

January 1, 2000

## Circuit Practices

All circuits purport to assign judges to panels on a random basis.<sup>1</sup> Only a few, however, require random assignment by rule.<sup>2</sup> Moreover, some do so only in specific types of cases. The Third and Ninth Circuits, for example, have adopted rules requiring the random assignment of judges in death penalty cases.<sup>3</sup>

The methods for assigning judges to panels varies considerably from circuit to circuit, with little uniformity. In some, the authority rests with the chief judge.<sup>4</sup> In others, the task falls to the court clerk or the circuit executive.<sup>5</sup> Some circuits form panels or assign cases through the use of computer program; others do so manually. In most of the circuits, the chief judge retains the residual authority to intervene and alter the system of assignments.

What follows is a summary of the practices of each circuit. In drafting these procedures, an effort was made to create a neutral description of the assignment system used in each circuit. The summaries were prepared after considerable discussion with the chief

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<sup>1</sup> . . . Rules describing the assignment process generally employ innocuous statements that have little substantive content. For example, the Sixth Circuit provides only that judges shall be assigned "as the court directs." Assignment of Judges, USCS Ct. Appl 6<sup>th</sup> Cir., Rule 3(a). Similar language appears in the rules of the 8<sup>th</sup> Circuit. Assignment of Judges, USCS Ct. App. 8<sup>th</sup> Cir., Rule 47D(a).

<sup>2</sup> . . . See note 255 supra.

<sup>3</sup> . . . Internal Operating Procedures, Chapter 15, Death Penalty Cases, Appendix. 15.2 Panel Assignments, USCS Ct. Appl 3<sup>rd</sup> Cir. See also Direct Appeals in Federal Death Penalty Cases, USCS Ct. App. 9<sup>th</sup> Cir., Rule 22-1 ("Judges shall be assigned to the panels by neutral drawing from the pool [of active judges]"). The rule requires the clerk to use a computer program "to neutrally select a panel from a pool of all possible three-judge combinations consisting only of circuit judges in active service." Moreover, control of the program including any adjustments was given to the clerk.

<sup>4</sup> . . . See Solimine, 67 N.C.L.Rev. at 39 n.52.

<sup>5</sup> . . . Only created in 1971, the circuit executive performs administrative functions associated with the judicial council of a circuit. 28 U.S.C. 332(e). See also Federal Judicial Center, The Impact of the Circuit Executive Act (1979).

judge, assignment judge, clerk and/or circuit executive in each circuit. In each case, the procedures were reduced to narrative form and sent to the circuit executive or clerk of each circuit for verification. Most of the circuits responded affirmatively, often with corrections. In every case, the corrections were made.

*D.C. Circuit.* The assignment system in the DC Circuit has a number of somewhat unique attributes that affect the court and the assignment process. It is the only circuit where all of the judges reside in the same city. Perhaps because of this, the circuit does not rely upon visiting or district court judges to hear cases. Moreover, the circuit probably has a greater number of judges who leave the court because of resignations or promotions, particularly to the Supreme Court, a constant source of disruption to the scheduling process.<sup>6</sup>

For oral argument panels, the schedule is set about a year in advance. At least one panel will be scheduled for each week of each month that the court is in session.<sup>7</sup> In general, judges are expected to sit one week a month. The composition of the panel will not normally change over the week.

In selecting panels, the task falls to the clerk's office. The clerk creates panels using numbers rather than names. The process is manual and does not involve a computer program. The paneling schedule must meet a certain number of rules. Judges must sit with each other at least three times and have 32 days of regular sittings, with about half before and half after Jan. 1.<sup>8</sup>

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<sup>6</sup> ... The DC Circuit is unique in that judges often are promoted (Justices Scalia, Thomas and Ginsburg), move to other careers (Judge Starr) or quit when not promoted (Judge Bork).

<sup>7</sup> ... In May and September, the court sits in double sessions two weeks during the month. Except for emergency hearings, arguments are not scheduled during the months of June, July and August. Letter from Mark J. Langer, Clerk, U.S. Court of Appeals, D.C. Circuit, to Professor J. Robert Brown, Jr., Oct. 29, 1998.

