UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

INTERNAL OPERATING PROCEDURES

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NOTICE

Because the Internal Operating Procedures (IOPs) govern internal court procedures, they are not intended to replace or supplement the Federal Rules of Appellate Procedure or the Federal Circuit Rules, which govern procedures in appeals. Counsel should not cite the IOPs in appeal filings or rely on them to avoid controlling statutes or rules.

IOP #1

DATE: November 14, 2008

SUBJECT: INTERNAL OPERATING PROCEDURES (IOPs) AND DEFINITIONS

1. IOPs.

These "Internal Operating Procedures" (IOPs) cover the essential processes of this court. The court reserves the right to depart from a provision in the IOPs when circumstances require.

2. Definitions.

"Session" - The sitting of a panel to hear a series of calendared cases over a set period of days.

"Court Session" - The period of days in which one or more panels is sitting.

"Presiding Judge" - The senior active judge sitting with a merits panel.

"Lead Judge" - The motions panel member designated to receive and initially consider motions and their disposition.

"Submission" - Occurs immediately after hearing, or on the date a case is submitted on the briefs.

"Issuance" - Occurs when the clerk makes an opinion or order available to the parties, public, and subscribers.

"Disposition Sheets" - Issued by the clerk, as required, to reflect daily and weekly dispositions.

"Motions Panel" - Three judges assigned on a rotating basis to review motions received during a prescribed month.

"Merits Panel" - Three or more judges assigned to consider the briefs, hear oral argument, if any, decide the case, and render an appropriate opinion or opinions. Where appropriate, "merits panel" may be read as including "the court en banc."

"Quorum" - In determining whether a quorum exists for en banc purposes, more than half of all circuit judges in regular active service, including recused or disqualified judges, must be eligible to participate in the en banc process.

DATE: **November 14, 2008**

SUBJECT: **MOTION AND PETITION PRACTICE**

1. Motions.

Each month, the chief judge appoints a three-judge motions panel and designates a lead judge.

2. Clerk.

(a) Before the appeal has been calendared, the clerk may grant a motion during that period and specified in Fed. Cir. R. 27(h) which contains a representation that the motion has the consent of the parties.

(b) After the appeal has been calendared, the clerk shall refer all motions specified in Fed. Cir. R. 27(h) to all members of the merits panel.

(c) Notwithstanding representations of consent, the clerk may decline to grant a motion if its allowance would be a substantial divergence from routine practice before the court. The clerk shall refer such a motion to the senior staff attorney (SSA) if the appeal has not been calendared and to the merits panel if the case has been calendared.

3. Senior staff attorney.

All precalendar motions requiring action by a judge or judges of the motions panel will be delivered by the clerk to the SSA, who shall be responsible for assisting the motions panel in the processing of such motions.

4. Prepaneling motions.

The clerk transmits to the SSA a motion or response filed before the case is assigned to a merits panel. In appropriate cases, a motion filed after the principal briefs have been filed may be deferred under the clerk's signature for consideration by the merits panel and delivered with the briefs and materials in the case. When a motion is under consideration by a motions panel and has not been referred to a merits panel, the lead judge may direct that all papers subsequently filed in relation to that motion will be acted upon by that motions panel. When a motion relates to an appeal that previously was heard by a merits panel and the merits panel remanded the case, the SSA may refer the motion to that merits panel. If that previous merits panel is not available, the SSA may refer the motion to the remaining judge or judges of that panel and one or two newly selected judges.

(a) Non-emergency motions.

(i) When it is not necessary that a motion be granted or denied before the case can be expected to be assigned to a merits panel, the motion may be deferred for consideration by a merits panel. Though a merits panel need not exist at time of deferral, care should be exercised to avoid both undue delay in disposing of the motion and unnecessary preparation and filing of briefs and appendices resulting from early deferral of a potentially dispositive motion.

(ii) The SSA notifies the clerk of deferral to a merits panel and returns the motions papers to the clerk. The clerk includes a copy of the motions papers with the briefs and materials when they are transmitted to each judge on a merits panel. The motion then will be considered and decided as part of the determination of the merits of the case.

(b) Emergency motions.

The SSA presents emergency motions promptly to the lead judge, who then elects to decide the motion alone or to obtain a decision by the motions panel.

(c) Dispositive motions.

Orders disposing of an appeal or a petition (dismissal, summary affirmance, mandamus, etc.) must be acted upon by the full motions panel.

(d) Orders.

Orders on motions may be signed by a judge or the clerk. Fed. Cir. R. 45(c).

5. Oral argument.

(a) Oral argument ordinarily will not be granted on prepaneling motions. Nonetheless, a motions panel may elect:

(i) To hear oral argument when deemed necessary and the nature of the case so warrants;

(ii) To hear oral argument after expiration of its term of service when it has devoted sufficient judge time to make consideration of the motion by a merits panel or other judges an unnecessary duplication; or

(iii) To be reconstituted as a merits panel for consideration of the motion as part of its determination of the case.

The chief judge will be notified when (i), (ii), or (iii) is elected.

(b) A merits panel may permit oral argument directed to a deferred motion as part of argument on the merits, instructing the clerk to notify counsel whether additional time will be granted for that purpose and the amount of that time.

6. Postpaneling, presubmission motions.

(a) Motions filed after the briefs and materials have been delivered to a merits panel, but before the case is under submission, will be referred by the clerk to the merits panel, which will decide the motion either before submission or as part of its determination of the whole case after submission.

(b) The action chambers on a post-calendar motion shall be that of the judge who has been assigned the responsibility of authoring, or who has authored the opinion. If a post-calendar motion requires action before hearing, the presiding judge of the merits panel will preassign the opinion-authoring responsibility, subject to reassignment after the hearing if necessary. The authoring judge will decide whether to act alone on a motion or to obtain the views of the other merits panel members (in conference or by vote sheet).

(c) To avoid premature disclosure of the merits panel membership, orders issued by a merits panel ordinarily will be signed by the clerk.

7. Postsubmission motions.

All postsubmission motions are referred to the members of the merits panel, and shall not ordinarily be argued. The action chambers shall be that of the authoring judge.

8. Reconsideration.

A motion for reconsideration of a decision on a motion is referred to the members of the motions panel or merits panel that decided the motion.

