable harm." The rule's mechanics are specific. The movant must: (a) make every practicable effort to notify the Court and opposing counsel and to serve the motion at the earliest possible time; (b) clearly state on the caption page the date by which relief is needed under the legend "Emergency Motion Under Circuit Rule 27-3"; and (c) submit a "Circuit Rule 27-3 Certificate" using Form 16, containing counsel contact information, the facts showing the emergency, an explanation of why the motion could not have been filed earlier, the manner and timing of notice to opposing counsel and the positions of the other parties if known, and an explanation of whether the relief was first sought in the district court (and if not, why the motion should not be remanded or denied). See 9th Cir. R. 27-3. Operationally, the Advisory Committee Note requires counsel to contact the Court's emergency motions unit by email (emergency@ca9.uscourts.gov) or by telephone (415-355-8020) before or upon filing the motion. Paper filing alone is not enough. The Note also makes the scope of the rule explicit. It is meant for parties facing significant harm, such as imminent removal, not for parties seeking procedural relief like more time to file a brief. The Court does not appreciate over-designation, and abuse of the rule undermines counsel's credibility for the entire appeal.

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Oral Argument

After the briefs are submitted, the Court determines whether oral argument is warranted. Under Fed. R. App. P. 34(a)(2), oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary because" (A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. Counseled civil appeals frequently receive argument, but the Court regularly decides cases on the briefs where the issues are well briefed and the answer is clear. Any party may file a statement explaining why oral argument should or need not be permitted. See Fed. R. App. P. 34(a)(1). Any party may also request, or all parties may stipulate, that a case be submitted on the briefs, but the panel must approve the request, and "Oral argument will not be vacated if any judge on the panel desires that a case be heard." See Fed. R. App. P. 34(f); 9th Cir. R. 34-1 to 34-3 (Advisory Committee Note (2)).

Place of hearing. Argument may be held at any location the Court designates, but cases are generally heard in the administrative unit where they arose. See 9th Cir. R. 34-1. In practice, the great majority of arguments are held at one of the Court's four primary courthouses in San Francisco, Pasadena, Seattle, and Portland. The Court also holds arguments in Honolulu, Anchorage, and occasionally other venues. Parties may state a preference for location, but the Court decides. Once the hearing date and place have been set, no change will be made absent a good-cause order from the Court, and within 14 days of the date set the bar climbs to "exceptional circumstances." See 9th Cir. R. 34-2. Counsel who cannot travel may request to appear by video. The Court has used video argument routinely since 2020 and continues to permit it in appropriate cases.

Priority. A party who believes the appeal is entitled to priority in scheduling under any statute or rule must inform the Clerk in writing at the earliest opportunity. See 9th Cir. R. 34-3. Civil appeals automatically receiving priority include recalcitrant witness appeals, habeas petitions, applications for temporary or permanent injunctions, appeals alleging deprivation of medical care or other cruel or unusual punishment in custody, and any appeal entitled to priority for good cause under 28 U.S.C. § 1657.

Time and structure. The time allowed for each side is set by the Clerk and stated in the Notice of Argument. See Fed. R. App. P. 34(b). In practice, allotments typically range from 10 to 20 minutes per side, depending on the complexity of the case. The appellant opens and, if desired, concludes the argument, reserving a portion of its time for rebuttal. See Fed. R. App. P. 34(c).

Two final points make oral argument in the Ninth Circuit distinctive. First, Ninth Circuit panels tend to be "hot." They ask a lot of questions, and they ask them early. Plan to get through your most important argument in the first two minutes, because you may not have an uninterrupted moment. Second, many Ninth Circuit oral arguments are livestreamed and posted to the Court's YouTube channel. This is a substantial public-facing element of practice in the Ninth Circuit, and counsel should prepare accordingly, not just for the panel, but for the broader audience that may watch the argument afterward, as the Ninth Circuit archives audio and video of past arguments as well.

Disposition: Opinions, Memoranda, and Orders

Under 9th Cir. R. 36-1, every written disposition is designated as an OPINION, a MEMORANDUM, or an ORDER. All opinions are published. No memoranda are published. Orders are not published except by order of the Court. Memoranda and orders do not identify their authors and are not designated "Per Curiam." See 9th Cir. R. 36-1.