<sup>8</sup> ... The DC Circuit has an affirmative requirement that judges sit together at least three times. Other circuits express the requirement as a prohibition, attempting to limit the frequency with which the same judges sit.

The process of determining panels is simplified in the non-use of visitors and the small number of senior judges.<sup>9</sup> In addition, the DC Circuit does not allow judges to indicate times when they are unavailable. Instead, once the panels are set, the Circuit has a moderate policy of allowing judges to trade places.<sup>10</sup> They may do so without explanation or approval of the chief judge but by simply notifying the clerk's office.<sup>11</sup>

Once the panels have been determined, the schedule is sent to the chief judge. In practice, the chief judge does not change individual panels but examines the schedule for any significant problem that should be corrected before circulation to the entire court. Thereafter, the schedule is distributed to the judges. Judges can raise broad issues concerning the schedule but cannot ask to be moved from a particular panel.<sup>12</sup>

Case assignments begin about five or six months in advance of oral argument. No other circuit assigns cases so far in advance. Appeals are divided into four categories: criminal; review of an agency's decision; appeal from a district court in which the U.S. is a party; and all other appeals from the district court.

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<sup>9</sup> ... The circuit currently has only one, Judge Buckley. In addition, the circuit so far does not have to wrestle with the problem of death penalty panels. The District of Columbia has no death penalty statute. While some federal crimes do provide for the imposition of the penalty, none have yet been appealed to the DC Circuit.

<sup>10</sup> ... Nonetheless, limits exist. To the extent that the trade would violate the three co-sit requirement, it will not be accepted by the clerk's office. The judge will have to find another panel member who will make the exchange without violating the co-sit requirement. Letter from Mark J. Langer, Clerk, U.S. Court of Appeals, D.C. Circuit, to Professor J. Robert Brown, Jr., Oct. 29, 1998.

<sup>11</sup> ... The practice was apparently implemented for purposes of administrative efficiency. Allowing judges to designate days of unavailability adds another variable that makes the designation of judges to panels more difficult. The practical affect of the DC Circuit system is to shift responsibility for accommodating these preferences from the clerk's office to the judges.

<sup>12</sup> ... Thus, one year, judges requested a reduced number of sittings in the Spring in order to provide adequate time to interview prospective law clerks.

Once categorized, cases are assigned to panels.<sup>13</sup> Appeals assigned to panels are not rated for complexity but a screening judge will assign an allotment of time for oral argument, ranging from 10 to 20 minutes per side.<sup>14</sup> In assigning the cases, the clerk's office uses an in-house computer program.<sup>15</sup> The program will screen cases for recusals, determine appropriate dates based upon the briefing schedule, and provide a mix of the four categories for each panel.<sup>16</sup> Once these variables have been considered, the program will assign a case to the first available date, usually five or six months in advance.

The circuit discloses to litigants the identity of the panel shortly after the cases have been assigned to panels.<sup>17</sup> The order setting the case for oral arguments identifies the panel.

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<sup>13</sup> ... USCS Ct. App. D.C. Cir., Appendix, Civil Appeals Management Plan for the District of Columbia, II. Management and Briefing Process in Complex or Multi-Party Litigation (1998). In addition to regular assignments, judges can be assigned up to three "complex cases" per year. These panels are selected on a random basis. Letter from Mark J. Langer, Clerk, United States Court of Appeals, District of Columbia Circuit, to Professor J. Robert Brown, Jr., April 17, 1998. The Circuit also has a Backlog Reduction Panel which consists of the chief judge and two judges "selected by rotation". Letter to the Honorable Arlen Specter, United States Senate, from Harry T. Edwards, Chief Judge, US Court of Appeals, District of Columbia, August 11, 1999. The two additional members are chosen from the current Special Panel which hears contested motions to dismiss. *Id.* The Backlog Reduction Panel hears "very easy or routine" cases. *Id.*

<sup>14</sup> ... In rare instances, a case may receive more than 20 minutes per side.