9. Petitions for writs of mandamus.

Petitions for writs of mandamus will be processed in the manner set forth above with respect to motions.

10. Precedential orders disposing of motions.

Orders disposing of motions may be made precedential when deemed advisable by the motions panel or merits panel applying the criteria of IOP #10.

11. A motions panel that grants a motion to expedite an appeal may decide, by majority vote, to sit as the merits panel. The chief judge shall be notified if a motions panel reconstitutes itself as a merits panel.

IOP #3

DATE: November 14, 2008

SUBJECT: MERITS PANELS - DISTRIBUTION OF BRIEFS, RECORDS, AND FILES

1. The chief judge provides to the clerk's office a list of judges that are available for each day of an argument session. The clerk's office runs a computer program that randomly generates three-judge panels for each month, subject to the judges' availability.

The clerk's office screens cases to determine if they are calendar-ready, i.e., if all briefs and the joint appendix have been filed. A computer program merges the list of calendar-ready cases in order of filing with panels of judges determined randomly, subject to the requirements of 28 U.S.C. 46(b) and Fed. Cir. R. 47.2(b) ("Assignment of cases to panels will be made so as to provide each judge with a representative cross-section of the fields of law within the jurisdiction of the court."). Cases are generally scheduled for a calendar approximately six weeks after the last brief and the appendix are filed.

A case that is remanded by the Supreme Court is referred to the panel or to the en banc court that previously decided the matter, subject to the circumstances provided by IOP # 15, paragraph 2(a). When an appeal is docketed in a case that was previously remanded by this court, or when an appeal concerning attorney fees is docketed after any appeal on the underlying merits is decided, the clerk's office attempts to assign the appeal to the previous panel, to a panel including at least two members of the previous panel (if one of those members was the authoring judge), or to a panel that contains the authoring judge, if such a panel is otherwise constituted and available on a subsequent argument calendar.

A motions panel that decides to expedite an appeal may decide to reconstitute itself as the merits panel. See IOP # 2, paragraph 11. A recusal of a judge may require revisions to the composition of a merits panel. See Fed. Cir. R. 47.11; IOP # 5, paragraph 3. Other circumstances may arise that require substitution of a judge or constitution of a panel in a manner not otherwise provided above.

2. Briefs, records, and other case related materials are distributed to the merits panel as early as possible before the hearing date.

3. The court's policy is that briefs will be read by the judges of the panel before oral argument.

4. When the appeal is terminated and the mandate has issued, such briefs and materials as are not retained in chambers will be placed in wastebaskets in chambers for discard.

5. Briefs and other materials marked Confidential or Protected Materials and no longer needed in chambers, will be returned to the clerk for supervised destruction after the mandate has issued.

DATE: **November 14, 2008**

SUBJECT: **BRIEFS, APPENDICES, AND HEARINGS IN CASES INVOLVING PROTECTIVE ORDER**

1. All materials (e.g., briefs, appendices, motions, parts of the record) that are subject to a protective order (see Fed. Cir. R. 11 and 17) shall on receipt be supplied with a large sticker stamped "Confidential" and placed on the front and back of the materials. Protected materials shall be disposed of upon completion of the case according to procedures established by the clerk.

2. The senior staff attorney and senior technical assistant shall endeavor to limit circulation of protected materials on an as-needed basis.

3. The clerk shall designate persons on his or her staff authorized to process protected materials.

4. Protected materials in the clerk's office shall be stored in a secure area.

5. After the case is closed, the clerk will return any original protected materials to the trial tribunal, and will destroy extra copies not required for permanent files of the court.

6. A case involving protected materials may be heard in camera, on motion or on sua sponte order of the court.

7. Oral argument in camera ordinarily shall be scheduled in a regular courtroom as the last case of a session. Before calling the case, the presiding judge shall order the courtroom cleared of all unauthorized persons. Counsel are solely responsible for persons seated at counsel table. Court employees authorized access to the protective materials, and whose duties require attendance, may remain during the hearing.

8. Electronic recordings of in camera hearings shall be considered and treated as protected materials.

9. Public or press inquiries about protected materials or in camera hearings will be referred to the clerk.

10. All court personnel shall be sensitive to the confidential nature of protected material.

DATE: November 14, 2008

SUBJECT: RECUSAL

1. Judges will consult the certificate of interest (Fed. Cir. R. 47.4) in determining whether a basis for recusal exists.

2. Alternatively, a judge may supply the clerk with a written list of circumstances which would require the judge's recusal, including, e.g., names of businesses or corporations in which the judge or family members have a financial interest, and names of lawyers or law firms whose appearance or participation as counsel would require the judge's recusal. The clerk will compare the list supplied by a judge with the certificates of interest and names of counsel filed in cases calendared for hearing by a panel on which the judge sits, and will notify the judge of any potential basis for recusal.

3. A judge who finds recusal necessary or advisable will, as early as possible, notify the other members of the panel and the chief judge. In preargument/presubmission cases, the chief judge will name a substitute to serve as though originally a member of the panel. When a recusal occurs after a case is argued or submitted, the procedures of Fed. Cir. R. 47.11 will be followed.

IOP #6

DATE: November 14, 2008

SUBJECT: VISITING JUDGES

1. Visiting judges provide a welcome aid in the work of the court. Their favorable impression is carried throughout the nation. Their contribution of varied viewpoints, experiences, ideas, and information from throughout the judicial system is invaluable.

2. Presiding judges will, at the beginning of each court session in which a visiting judge sits, introduce the visiting judge and express the court's appreciation for his or her assistance to the court.

3. While serving with the court, a visiting judge shall be considered and treated in the manner applicable to a member of the court.

4. Presiding judges will determine the appropriate seating at the bench in each session. Visiting chief judges will normally be seated at the right of the presiding judge, visiting senior judges normally at the left.

5. Presiding judges are responsible for follow-up in relation to votes and opinions due from visiting judges.

DATE: **November 14, 2008**

SUBJECT: **ORAL ARGUMENT**

1. It is the court's policy that 15 minutes per side be the normal time allocation, and that 30 minutes per side be normally the maximum time allocation. A judge in disagreement with the normal time allocation will so state to the presiding judge. In a case that initially has been designated for no oral argument, oral argument will be held on request of one member of a panel. The presiding judge will notify the clerk of any change in the time allocation, not later than seven days prior to the date of argument, to enable the clerk to notify counsel well before the first day of the panel session.