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Opinions are the only written dispositions that have generally binding precedential effect within the Circuit. Under 9th Cir. R. 36-2, a written, reasoned disposition is designated as an opinion if it: (a) establishes, alters, modifies, or clarifies a rule of federal law; (b) calls attention to a rule of law that appears to have been generally overlooked; (c) criticizes existing law; (d) involves a legal or factual issue of unique interest or substantial public importance; (e) is a disposition of a case in which there is a published opinion by a lower court or administrative agency (unless the panel determines that publication is unnecessary for clarifying the panel's disposition); or (f) is accompanied by a separate concurring or dissenting expression and the author of that expression requests publication.

Memoranda are unpublished, reasoned dispositions the panel has determined do not warrant publication under Rule 36-2. Under 9th Cir. R. 36-3(a), unpublished dispositions and orders "are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." Unpublished dispositions issued on or after January 1, 2007 may be cited to the courts of the Circuit in accordance with Fed. R. App. P. 32.1. See 9th Cir. R. 36-3(b).

Orders are the residual category, used for any disposition that is not a reasoned opinion or memorandum: procedural rulings, dismissals, and similar dispositions. See 9th Cir. R. 36-1. A majority of the panel may specially designate an order for publication, in which case the order "may be used for any purpose for which an opinion may be used." See 9th Cir. R. 36-5.

Requesting publication. Under 9th Cir. R. 36-4, publication of any unpublished disposition may be requested by letter to the Clerk, stating concisely the reasons for publication. Notably, the rule places no restriction on who may submit a request. Anyone, including parties to the appeal, non-parties affected by the decision, and other interested observers, may write to the Clerk. The letter must be received within 60 days of issuance of the disposition. A copy of the letter must be served on the parties to the case, who have 14 days from the date of service to notify the Court of any objections. If granted, the unpublished disposition is redesignated as an opinion and becomes precedential. This is a rarely used but genuinely useful tool where a Ninth Circuit unpublished disposition clarifies or extends an important rule, and your client would benefit from binding circuit precedent.

Petition for Rehearing and Rehearing En Banc

After the Ninth Circuit issues its decision, either party may be unhappy with the outcome and may want to challenge that decision. A mechanism for doing so is a petition for rehearing or rehearing en banc.

Important note. The Federal Rules of Appellate Procedure were amended effective December 1, 2024, to consolidate the two rehearing provisions. Both panel rehearing and rehearing en banc are now governed by Federal Rule of Appellate Procedure 40. The text of former Rule 35 has been transferred entirely into Rule 40. The Ninth Circuit's Local Rules were updated to mirror that change. Former 9th Cir. R. 35-1 through 35-4 are now 9th Cir. R. 40-1 through 40-4. If you are working from older forms or sample briefs, double-check the rule citations.

Under the consolidated rule, a party may seek panel rehearing, rehearing en banc, or both. Where the party seeks both, the petitions must be filed as a single document. See Fed. R. App. P. 40(a). The cover of the petition must state whether it seeks panel rehearing, rehearing en banc, or both, and the petition must be accompanied by a copy of the panel's order, memorandum, or opinion being challenged. See 9th Cir. R. 40-1(a), (d). The rule frames the two mechanisms differently. Panel rehearing is the "ordinary means of reconsidering a panel decision," while "rehearing en banc is not favored." Fed. R. App. P. 40(a).

Petition for panel rehearing. A petition for panel rehearing asks the same three-judge panel to reconsider its decision. The petition must "state with particularity each point of law or fact" that the petitioner believes the Court has overlooked or misapprehended and must argue in support. Fed. R. App. P. 40(b)(1). The petition must be filed within 14 days of entry of judgment. See Fed. R. App. P. 40(d)(1). The deadline extends to 45 days in civil cases where one of the parties is the United States, a U.S. agency, a U.S. officer or employee sued in an official capacity, or a current or former U.S. officer or employee sued in an individual capacity for an act in connection with federal duties. See Fed. R. App. P. 40(d)(1)(A) to (D).

Petition for rehearing en banc. A petition for rehearing en banc asks the Court to review the decision through its en banc procedure. See Fed. R. App. P. 40(b)(2). It is subject to the same 14-day (or 45-day federal-party) deadline as a panel rehearing petition.