<sup>15</sup> ... Langer letter ("Once the case is screened as appropriate for oral argument (by the staff attorneys in the Legal Division of the Clerk's Office) the case enters a queue by date filed. The Calendar Clerk enters the case into the program in the order that the case was filed. The program searches for the first available panel checking to make certain that there is sufficient time for an appropriate briefing schedule, that no judges are disqualified, and that the "case-mix" rules are met."). See also General Description of New Case Management Plan," USCS Ct. App. D.C. Cir., Appx, VIII: Disclosure of Panels (1998)("[T]he names of judges on the regular merits panels will be revealed in the order which establishes briefing and argument dates."). In addition, calendars of hearings and the members of the panels that will hear the appeals are published in the Daily Washington Law Reporter. *Id.*

<sup>16</sup> ... The precise mix will, of course, vary depending upon the particular mix filed with the circuit at any given time. Efforts are made to ensure that no more than half of each panel's allotment will be appeals from an agency and that panels receive a mix of each category.

<sup>17</sup> ... The decision was made deliberately by the judges of the circuit. Chief Judge Edwards indicated that the change was primarily motivated by the convenience of the parties. He also noted, however, that it had the potential affect of inducing settlements. As he noted: "It occurred to us that this false assumption [that panel composition permitted prediction of the outcome] might lead some parties to settle their claims to avoid certain panels. We were happy to accommodate those who might thus settle their cases and thereby reduce our caseload." Letter from Harry T. Edwards, Chief Judge, D.C. Circuit, to Professor J. Robert Brown, Jr., Sept. 24, 1998. It should be noted that Judge Edwards also indicated that the judges were unaware whether early notification in fact actually produced more settlements. *Id.*

One concern with early notification, however, is the possibility that parties will attempt to disqualify judges considered unfavorable toward their side. This can occur, for example, where a party obtains amicus support from a company or organization that causes a conflict with the relevant judge,

As a result, litigants know the identity of the panel at least four or five months in advance, the earliest of any circuit.<sup>18</sup> Nonetheless, notification does not amount to entitlement. Composition can change. To the extent that the panels change, parties are notified but not given the reasons.

Once cases have been assigned to panels and the parties notified, judges receive the briefs.<sup>19</sup> Panel members will then have an opportunity to note recusals. In general, the reasons are disclosed to the clerk's office and a record maintained. In those circumstances, a replacement judge will be selected by rotation.<sup>20</sup>

***First Circuit.*** The First Circuit is the smallest circuit, with only six full time judges. Proportionately, it also has the largest number of senior judges who regularly hear cases.<sup>21</sup>

The entire circuit meets in sessions, usually one week each month.<sup>22</sup> On average, approximately six panels will convene during a session. Panel composition changes daily; the same judges do not sit throughout the week.<sup>23</sup> As a result, judges will sit on panels only two or three days during each session. Panels sit Monday through Friday and hear

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requiring recusal under Section 455. While no appellate judge indicated to the authors that this had in fact occurred, some circuits such as the Seventh are taking a harder line toward the filing of amicus briefs, denying motions and reducing the risk of a conflict.

<sup>18</sup> ... The Eighth Circuit discloses the identity of the panel at the time the briefs have been filed. With the exception of the DC Circuit, no other court discloses panel composition more than one week in advance of oral arguments.

<sup>19</sup> ... Parties can, therefore, write the briefs with the identity of the panel in mind. The DC Circuit approves of and encourages the approach. Other circuits give as a reason for delayed disclosure of panel assignments the desire to prevent parties from orienting briefs toward the particular panel.

<sup>20</sup> ... Rather than randomly select the replacement member each time, the clerk's office maintains a list and assigns judges by rotation. The judge leaving the panel will subsequently take a case from the replacement judge. As a result, the practice essentially entails a trade whenever a judge recuses after a case has been scheduled for oral argument. Letter from Mark J. Langer, Clerk, U.S.I Court of Appeals, D.C. Circuit, to Professor J. Robert Brown, Jr., Oct. 29, 1998.

<sup>21</sup> ... Currently there are five, judges Aldridge, Coffin, Campbell, Benz and Sear. [Check spelling].

<sup>22</sup> ... The court will meet for only one week during the July-August period. In September, the circuit meets for two weeks, less the Memorial day holiday.