2. Consistent with Fed. R. App. P. 34 and Fed. Cir. R. 34, it is the court's policy to allow oral argument unless:

(a) The appeal is frivolous; or

(b) The dispositive issue or set of issues recently has been authoritatively decided; or

(c) The facts and legal arguments are presented adequately in the briefs and record, and the decisional process would not be aided significantly by oral argument.

DATE: **November 14, 2008**

SUBJECT: **PANEL CONFERENCE - AUTHORING ASSIGNMENT**

1. After a case has been argued, the merits panel will hold at least one conference and will at that conference exchange tentative views and votes. The judges announce a "straw" vote, in reverse order of seniority, on the decision in each case and on whether to employ a precedential opinion, a nonprecedential opinion, or a judgment of affirmance without opinion under Rule 36.

2. The presiding judge assigns the authoring responsibility for each case at the end of each day's sitting or at the end of a session. If the panel is divided, the authoring role is assigned to a member of the majority. If the presiding judge dissents, assignment will be made by the senior active member of the majority.

3. Panel members desiring to change authoring assignments shall refer the matter to the presiding judge for decision. The presiding judge will notify the chief judge of any change.

4. A merits panel may follow these procedures for cases submitted on the briefs. Alternatively, the panel may conclude that the case is appropriate for a Rule 36 judgment or the presiding judge may preassign the authoring responsibility to a panel member before the panel conference. Under the alternative procedure, a Rule 36 judgment or an opinion may be voted on before the panel conference and may be ready to be issued promptly following the panel conference.

DATE: **November 14, 2008**

SUBJECT: **DISPOSITION OF CASES - OPINIONS AND ORDERS - VACATE, REVERSE, REMAND - COSTS**

1. The court employs only the following means in disposing of matters before it for decision: precedential opinions; nonprecedential opinions; precedential orders; nonprecedential orders; and Rule 36 judgments of affirmance without opinion.

2. The court's decisions on the merits of all cases submitted after oral argument or on the briefs, other than those disposed of under Rule 36, shall be explained in an accompanying precedential or nonprecedential opinion.

3. The court's decisions on motions, petitions, and applications will be by precedential or nonprecedential orders.

4. The court's policy is that all opinions and orders shall be as short and as limited to the dispositive issue as the nature of the cases or motions will allow.

5. At the election of the authoring judge, a unanimous or majority opinion, precedential or nonprecedential, may be headed "PER CURIAM." Rule 36 judgments shall be "PER CURIAM."

6. Copies of all issued opinions and precedential orders shall be provided when issued to all judges of the court, to other participating judges, to the parties involved, and to the tribunal from which the appeal was taken, or which is affected by the order. Copies of Rule 36 judgments signed by the clerk will be provided by the clerk to the parties, the trial tribunal, and the members of the panel.

7. All dispositions will be entered by the clerk on the daily disposition sheet. All Rule 36 judgments and all opinions and orders, precedential and nonprecedential, are public records of the court and shall be accessible to the public.

8. Nonprecedential opinions and orders and Rule 36 judgments shall not be employed as binding precedent by this court, except in relation to a claim of res judicata, collateral estoppel, or law of the case, and shall carry notice to the nonprecedential effect.

9. The court will VACATE all or part of a judgment, order, or agency decision when it is being eliminated but not replaced with a contrary judgment or order of this court.

The court will REVERSE all or part of a judgment, order, or agency decision when it is being replaced with a contrary judgment or order of this court.

The court will REMAND only when there is something more for the trial court or agency to do, and will supply such guidance as the case may warrant.

10. Adoption of opinions of trial tribunals.

(a) Because a precedential opinion stating that this court affirms "on the basis of" an opinion of a trial tribunal might cause confusion as to what constitutes precedent in this court, that format will no longer be used in precedential opinions. It is not objectionable in nonprecedential opinions. Except for the provisions (b) and (c) below, a precedential opinion should say enough to supply, in itself without reference to the opinion or order being reviewed, the basis of this court's decision.

(b) If a trial tribunal's opinion has been published, and a panel can accept all or a separable part thereof as its own opinion, the panel may state that it adopts the trial tribunal's opinion or separable part as its own. If this has been done, the panel's opinion, when circulated to the court for review, shall be accompanied by a copy of what has been adopted. The panel's precedential opinion and what has been adopted then constitutes precedent in this court.

(c) If a trial tribunal's opinion has not been published, and a panel accepts all or a separate part thereof as its own opinion in its precedential opinion, the panel will circulate for review and will publish the adopted opinion or separable part, as an appendix to or in the body of the panel's opinion, with suitable attribution.

11. Costs.

(a) When a panel affirms or reverses a judgment or order in its entirety, or dismisses an appeal, it need say nothing respecting costs, which will be assessed by the clerk automatically against the losing party. A panel that does not wish assessment of costs against the losing party will instruct that costs be assessed as the panel may deem just.

(b) When a panel's decision is other than a total affirmance or reversal (e.g., affirm in part, reverse in part, vacate, remand) the panel will include in its opinion or order a direction on the award of costs.

(c) A panel's direction respecting costs will appear as the last paragraph in this court's opinion or order and will be headed "COSTS."

(d) The foregoing does not apply to appeals from decisions of the Boards of the Patent and Trademark Office. The clerk will not send forms for designation of costs to parties in such cases.

IOP #10

DATE: July 7, 2010

SUBJECT: PRECEDENTIAL / NONPRECEDENTIAL OPINIONS AND ORDERS

1. The workload of the appellate courts precludes preparation of precedential opinions in all cases. Unnecessary precedential dispositions, with concomitant full opinions, only impede the rendering of decisions and the preparation of precedential opinions in cases which merit that effort.

2. The purpose of a precedential disposition is to inform the bar and interested persons other than the parties. The parties can be sufficiently informed of the court's reasoning in a nonprecedential opinion.