The substantive standard is intentionally demanding. The petition must begin with a statement that one of four grounds is satisfied:

(A) the panel decision conflicts with a decision of the Ninth Circuit, and the full court's consideration is necessary to secure or maintain uniformity of the Court's decisions (with citation to the conflicting case or cases);
(B) the panel decision conflicts with a decision of the U.S. Supreme Court (with citation to the conflicting case or cases);
(C) the panel decision conflicts with an authoritative decision of another United States court of appeals (with citation to the conflicting case or cases); or
(D) the proceeding involves one or more questions of exceptional importance, each concisely stated.
See Fed. R. App. P. 40(b)(2). Grounds (A), (B), and (C) each require specific citation to the conflicting cases. A petition that asserts a conflict without identifying the conflicting cases does not comply with the rule's pleading standard. Ground (C), inter-circuit splits, is a meaningful change from the prior rule and is worth squarely addressing in the petition when applicable.

Most petitions for rehearing en banc are denied without comment. As a practical matter, en banc review is more likely where the panel's opinion creates a circuit split, places the Ninth Circuit in the minority on a recurring issue, or is written in a way likely to govern a large number of future appeals.

Length and form. Under Ninth Circuit Rules, a petition (whether for panel rehearing, en banc, or both) may not exceed 15 pages, or 4,200 words if a word-count format is used. See 9th Cir. R. 40-1(b). The 4,200-word allowance is slightly more generous than the Federal Rule's default of 3,900 words. See Fed. R. App. P. 40(d)(3)(A). The petition must be accompanied by a completed certificate of compliance on Form 11.

Response. No response to the petition is permitted unless the Court orders one, and ordinarily the petition will not be granted without such a request. See Fed. R. App. P. 40(d)(4). If a response is requested, the same length limits apply. See 9th Cir. R. 40-1(b). Oral argument on whether to grant the petition is not permitted. See Fed. R. App. P. 40(d)(5). The Ninth Circuit adds one local practice: "The Court will not ordinarily order en banc review, either sua sponte or in response to a petition for such review, without giving the parties an opportunity to express their views whether en banc review is appropriate." 9th Cir. R. 40-2.

The Ninth Circuit's Limited En Banc Court: A Distinctive Feature

Here is the Ninth Circuit's perhaps most distinctive procedural feature, and one of the few of its kind in any federal appellate court. The Ninth Circuit currently has 29 authorized active judgeships. If the Court reheard cases en banc with every active judge, the en banc court would be unwieldy.

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So, the Ninth Circuit does not do that. Under 9th Cir. R. 40-3 (formerly 9th Cir. R. 35-3), the en banc Court for each case or group of related cases consists of the Chief Judge plus 10 additional judges drawn by lot from the active judges of the Court. If the Chief Judge is absent, an eleventh judge is drawn by lot to replace them, and the most senior active judge on the panel presides. See 9th Cir. R. 40-3. The result is an 11-judge "limited en banc" court whose decision binds the entire Circuit, including the active judges who were not selected to sit. Senior judges are generally not eligible to be drawn, with two exceptions: a judge who takes senior status during the pendency of an en banc case for which the judge was already chosen may continue to serve, and a senior judge may elect to be eligible when the en banc Court is reviewing a decision of a panel of which the judge was a member. See 9th Cir. R. 40-2 to 40-3 (Advisory Committee Note (1)).

Rule 40-3 preserves one residual option. "In appropriate cases, the Court may order a rehearing by the full Court following a hearing or rehearing en banc." This is sometimes called a "super en banc." The rule does not define "appropriate cases" or specify a procedure for invoking the provision, and it is exceptionally rare.

One important consequence of a grant of en banc rehearing: the three-judge panel opinion is vacated, subject to reinstatement by the en banc Court. See 9th Cir. R. 40-2 to 40-3 (Advisory Committee Note (2)). Until the en banc Court decides the case, the panel opinion is no longer binding precedent and should not be cited as such.

Two practical consequences flow from the limited en banc structure. First, the composition of the en banc court is, in significant part, random. A party seeking en banc review cannot predict which judges will hear the case, and that uncertainty should inform the strategic decision whether to seek en banc review at all. Second, an en banc court drawn by lot may include none of the original three-judge panel members and brings a fresh perspective to the case. That cuts both ways. An unfavorable panel decision may look very different to ten different judges, but so may a favorable one.