<sup>23</sup> ... Is this true when the court meets in Puerto Rico?

approximately six cases per day. Most of the sittings are in Boston although two months a year the court also sits simultaneously in San Juan.<sup>24</sup>

In setting the schedule, the process begins about 18 months in advance of the calendar year.<sup>25</sup> The circuit executive first determines the number of panels required for the upcoming year. Thereafter, each judge will be asked to designate a month in which they would prefer not to hear cases. Similarly, judges will indicate any known scheduling conflict during the weeks when the court meets. Senior judges designate the months and the days of the week they are willing to hear cases.

With the information, the circuit executive determines an initial draft of the schedule. The panel composition process is done manually, without the assistance of a computer program. In setting the schedule, the circuit executive applies a number of guidelines. In general, panels will include at least two active judges. Judges will sit approximately 30 days a year.<sup>26</sup> All active judges get to preside over a panel at least once.<sup>27</sup> The circuit executive also attempts to ensure that all judges sit together on a regular basis but does not rely on any specific number or guideline. Finally, an effort is made to make certain that judges do not sit more than two days in a row.

Once completed, the schedule is approved by the chief judge. It is then circulated to the other members of the court, approximately nine months before the term begins. Thereafter, changes may occur, particularly as scheduling conflicts develop. While judges

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<sup>24</sup> ... The court does so in March and November. The practice has also begun to have the court hear cases in at least one other district each year. In April 1999, the court heard appeals at Roger Williams Law School in Rhode Island. The year before cases were heard in New Hampshire.

<sup>25</sup> ... The calendar year is Sept. – August.

<sup>26</sup> ... The chief judge has the right to a reduction in the workload. The current chief has not taken advantage of the reduction.

<sup>27</sup> ... The most senior active judge presides. In order to allow the most junior member of the court to preside, the panel will have to have only one active judge.

will sometimes arrange to switch days among themselves, the usual practice is to notify the circuit executive. If far enough in advance of oral argument, the circuit executive will simply switch places among judges scheduled to hear cases during that particular session.<sup>28</sup>

Occasionally, the need arises to replace a judge on a panel shortly before oral argument. This can occur because of illness, recusals or other conflicts. In general, responsibility falls to the circuit executive who will informally find a replacement, often from the district court or a senior appellate judge.

As cases become ripe, they are screened by both the staff attorney's office and clerk's office to determine which will be scheduled for oral argument.<sup>29</sup> Those assigned to oral argument generally receive 15 minutes per side. More or less time can be assigned, depending upon the issues in the case and other circumstances.

The clerk's office assigns approximately 40 to 45 cases each term. In doing so, the office first screens for conflicts. The clerk's office maintains a database of conflicts. Unlike some other circuits, the database does not represent only the cumulative experience of the clerk's office. Instead, all judges are expected to apprise the clerk's office of conflicts and to keep the information current.

Thereafter, the clerk's office assigns cases manually to the various panels sitting during the term. Criminal cases receive a priority and are assigned first. The same applies to expedited appeals. Thereafter, all other cases are assigned, with no attempt to balance the types of cases heard by each panel. An effort is made to schedule cases from Puerto Rico for one of the two sittings in San Juan.<sup>30</sup>

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<sup>28</sup> ... Judges also sit on duty panels. A duty panel exists for each month and largely hears motions. Active judges serve on the duty panel during five or six months each year.

<sup>29</sup> ... Cases become ripe when they are fully briefed.

<sup>30</sup> ... The clerk's office will assign such cases only if they become ripe close enough in time to a sitting in Puerto Rico. Otherwise, they will be heard like any other case during a regular term in Boston.

As with other circuits, the First Circuit does make use of preexisting panels. Although arising rarely, they most often occur in connection with remands from the Supreme Court and the appeal of a case remanded to the district court.<sup>31</sup> In these circumstances, the clerk's office attempts to assign the cases to the same panel or a panel with at least two of the original members. To the extent requiring oral argument, the case will generally be heard during a regular term. To the extent the same panel is already scheduled, the case will simply be assigned to it. Otherwise, the case will be heard at the end one of the days during the term and the panel reformed specially to hear oral argument.

Parties receive approximately eight weeks notice of the date of oral argument. They will only be told the composition a week before.