3. Disposition by nonprecedential opinion or order does not mean the case is considered unimportant, but only that a precedential opinion would not add significantly to the body of law or would otherwise fail to meet a criterion in paragraph 4. Nonprecedential dispositions should not unnecessarily state the facts or tell the parties what they argued or what they otherwise already know. It is sufficient to tell the losing party why its arguments were not persuasive. Nonprecedential opinions are supplied to the parties and made available to the public.

4. The court's policy is to limit precedent to dispositions meeting one or more of these criteria:

(a) The case is a test case.

(b) An issue of first impression is treated.

(c) A new rule of law is established.

(d) An existing rule of law is criticized, clarified, altered, or modified.

(e) An existing rule of law is applied to facts significantly different from those to which that rule has previously been applied.

(f) An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued.

(g) A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved.

(h) A significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case, is set forth.

(i) A new interpretation of a Supreme Court decision, or of a statute, is set forth.

(j) A new constitutional or statutory issue is treated.

(k) A previously overlooked rule of law is treated.

(l) Procedural errors, or errors in the conduct of the judicial process, are corrected, whether by remand with instructions or otherwise.

(m) The case has been returned by the Supreme Court for disposition by action of this court other than ministerial obedience to directions of the Court.

(n) A panel desires to adopt as precedent in this court an opinion of a lower tribunal, in whole or in part.

5. When a nonprecedential opinion is approved by a majority of the panel and all panel votes are in, the authoring judge sends the opinion and any concurring or dissenting opinions to the administrative services office (ASO) for copying and delivery to the clerk for issuance. When all panel votes are in on a precedential opinion or order, the authoring judge circulates the opinion and any concurring or dissenting opinions, with a transmittal sheet, to each judge. A copy is also circulated to the senior technical assistant (STA), and if requested the STA shall provide information on potential conflicts between the panel-approved opinion and any other prior opinions of the court or other relevant precedents. The nonpanel members of the court will have ten working days to review a circulated opinion or order. Nonpanel members may send comments to the authoring judge, to the panel, or to all judges. A nonpanel member judge in regular active service may submit a hold sheet pending a request for an en banc poll. Absent transmittal of a hold sheet or a request for an en banc poll during the circulation period, the authoring judge sends the opinion, and any concurring or dissenting opinions, to the ASO for copying and delivery to the clerk for issuance.

6. An election to utilize a Rule 36 judgment shall be unanimous among the judges of a panel. An election to issue a nonprecedential opinion shall be by a majority of a panel, except when the decision includes a dissenting opinion and the dissenting judge elects to have the decision issued as precedential. These election rights may be made at any time before issuance of an opinion.

7. A request of a panel member or a motion seeking reissuance of an issued opinion or order as a precedential disposition shall only be granted by a unanimous vote of the judges on the merits or motions panel that decided the case or matter. If such request or motion be granted, the author of the opinion shall revise it appropriately.

8. Nothing herein shall be interpreted as impeding the right of any judge to write a separate opinion.

DATE: September 22, 2014

SUBJECT: UNIFORMITY OF CITATION

1. The latest edition of the "Bluebook" (A Uniform System of Citation) will ordinarily be followed.

2. Citation of opinions to official reports.

(a) In citing opinions of this court and its predecessors, cite as found in the Federal Reporter:

Doe v. Roe, 000 F.3d 333 (Fed. Cir. 2003).

Roe v. Doe, 000 F.2d 222 (Fed. Cir. 1982).

Goutos v. United States, 522 F.2d 922 (Ct. Cl. 1976).

In re Sponnoble, 405 F.2d 578 (CCPA 1969).

(b) Cite official reports of the Court of Claims only when the matter cited was not published in the Federal Reporter and cite official reports of the Court of Customs and Patent Appeals or the United States Patent Quarterly only when the matter was not published in the Federal Reporter:

Jones v. United States, 107 Ct. Cl. 806 (1972).

Rogers v. Smith, 35 CCPA 47 (1960).

In re John Doe, 33 USPQ2d 336 (Fed. Cir. 1999).

(c) Cite this court's opinions in appeals from the Court of International Trade and the International Trade Commission as found in the Federal Reporter; may also cite U.S. Court of Appeals for the Federal Circuit, Int'l Trade Cases (_____Fed. Cir. (T)_____):

United States v. Roses, Inc., 706 F.2d 1563, 1 Fed. Cir. (T) 39 (1983).

3. Cite without periods in CCPA (modifies Bluebook).

4. In citing opinions of the Court of International Trade, cite as found in the Federal Supplement. Cite official reports of that court, (69 Cust. Ct. 105) or (4 CIT 110), only where the matter cited was not published in the Federal Supplement. In citing opinions of the Claims Court, cite as found in Claims Court Reports (Cl. Ct.). For cases appearing in 1 Cl. Ct. 1 through 1 Cl. Ct. 129, cite at the first occurrence in this court's opinion the additional corresponding citation of 550 F. Supp. 669 through 555 F. Supp. 403. In citing opinions of the Court of Federal Claims, cite as found in the Federal Claims Reporter (Fed. Cl.).

5. In government contract cases, cite published opinions of Boards of Contract Appeals from the publications in which they appear, e.g., Goodyear Tire Co., ASBCA No. 12345, 74-2 BC ¶54321.

6. When an opinion has been published by a trial level tribunal in a recognized reporter, a citation thereto will be entered in the opinion of this court disposing of the appeal. When a slip opinion has been issued by a trial level tribunal and is intended for publication in a recognized reporter, but has not appeared in such reporter when our opinion is ready for issuance, the date and case number of the slip opinion will be cited in the opinion of this court. Issuance of opinions of this court will not be delayed by an effort to comply with this paragraph.

7. In citing patent and trademark opinions of other courts, cite as found in Federal Reporter or Federal Supplement.

8. Opinions of the Supreme Court and of this court relating to this court's exclusive jurisdiction should be cited as precedent, in preference to opinions of courts no longer having jurisdiction over the subject matter with which the citation is concerned.

9. Respect for the tribunals from whose judgments and decisions appeals are taken to this court requires care in referring to those tribunals in our opinions. Reference should not be made to "the court below," "the lower court," "the lower tribunal," or "the judge below." Reference should be made to, e.g., "the district court," "the trial court," "the district judge," "the trial tribunal," or "the court." The presiding officer in MSPB hearings is an "administrative judge."