The Mandate

After the time for rehearing has expired (or any rehearing petition has been denied), the Ninth Circuit will issue its mandate. As a matter of established appellate practice, issuance of the mandate is the procedural event that returns active control of the case to the district court.

Timing. The mandate ordinarily issues 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See Fed. R. App. P. 41(b). The Court may shorten or extend the time by order. The mandate is effective when issued. See Fed. R. App. P. 41(c).

Stay pending certiorari. A party intending to seek certiorari from the United States Supreme Court may move to stay the mandate. See Fed. R. App. P. 41(d). The motion must show that the certiorari petition would present a substantial question and that there is good cause for a stay. See Fed. R. App. P. 41(d)(1). The Ninth Circuit's Rule adds a substantive overlay: a motion to stay the mandate "will not be granted as a matter of course but will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay." 9th Cir. R. 41-1. Filing a certiorari petition does not automatically stay the mandate. A stay motion must be filed and granted. See 9th Cir. R. 41-1 (Advisory Committee Note).

One important practitioner clarification. The 90-day clock for filing a petition for certiorari runs from entry of the Ninth Circuit's judgment, not from issuance of the mandate. The judgment is entered on the date of the Court's decision, or, if a petition for rehearing was timely filed and denied, on the date of that denial, whichever is later. See 9th Cir. R. 41-1 (Advisory Committee Note). Counsel sometimes conflate the two. A circuit court cannot extend the 90-day cert clock. Any extension must be sought from the U.S. Supreme Court.

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Petition for Certiorari to the U.S. Supreme Court

If a party remains dissatisfied after the Ninth Circuit's decision (including any en banc decision), the final avenue of review is a petition for a writ of certiorari to the U.S. Supreme Court. The petition must ordinarily be filed within 90 days of entry of the Ninth Circuit's judgment, or 90 days after denial of a timely petition for rehearing. See Sup. Ct. R. 13.1, 13.3. As noted in the mandate section above, the 90-day clock runs from entry of the Ninth Circuit's judgment, not from issuance of the mandate. See Sup. Ct. R. 13.3. For good cause, a Justice may extend the time to file by up to 60 days. See Sup. Ct. R. 13.5. The extension application must be filed with the Clerk at least 10 days before the petition is due, except in extraordinary circumstances, and the rule cautions that such applications are not favored.

The standard for review. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Rule 10 identifies the kinds of reasons the Court considers, including conflicts between circuits on important matters, conflicts with the Court's own decisions, and important questions of federal law that should be settled. Rule 10 also cautions that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." In other words, garden-variety error correction is not the Supreme Court's function.

The Supreme Court grants roughly 1% of the petitions filed each Term. The petition should be drafted with the cert standard in mind from the first sentence. Identify the legal question, frame it as one of recurring federal importance or as a circuit split, and demonstrate why the case is a clean vehicle for resolution.

Conclusion

An appeal is often a key part of litigation, and practitioners should know and follow an appellate court's requirements. The Ninth Circuit has more procedural quirks than most federal appellate courts. The Mediation Questionnaire, the Excerpts of Record, the 14,000-word brief limit, the Statutory Addendum, the streamlined 30-day extension, the 11-judge limited en banc panel, and the post-December 2024 consolidation of Rule 35 into Rule 40 are all worth confirming before you file anything.

One of the best things a practitioner can do is to check the Rules. Both the Federal Rules of Appellate Procedure and the Ninth Circuit's Local Rules should be consulted. Confirm the deadlines and confirm the requirements. The Ninth Circuit also publishes a thorough Appellate Practice Guide that covers practice in the Court in detail and is well worth reading before you file an appeal there.

Good luck!

[Note: These rules apply to appeals in civil cases before the Ninth Circuit involving just one appellant and one appellee. Appeals involving multiple parties, cross-appeals, criminal cases, immigration matters, habeas corpus proceedings, bankruptcy appeals, or those involving federal agencies are governed by somewhat different rules and may have different requirements. In any event, you should always check the rules and not rely solely on this or any other practice guide.]

Bona Law attorneys have substantial experience with state and federal appeals, including in the Ninth Circuit, where the firm has secured published wins in, as two examples, Ariix v. NutriSearch and PharmacyChecker.com v. LegitScript, and filed amicus briefs in matters, including FTC v. Qualcomm. If you would like to talk to us about your appeal, please contact us.

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