***Second Circuit.*** Panels hear cases each week of the year, with the exception of reduced schedules in December, July and August. The chief judge<sup>32</sup> determines the panels approximately a year in advance.<sup>33</sup> In making the decisions, the chief judge first gives priority to senior judges and the "previously scheduled" unavailability of active judges.<sup>34</sup> In addition, the chief judge attempts to provide a "decent interval" between sittings and to obtain "as much diversity among panels as possible . . ." <sup>35</sup> A draft will be circulated to all of the judges on the court. The information will then be given to the clerk's office.

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<sup>31</sup> . . . They do not include death penalty panels. The First Circuit has not yet heard a death penalty appeal in the post-*Furman* era.

<sup>32</sup> . . . Chief Judge Winter was extraordinarily patient with this project, answering three separate letters about the system for assigning judges, providing access to the court clerk, and engaging in one lengthy conversation about the process.

<sup>33</sup> . . . Letter from Ralph K. Winter, Chief Judge, Second Circuit, to J. Robert Brown, Jr., Professor, University of Denver College of Law, April 20, 1998. The process is usually completed in April for the next term, which begins at the end of August.

<sup>34</sup> . . . See 2d Cir. Declares Judicial Vacancies an 'Emergency', 16 Bank & Lender Liability Litigation Reporter 3 (April 15, 1998)(noting that in the Second Circuit, panel composition announced only one week before oral argument).

<sup>35</sup> . . . Letter from Ralph K. Winter, Chief Judge, Second Circuit, to J. Robert Brown, Jr., Professor, University of Denver College of Law, April 20, 1998. The chief judge tries to schedule an interval of at least four weeks between sittings. *Id.*



Once the schedule has been determined, the Second Circuit has a "liberal policy" allowing judges to switch panels.<sup>36</sup> Trades are discouraged only where it would change the identity of the presiding judge or would result in an inadequate number of judges from the circuit.<sup>37</sup> No reason need be given for a trade and the judges exercise the privilege "frequently."

The practice also is to have judges arrange their own replacement in the case of last minute vacancies on a panel. These may arise in the case of a late recusal, illness or other unexpected conflict. To the extent problems occur in the location of a replacement, the matter will be taken up with the chief judge; the clerk's office does not play a role in the designation of a replacement.<sup>38</sup>

With respect to case assignments, all appeals are scheduled for oral argument, making the Second Circuit the only remaining circuit that does not prescreen cases.<sup>39</sup> After the briefs have been filed, staff attorneys review them and divide them into one of about 20 categories based upon type of case. They will also assign a number from one to ten based upon the perceived complexity.<sup>40</sup>

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<sup>36</sup> ... Nonetheless, the clerk's office has indicated that the exercise of this right is "extraordinarily rare" after the calendar has been determined. The chief judge of the court indicated that, to the best of his knowledge, such exchanges have not occurred after cases have been assigned except where a panel member became ill and could not sit.

<sup>37</sup> ... A panel must have two judges (with at least one of them active) from the circuit. Letter from Ralph K. Winter, Chief Judge, Second Circuit, to J. Robert Brown, Jr., Professor, University of Denver College of Law, Sept. 3, 1998. This is required by statute. See text at note 229 supra. In emergency situations, the circuit has sometimes met this requirement through the use of two senior second circuit judges.

<sup>38</sup> ... In the case of a death shortly before the convening of a panel, the circuit will sometimes not designate a replacement and allow the remaining two judges to decide the matter.

<sup>39</sup> ... The circuit recognizes one significant exception. Panels hearing any motion in a pro se appeal will examine the record to determine whether the matter can be decided on the merits. In addition, panels may review a pro se case sua sponte to determine whether it is frivolous or should otherwise be dismissed where, for example, the court lacks jurisdiction. It is not unusual for 15 appeals to be resolved in this manner. These are the only cases addressed in a summary fashion in the Second Circuit, without resort to oral argument.

<sup>40</sup> ... The rating system is informal and not particularly precise. Among other things, staff attorneys factor in the number of parties and issues involved in a case.