DATE: **November 14, 2008**

SUBJECT: **PETITIONS FOR PANEL REHEARING**

In accordance with Fed. R. App. P. 26(a)(1), which states that its provisions apply in computing any period of time specified in a local rule, one must "[e]xclude the day of the act, event, or default that begins the period." Thus, for example, when a voting deadline is seven working days in this IOP, the day that the clerk distributes the petition is excluded from the seven-day count.

1. Distribution of petition.

(a) Unless a petition expressly asks for en banc action, it will be deemed to request only rehearing by the panel. Petitions for rehearing en banc and combined petitions for panel rehearing and for rehearing en banc are first processed as petitions under this IOP and thereafter may be processed under IOP #14.

(b) Promptly on receipt, the clerk will distribute the petition for rehearing to the merits panel members with a petition for panel rehearing vote sheet. The voting deadline will be ten working days following distribution of the petition.

2. Voting.

(a) Panel members who desire no action on a petition need do nothing.

(b) If the clerk does not receive a form from a panel member by the day following the deadline, that panel member will be deemed to have voted to deny the petition.

(c) A panel member desiring action on the petition will so indicate on the petition for panel rehearing vote sheet and send it to the clerk. Copies of the marked form will be sent to the other panel members, with an attached memorandum of reasons if desired.

3. Orders.

(a) On the day following the deadline, if the vote of the panel is to deny the petition, the clerk will forthwith prepare and issue an order if en banc action is not requested, but if en banc action is requested, the panel order denying the petition will be withheld and entered in a consolidated order disposing of the petition for rehearing en banc.

(b) In preparing an order granting the petition, the clerk will include the action specified by the panel (oral argument; additional briefing; modification of opinion; etc.). If oral argument is ordered, the clerk will notify the chief judge. If modification of the opinion is desired, the author of the original opinion will supply the clerk with an appropriate order.

4. Responses.

(a) When a panel wishes to grant a petition (other than to make mere language changes without change in result) the clerk will invite a response from the non-petitioning parties and will not issue the order granting the petition until ten working days following distribution of a response. The response will be distributed with a new petition for panel rehearing vote

sheet, with a voting deadline of ten working days following distribution of the response. During the period following distribution of a response, a judge may change his or her earlier vote to grant by distributing a memo to the other panel members and the clerk. Judges who have not voted, and who continue after receipt of a response to favor denial, need do nothing. If the invitation to respond is declined, the clerk will issue the order granting the petition.

(b) A judge may, before the original voting deadline, direct the clerk to request a response, notifying the other panel members by a copy of his or her petition for panel rehearing vote sheet. The original voting deadline is stayed pending receipt of the response. A new voting deadline, ten working days after the clerk distributes the response, will appear on the new petition for panel rehearing vote sheet accompanying the response. If the party declines to file a response, the new date shall be seven working days after the clerk distributes a routing slip indicating no response will be filed.

5. In general.

(a) When a judge votes to grant a petition "only to make language changes attached", the clerk will withhold issuance of an order for seven additional working days, to enable other merits panel members to review those changes. Absent contrary notice on a petition for panel rehearing vote sheet, the clerk will issue the order making the changes attached.

(b) When a panel's action on a petition is limited to changes in the language of an original precedential opinion (without change in the result) and the panel deems the changes material, the petition for panel rehearing vote sheet and the order reflecting the changes will be circulated to the court.

(c) When a senior judge of this court or a visiting judge served on the panel, that judge will participate in consideration and disposition of a petition. The clerk will send two copies of the petition for panel rehearing vote sheet to a visiting judge who authored the panel's original opinion.

(d) If the panel's action on the petition involves substitution of a precedential for an original nonprecedential opinion, the substituted opinion will be circulated to the court.

IOP #13

DATE: November 14, 2008

SUBJECT: BASES FOR HEARING EN BANC OR REHEARING EN BANC

1. En banc consideration is required to overrule a prior holding of this or a predecessor court expressed in an opinion having precedential status.

2. Upon the concurrence of the majority of active judges, the court will, for any appropriate reason, conduct an en banc hearing, rehearing, or reconsideration. Judges who are recused or disqualified from participating in an en banc case are not counted as active judges for purposes of this IOP. Among the reasons for en banc action are:

(a) Necessity of securing or maintaining uniformity of decisions;

(b) Involvement of a question of exceptional importance;

(c) Necessity of overruling a prior holding of this or a predecessor court expressed in an opinion having precedential status; or

(d) The initiation, continuation, or resolution of a conflict with another circuit.

IOP #14

DATE: August 24, 2015

SUBJECT: HEARING AND REHEARING EN BANC - DISSOLUTION OF EN BANC

In accordance with Fed. R. App. P. 26(a)(1), which states that its provisions apply in computing any period of time specified in a local rule, one must "[e]xclude the day of the event that triggers the period." Thus, for example, when a voting deadline is seven working days in this IOP, the day that the clerk distributes the petition is excluded from the seven-day count.

Judges who are recused or disqualified from participating in an en banc case are not counted as "active" or "regular active" judges for purposes of this IOP. For example, under paragraph 5 governing polling, recused or disqualified judges are not counted when determining whether a majority has voted to defer voting pending a conference or voted to hear or rehear a case en banc.

1. Petitions for hearing en banc.

(a) The clerk shall send petitions for hearing en banc to the active judges of the court promptly upon filing, allowing ten working days for any judge to request a response.

(b) If no judge requests a response, the clerk will enter an order for the court denying the petition for hearing en banc.

(c) If a response is requested, the clerk will thereafter send the response (or a notice that none was filed) to the judges, allowing ten working days for any judge to initiate a poll in accordance with paragraph 5 of this procedure to determine whether the appeal or other matter should be heard en banc.

(d) If no poll is initiated, the clerk will enter an order for the court denying the petition for hearing en banc.

(e) If a poll is initiated and the petition for hearing en banc is granted, a committee of judges selected by the chief judge, which shall normally include the judge who initiated the poll, shall within ten working days transmit on a vote sheet to the judges who will sit en banc a draft order setting forth any questions proposed to be addressed by the court en banc. The clerk will enter the order for the court granting the petition for hearing en banc and setting forth the schedule for additional briefing, if any, by the parties and by amici curiae, and for oral argument, and any questions the court may wish the parties and amici to address.