Case assignments are done by the clerk's office. Once a week, the judges on the circuit receive a print out of all cases in which an appellant's brief has been filed.<sup>41</sup> The print out will include the identity of the parties, the attorneys involved and the district court judge. The print out permits judges to note a disqualification, something that will then be taken into account at the time the cases are assigned to panels.<sup>42</sup>

Each panel receives approximately 31 cases for the week. A case will not be assigned to a panel where a judge indicated a disqualification. Cases are largely assigned on a first in, first out basis.<sup>43</sup> In addition, the clerk's office attempts to balance the type of cases heard by a panel.<sup>44</sup> Before the calendar is finalized, the briefs in each case will be sent to the presiding judge of the panel.

The presiding judge can ask to have a case removed and reassigned.<sup>45</sup> This could most commonly occur in the case of a recusal. Occasionally, however, the presiding judge may do so where an emergency appeal has been docketed and requires more immediate consideration. Only after approval by the presiding judge will the other members of the

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<sup>41</sup> ... The list is circulated to active and senior judges on the court. At this stage, cases are not ready for calendaring. That occurs after the filing of the appellee's brief, usually 30 days later.

<sup>42</sup> ... Because a judge may be concerned with the appearance of a conflict, a disqualification decision may or may not indicate an actual conflict.

<sup>43</sup> ... The cases are assigned manually. While first in, first out is the preferred approach, the assignment process also factors in the complexity of the case. A panel assigned enough complex cases, for example, would not necessarily receive the next oldest case in a category if it also was a complex case.

<sup>44</sup> ... Cases are balanced among civil, criminal and pro se. The precise balance can change throughout the year, depending upon the mix of appeals filed with the Second Circuit. Cases within each category are ordinarily assigned on a first in first out basis.

<sup>45</sup> ... A reassigned case will be given to the next available panel under the first in, first out system of assignment. This raises the question of whether a presiding judge of a panel could reject a case, knowing that the case would go to a panel had a more favorable composition. In fact, however, the ongoing process of assigning cases means that the system is not so predictable. The rejected case is returned to the clerk's office for reassignment. The clerk's office will assign the case to the first available panel. Often the next panel will have already received a full compliment of cases, causing the clerk's office to give the case to a later panel. In addition, other cases from other panels may have been returned for reassignment. As a result, it would be difficult to predict with any certainty the panel that would ultimately obtain the case, making manipulation exceedingly difficult.

panel receive the briefs. Parties are notified of the composition of the panel on the Thursday before the week in which the court meets.

*Third Circuit.* The Third Circuit has developed a system that leaves considerable control over the treatment of cases in the hands of each panel. Rather than set up separate screening panels to determine which cases should be heard for oral argument, the clerk places all cases on the calendar.<sup>46</sup> The panel receiving the cases decides which to schedule for oral argument. The Third Circuit also has the most developed set of rules and operating procedures concerning the panel and case assignment function.

The panels are determined approximately one year in advance. The court hears cases 26 weeks each year.<sup>47</sup> Judges sit on approximately seven merit panels during the year. Most sittings take place in Philadelphia, although the circuit has begun hearing cases in other cities on an experimental basis.<sup>48</sup>

The circuit executive's office has initial responsibility for determining the schedule and does so with the assistance of a computer program. The circuit executive first queries the judges about availability. Senior and visiting judges designate the weeks and number of days they are willing to sit.<sup>49</sup> The circuit also has a policy of attempting to set the schedule so that each judge sits together at least once every two years.<sup>50</sup> With the information, the circuit executive runs the computer program to determine the schedule, although the final result will reflect considerable human intervention.

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<sup>46</sup> ... The only exception are pro se cases. These are examined by staff attorneys, with the analysis sent to special three judge panels.

<sup>47</sup> ... The weeks the court is in session each month varies, with an effort to schedule oral arguments in weeks that do not involve religious or federal holidays.

<sup>48</sup> ... Under Judge Becker, who became the chief judge in 1998, the circuit also hears cases in Newark and Pittsburgh. Judges have been assigned to hear the cases on a random basis,

<sup>49</sup> ... In addition, the circuit tries to ensure that new district court judges sit on the appellate court sometime in their first two years on the bench. This would also be imputed into the system manually.