(f) If a poll is initiated and the petition for hearing en banc is denied, and there are no dissenting votes or a judge votes to dissent without opinion, the clerk will enter an order for the court:

(i) Advising that a poll was conducted, and

(ii) Denying the petition for hearing en banc, noting thereon any dissenting votes that may have been directed.

If a judge indicates on an en banc poll sheet that he or she intends to file a separate opinion regarding the denial of an en banc action, then within six working days after the poll deadline ends, the judge will transmit his or her opinion to the other judges. Within three working days of the end of that six-day period, if a separate opinion is transmitted, any other judge may transmit a separate opinion. Six working days after transmittal of the last separate opinion, the clerk will enter an order for the court:

(i) Advising that a poll was conducted,

(ii) Denying the petition for hearing en banc, and

(iii) Attaching the opinion(s).

If no opinion is transmitted within six working days after the poll deadline ends, then the clerk, unless otherwise ordered by the chief judge, will enter an order for the court:

(i) Advising that a poll was conducted,

(ii) Denying the petition for hearing en banc, and

(iii) Advising that an opinion will follow.

2. Petitions for rehearing en banc.

(a) Action on a petition for rehearing en banc that is part of a combined petition for panel rehearing and rehearing en banc will be deferred until the panel has acted on the petition for rehearing. A petition for rehearing en banc that is not combined with a petition for panel rehearing will be presumed to request relief that can be granted by the panel that heard the appeal; consequently, the clerk will send the petition for rehearing en banc promptly upon filing first to the panel in accordance with IOP #12, paragraph 1(b), and action on the petition for rehearing en banc will be deferred until the panel has had the opportunity to grant the relief requested. If the panel either takes no action or grants less than all of the relief requested, the clerk shall send both the combined petition and any response considered by the panel to the active judges of the court and to any judge who was a member of the panel that heard the appeal or other matter but is not an active judge of the court, allowing ten working days for any of these judges to request a response to the petition for rehearing en banc.

(b) If no judge requests a response, the clerk will enter an order for the court denying the petition for rehearing en banc.

(c) When a response is requested and filed or the time for filing the requested response has passed without one having been filed, the clerk will send the response or a notice that none was filed to the judges, allowing ten working days for any active or panel judge to initiate a poll in accordance with paragraph 5 of this IOP to determine whether the appeal or other matter should be reheard en banc.

(d) If no judge initiates a poll, the clerk will enter an order for the court denying the petition for rehearing en banc.

(e) If a poll is initiated and the petition for rehearing en banc is granted, a committee of judges appointed by the chief judge, which normally will include the judge who initiated the poll, shall within ten working days transmit on a vote sheet to the judges who will sit en banc an order setting forth the questions proposed to be addressed by the court en banc. The clerk will enter the order for the court granting the petition for rehearing en banc and setting forth the schedule for additional briefing by the parties and by amici curiae and for additional oral argument, if any, and any questions the court may wish the parties and amici to address. Notice shall be given that the court en banc shall consist of all circuit judges in regular active service who are not recused or disqualified and any senior circuit judge of the court who participated in the decision of the panel and elects to sit, in accordance with the provisions of 28 U.S.C. § 46(c).

(f) If a poll is initiated and the petition for rehearing en banc is denied, and there are no dissenting votes or a judge votes to dissent without opinion, the clerk will enter an order for the court:

(i) Advising that a poll was conducted, and

(ii) Denying the petition for rehearing en banc, noting thereon any dissenting votes that may have been directed.

If a judge indicates on an en banc poll sheet that he or she intends to file a separate opinion regarding the denial of an en banc action, then within six working days after the poll deadline ends, the judge will transmit his or her opinion to the other judges. Within three working days of the end of that six-day period, if a separate opinion is transmitted, any other judge may transmit a separate opinion. Six working days after transmittal of the last separate opinion, the clerk will enter an order for the court:

(i) Advising that a poll was conducted,

(ii) Denying the petition for rehearing en banc, and

(iii) Attaching the opinion(s).

If no opinion is transmitted within six working days after the poll deadline ends, then the clerk, unless otherwise ordered by the chief judge, will enter an order for the court:

(i) Advising that a poll was conducted,

(ii) Denying the petition for rehearing en banc, and

(iii) Advising that an opinion will follow.

3. Sua sponte petitions for hearing en banc.

Hearing en banc following hearing by a panel of judges, but before the entry of judgment and opinion(s) by the panel, may be ordered sua sponte.

(a) During the circulation period to the court before precedential opinions are issued, any active judge may initiate a poll in accordance with paragraph 5 of this IOP. The request for a poll should ordinarily be accompanied by a memorandum of reasons supporting the petition or adopting the dissenting or concurring opinion of a judge on the panel.

(b) During the time for polling or awaiting a conference, the panel judgment and opinion(s) shall automatically be withheld for filing.

(c) If the sua sponte petition for hearing en banc is granted, a committee of judges appointed by the chief judge, which normally shall include the judge who initiated the poll, shall within ten working days transmit on a vote sheet to the judges who will sit en banc an order setting forth the questions proposed to be addressed by the court en banc. The clerk shall provide notice that a majority of the judges in regular service has acted under 28 U.S.C. § 46 and Fed. R. App. P. 35(a) to order the appeal to be heard en banc, and indicate any questions the court may wish the parties and amici to address. Notice shall be given that the court en banc shall consist of all circuit judges in regular active service who are not recused or disqualified. Additional briefing and oral argument will be ordered as appropriate.

4. Sua sponte petitions for rehearing en banc.

Rehearing en banc following issuance of a precedential opinion may be ordered sua sponte in the absence of a petition for rehearing en banc filed by a party.

(a) When no petition for rehearing en banc has been filed in an appeal that has been decided in a precedential opinion, within ten working days after the time allowed by the rules for filing a petition for panel rehearing any active judge may initiate a poll in accordance with paragraph 5 of this IOP. The request for a poll ordinarily should be accompanied by a memorandum of reasons supporting the petition or adopting the dissenting or concurring opinion of a judge on the panel.