<sup>50</sup> ... This is a "stated ideal" rather than rigid requirement.

The schedule is circulated by the chief judge to the entire circuit.<sup>51</sup> Refinements will occur, with some judges swapping panels. Once this process has been completed, the schedule is considered finished. Thereafter, judges can, but rarely do, exchange places on panels.<sup>52</sup>

In assigning cases, the circuit uses a first in, first out system. About six to eight weeks before oral argument, the clerk's office will assign 40-45 cases to a panel, with the oldest assigned first.<sup>53</sup> The clerk's office does not modify the assignments in an effort to vary the types or complexity of cases that will be heard by a panel.<sup>54</sup> The clerk's office does prescreen cases to be sent to panels for known conflicts.

Thereafter, each panel will receive a recusal packet,<sup>55</sup> including the docket sheet and the corporate disclosure statements filed by the parties.<sup>56</sup> After judges on the panel have communicated their recusals, the clerk's office will issue a tentative calendar assigning the remaining cases to particular day of the week and will circulate the briefs<sup>57</sup> in those cases to the panel.<sup>58</sup>

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<sup>51</sup> ... Judges generally use the comment period as an opportunity to raise scheduling conflicts.

<sup>52</sup> ... Swapping is arranged between the judges and does not require the approval of the clerk's office or the chief judge.

<sup>53</sup> ... A case is deemed ripe once the appellee's brief has been filed. Most circuits have a number of exceptions to the first in first out system. The Third Circuit does not. Because the court is generally current in its docket, there has been no need to give criminal cases priority. Some cases are heard on an accelerated basis but this occurs only where a panel issues an order to that affect. The clerk's office, therefore, has little or no discretion in the assignment of cases to panels.

<sup>54</sup> ... A system of weighing the cases for complexity did at one time exist. The imprecision of the system and the difficulty incurred by the clerk's office or staff attorneys in assessing complexity caused the circuit to abandon the practice.

<sup>55</sup> ... The clerk's office has a data base of recusal information on individual judges. See IOP Appendix 11.1.2, Procedure, USCS Ct. App. 3d Cir. (1998)(judges may, but are not required, to provide clerk's office with circumstances which "would generally require recusal"). To the extent the clerk's office knows about a recusal in advance, the case will not be scheduled for the panel and the recusal packet not sent.

<sup>56</sup> ... IOP Appendix 11.1, Procedure, USCS Ct. App. 3d Cir. (1998). See also LAR 26.1 (Jan. 1, 2000) and Rule 26, Federal Rules of Appellate Procedure.

<sup>57</sup> ... Brief are sent at least four weeks before oral argument unless the panel agrees to a shorter time period. IOP Appendix, 1.1, USCS Ct. App. 3d Cir. (January 1, 2000).

<sup>58</sup> ... The clerk's office typically sends 40 to 45 clearance packages to each panel for purposes of identifying possible recusals and disqualifications. The package includes corporate disclosure statements,

Thereafter the process becomes driven by the preferences of the judges on the panel.<sup>59</sup> The judges decide which cases to set for oral argument.<sup>60</sup> They decide the amount of time to be given to each litigant, with most receiving 15 minutes.<sup>61</sup> While panels typically hear cases on the days<sup>62</sup> tentatively scheduled by the clerk's office, they may order changes.<sup>63</sup> At least 10 days before the week of hearings begins, the presiding judge<sup>64</sup> will communicate these decisions to the clerk's office.<sup>65</sup> Approximately one-third of the cases are set for oral argument.

Occasionally judges recuse themselves only after the panel has received the briefs.

In these circumstances, the general rule is that that case remains with the panel.<sup>66</sup> The task of

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positive disclosure statements, lists of parties and attorneys in appeals. Once reviewed, the clerk's office will assign approximately 32 cases to the panel. If the list contains more than 32 cases, the clerk's office will typically assign to the panel the oldest (most ripe) cases first.

<sup>59</sup> ... Moreover, the circuit has a strong culture that once assigned, the case will be decided by that particular panel. For example, motions rescheduling of the argument will only be granted upon a showing of "extraordinary circumstances." LAR 34.1(d), USCS Ct. App. 3d Cir. (January 1, 2000).