(b) If the sua sponte petition for rehearing en banc is granted, a committee of judges appointed by the chief judge, which normally shall include the judge who initiated the poll, shall within ten working days transmit on a vote sheet to the judges who will sit en banc an order setting forth the questions proposed to be addressed by the court en banc. The clerk shall provide notice that a majority of the judges in regular active service has acted under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a) to order the appeal to be heard en banc, enter an order for the court vacating the judgment and withdrawing the opinion(s) filed by the panel that heard the appeal, and indicate any questions the court may wish the parties and amici to address. Notice shall be given that the en banc panel shall include all circuit judges in regular active service who are not recused or disqualified and any senior circuit judge of the circuit who participated in the decision of the panel and elects to sit, in accordance with the provisions of 28 U.S.C. § 46(c). Additional briefing and oral argument will be ordered as appropriate.

(c) If a sua sponte petition for rehearing en banc is denied, and there are no dissenting votes or a judge votes to dissent without opinion, the clerk will enter an order for the court advising that a poll of judges in regular active service whether to rehear the

appeal was conducted at the request of an active judge, but failed of a majority, noting thereon any dissenting votes that may have been directed. If a judge indicates on an en banc poll sheet that he or she intends to file a separate opinion regarding the denial of an en banc action, then within six working days after the poll deadline ends, the judge will transmit his or her opinion to the other judges. Within three working days of that six-day period, if a separate opinion is transmitted, any other judge may transmit a separate_opinion. Six working days after ~~such~~ transmittal of the last separate opinion, the clerk will enter an order for the court:

(i) Advising that a poll was conducted,

(ii) Denying the petition for rehearing en banc, and

(iii) Attaching the opinion(s).

If no opinion is transmitted within six working days after the poll deadline ends, then the clerk, unless otherwise ordered by the chief judge, will enter an order for the court:

(i) Advising that a poll was conducted,

(ii) Denying the petition for rehearing en banc, and

(iii) Advising that an opinion will follow.

5. Poll.

(a) A poll is initiated by a judge or a panel of judges requesting the chief judge to poll the active judges on a petition for hearing or rehearing en banc of a party or sua sponte. When a poll is requested, the chief judge shall distribute an en banc ballot containing these choices:

(i) To deny en banc review.

(ii) To hear or rehear the appeal en banc.

(iii) To defer voting pending a conference of the judges.

For sua sponte suggestions, the chief judge also will distribute any memoranda accompanying a judge's request for a poll. Copies of the certificates of interest filed in the matter shall accompany the distribution if they have not previously been circulated with the en banc suggestion of a party.

If the chief judge fails to distribute the ballots within six working days following the request for a poll, the requesting judge may conduct the poll.

(b) The judges will adhere strictly to the period for polling. The polling shall end at 5:30 p.m. on the tenth working day following the date of distribution of the ballot, and ballots received in the office of the chief judge thereafter shall not be counted.

(c) The poll results shall be tallied and announced. When the time for balloting closes, the chief judge shall promptly tally the ballots and notify the court of the results of the poll. If a majority either votes against en banc review or fails to vote, the poll fails and the petition, if any, is denied. If a majority votes to hear or rehear the appeal en banc, the poll passes and the petition, if any, is granted. If a majority votes to defer voting pending a conference of judges, the chief judge shall schedule a conference. If less than a majority vote to hear or rehear the appeal en banc or to defer voting pending a conference, but together those votes constitute a majority, the chief judge shall schedule a conference. A judge voting for or against en banc hearing or rehearing may indicate that the vote also shall be counted in the event a postconference poll is conducted.

(d) A postconference poll may be conducted. If a conference is called, and a poll is not conducted at the conference, promptly following the conference the chief judge shall distribute a ballot containing these choices:

(i) To deny en banc review.

(ii) To hear or rehear the appeal en banc.

If the chief judge fails to distribute the ballots within four working days following the conference, the requesting judge may conduct the poll.

(e) The judges will adhere strictly to the period for postconference polling. The postconference polling shall end at 5:30 p.m. on the fourth working day following the date of distribution of the ballot, and ballots received in the office of the chief judge thereafter shall not be counted.

(f) The postconference poll results shall be tallied and announced. When the time for balloting closes, the chief judge shall promptly tally the ballots (including those votes to be carried over from the preconference poll) and notify the court of the results of the post-conference poll. If a majority votes to hear or rehear the appeal en banc, the postconference poll passes and the petition, if any, is granted; otherwise, the poll fails and the petition, if any, is denied.

(g) Multiple polls will not be taken. The initiation of a poll by a judge or judges terminates the period for requesting a poll. Thereafter, other judges may circulate memoranda supporting or opposing en banc hearing or rehearing during the balloting period.

(h) If a conference or postconference poll is conducted, and the petition is denied, and there are no dissenting votes or a judge votes to dissent without opinion, the clerk will enter an order for the court:

(i) Advising that a poll was conducted, and

(ii) Denying the petition, noting thereon any dissenting votes that may have been directed.

If a judge indicates on a ballot that he or she intends to file a separate opinion regarding the denial of an en banc action, then within six working days after the poll deadline ends, or after the court votes to deny the petition, whichever is later, the judge will transmit his or her opinion to the other judges. Within three working days of that six-day period, if a separate opinion is transmitted, any other judge may transmit a separate opinion. Six working days after transmittal of the last separate opinion, the clerk will enter an order for the court:

(i) Advising that a poll was conducted,

(ii) Denying the petition, and

(iii) Attaching the opinion(s).

If no opinion is transmitted within six working days after the poll deadline ends, or the court denies the petition, the clerk, unless otherwise ordered by the chief judge, will enter an order for the court:

(i) Advising that a poll was conducted,

(ii) Denying the petition, and

(iii) Advising that an opinion will follow.

6. Extension of six working days upon request.

A judge entitled to request or to participate in an en banc or dissolution poll may extend any time set forth in this procedure by six working days upon sending a notice to the chief judge received before 5:30 p.m. on the final day for action, with copies to other participating judges. The notice extends that time for all judges. Only one such extension is permitted for any period of action.

7. Composition of en banc court

In any case in which en banc hearing or rehearing is granted, and subject to any recusal or disqualification, pursuant to 28 U.S.C. § 46(c) the en banc court shall consist of all active judges, except that a senior judge shall be eligible to participate as a member of an en banc court reviewing a decision of a panel of which that judge was a member. Additionally, pursuant to 28 U.S.C. § 46(c) a senior judge may continue to participate in the decision of a case that was heard or reheard by the court en banc at the time when that judge was in regular active service. Any new judge joining the court after a case is heard or reheard en banc, but before issuance of the en banc decision, shall be eligible to participate in the decision as a member of the en banc court. A judge joining the court after a case is heard or reheard en banc but before issuance of the en banc decision shall promptly inform the members of the en banc court of his or her choice whether to participate in the court's en banc decision.

8. Petitions to hear or rehear motions or other non-merits matters en banc.

A petition that a motion or other matter not involving the merits of the case should be determined by the court en banc will not be circulated to the judges in regular active

service until the underlying motion or matter has been acted upon by a motions or merits panel, as appropriate, but if the panel grants the entire relief requested, the petition shall be deemed moot.

9. Sua sponte petitions for dissolution of en banc status.

(a) Dissolution of en banc status may be ordered any time before filing or entry of a judgment and opinion(s) by the en banc court or, in the case of a remand by the Supreme Court to the en banc court, any time before filing or entry of a judgment and opinion(s) after remand.

(b) Any active judge who voted to grant a petition for hearing or rehearing en banc may initiate a dissolution poll by transmitting a request for dissolution of the en banc poll to the chief judge. The request for a dissolution poll should ordinarily be accompanied by a memorandum of reasons supporting the petition for dissolution of en banc status.

(c) After a judge has initiated a dissolution poll, the en banc judgment and opinion(s) will automatically be withheld for filing or entry until the petition for dissolution of en banc status is granted or denied.

(d) When a poll is requested, the chief judge will distribute to all of the judges in regular active service a dissolution poll ballot containing these choices:

(i) To retain en banc status;

(ii) To dissolve the en banc court and refer the case to a panel; or

(iii) To defer voting pending a conference of judges.

If the chief judge fails to distribute the ballots within six working days following the request for a poll, the requesting judge may conduct the poll. Any judge may circulate memoranda supporting or opposing dissolution during the balloting period.

(e) The polling period ends at 5:30 p.m. on the tenth working day following the date of distribution of the ballot, and ballots received in the office of the chief judge after that time will not be counted.

(f) When the time for balloting closes, the chief judge will promptly tally the ballots and notify the court of the results of the poll. If a majority either votes against dissolution or fails to vote, the poll fails and the petition is denied. If a majority votes to dissolve, the poll passes and the petition for dissolution of en banc status is granted. If a majority votes to defer voting pending a conference of judges, the chief judge will promptly schedule a conference. If less than a majority vote to dissolve and less than a majority vote to defer voting pending a conference, but the votes to dissolve and to defer voting together constitute a majority of votes, the chief judge will schedule a conference.

(g) If a conference is called, and the court does not vote at the conference on the petition, promptly following the conference the chief judge will conduct a postconference poll. The chief judge will distribute a ballot containing these choices:

(i) To retain en banc status; or

(ii) To dissolve the en banc court and to refer the case to a panel.

If the chief judge fails to distribute the ballots within four working days following the conference, the requesting judge may request the poll.

(h) A postconference polling period ends at 5:30 p.m. on the fourth working day following the date of distribution of the ballot, and ballots received in the office of the chief judge after that time will not be counted.

(i) When the time for balloting closes, the chief judge will promptly tally the ballots and notify the court of the results of any postconference poll. If a majority votes to dissolve the en banc court, the postconference poll passes and the petition for dissolution of en banc status is granted; otherwise the poll fails and the petition is denied.

(j) Multiple polls may not be requested or taken. The initiation of a dissolution poll by a judge terminates the period for requesting a poll.

(k) If the sua sponte petition for dissolution of en banc status is granted, the chief judge will distribute to all of the judges in regular active service a vote sheet containing these choices:

(i) To refer the case to the panel that was initially assigned to the case, if any (or if the original panel cannot be reconstituted, to the remaining judge or judges of that panel and one or two newly selected judges); or

(ii) To refer the case to a newly selected three-judge panel.

The voting period will end at 5:30 p.m. on the sixth working day following the distribution of the vote sheet, and votes received in the office of the chief judge after that time will not be counted. A majority of votes received will determine the issue.

(l) After these procedures are completed and if the en banc court has determined to dissolve its en banc status, the chief judge will direct the clerk to issue an order giving notice thereof.

10. Recusal.

A judge wishing to recuse shall upon receiving a petition for hearing or rehearing en banc or upon receiving a ballot for a sua sponte en banc poll or a dissolution poll promptly notify the court of his or her recusal.

11. Remands to Panel.

If the en banc court returns the case to the panel to address additional issues, the court may enter the en banc opinion on any panel opinion simultaneously, or it may enter the en banc opinion separately, before the panel addresses the additional issues. The Clerk's Office at that time shall enter the en banc opinion without a judgment, and the Office shall return the case to the panel for further action. In such a situation, judgment shall be entered when the panel's subsequent opinion is issued.

DATE: **November 14, 2008**

SUBJECT: **REMAND FROM THE SUPREME COURT**

1. In general.

A remand from the Supreme Court is referred to the panel or to the en banc court that decided the matter.

2. Referral.

(a) No action will be taken by the court until the clerk receives a certified copy of the judgment from the clerk of the Supreme Court. Upon receipt, the clerk will reopen the case under the original docket number and will transmit a copy of the Supreme Court judgment and opinion to the panel that decided the matter (or if the original panel cannot be reconstituted, the remaining judges of that panel and one or two newly selected judges) or, if the en banc court decided the matter, to the chief judge. If no judge from the original panel that decided the matter is available, the case will be referred to a newly selected three-judge panel.

(b) In a case in which a matter is referred to the en banc court, the en banc court may, by a majority vote of the active judges:

(i) Retain the case,

(ii) Refer the case to the panel that decided the case initially (or to the remaining judges of that panel and one or two newly selected judges), or

(iii) Refer the case to a newly selected three-judge panel.

3. Action by the court.

The en banc court or the panel may require the parties to file statements of their positions regarding the action to be taken by the court on remand. The en banc court or the panel may require additional briefs, schedule oral argument, summarily dispose of the case, remand to the trial court, or take any other action consistent with the opinion of the Supreme Court.