<sup>60</sup> ... IOP Appendix, 2.1, Determination in Panel Cases, USCS Ct. App. 3d Cir. (January 1, 2000). The decision to decide a case on the briefs, without oral argument, must be unanimous. LAR 34.1(a), USCS Ct. App. 3d Cir. (January 1, 2000). For the factors generally used to determine whether to hold or not hold oral argument in a case, see IOP Appendix 2.4, Suggested Criteria for Oral Argument, USCS Ct. App. 3d Cir. (January 1, 2000).

<sup>61</sup> ... See IOP Appendix, 2.1, Determination in Panel Cases, USCS Ct. App. 3d Cir. (January 1, 2000). Because the panel will hear oral argument in only a fraction of the cases assigned for the week, it is often in a position to allow cases to continue beyond scheduled time periods without conflicting with a later scheduled case. Depending on the composition of the panel, therefore, oral arguments in the Third Circuit can often go on for longer periods.

<sup>62</sup> ... Cases are generally scheduled each day of the week except Wednesdays, which is reserved as a day for the judge to remain in chambers.

<sup>63</sup> ... Any number of reasons for changes may exist. Since the tentative schedule includes cases that will be scheduled for oral argument and cases that will be decided on the briefs, the panel could alter the calendar to hear all oral argument cases on the same day or days. The panel may also alter the proposed calendar to create a day off other than Wednesday.

<sup>64</sup> ... The presiding judge is the chief judge or the active judge with the most seniority on the panel. IOP Appendix 3.2, Presiding Judge, USCS Ct. App. 3d Cir. (January 1, 2000).

<sup>65</sup> ... IOP Appendix, 2.1, Determination in Panel Cases, USCS Ct. App. 3d Cir. (January 1, 2000). The other judges on the panel communicate their preferences to the presiding judge. To the extent they have not, the presiding judge can assume that the panel member has agreed to be bound by the decisions of the other two members. IOP Appendix, 2.3, Failure to Notify Presiding Judge, USCS Ct. App. 3d Cir. (January 1, 2000).

<sup>66</sup> ... More accurately, the case will remain with the panel to the extent the judges have become invested in the case as a result of preparation. Thus, a recusal that occurs early in the assignment process, before briefs have been read, may be handled by simply pulling the case and reassigning it to the next panel. To the extent the conflict surfaced shortly before oral argument, the case will be left with the panel and a new

finding a replacement falls to the chief judge of the circuit.<sup>67</sup> In the case of a judge becoming sick after cases have been assigned, the responsibility for finding a replacement falls to the senior judge on the panel. In general, this entails a search among judges in the circuit (active or senior) to determine who can sit.<sup>68</sup>

The court does form panels outside of the annual schedule in a number of instances. Death penalty panels are formed randomly, on an as needed basis.<sup>69</sup> The circuit annually forms five pro se panels to hear fully briefed pro se cases.<sup>70</sup> Remands from the Supreme Court return, where possible, to the same panel that had previously heard the case. A panel may choose to retain jurisdiction over a case remanded to the district court.<sup>71</sup> Motions panels<sup>72</sup> also sometimes will hear the merit appeal.<sup>73</sup> In general, however, these panels hear

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judge assigned.

<sup>67</sup> ... IOP Appendix 11.1.3, Procedure, USCS Ct. App. 3d Cir. (January 1, 2000). To the extent that it is the chief judge who has recused, the right to appoint the replacement falls to the next most senior active judge on the court.

<sup>68</sup> ... Where illness or other conflicts cause the judge to miss an entire week, it is the usual practice that a number of judges will each take a day or two and sit as replacements.

<sup>69</sup> ... The clerk's office uses a computer program to select panels from the active judges on the court. Thus, unlike some others, the circuit does not maintain a standing list of panels that are used seriatim but configures panels on as needed basis. Under the current system, the panels are made up of active judges and senior judges willing to serve. IOP Appendix 15.2, Panel Assignments, USCS Ct. App. 3d Cir. (January 1, 2000). As a judge is selected for a panel, however, his or her name is removed from the pool until all others have been assigned to a death penalty panel. As in other circuits, the panel hears all matters that arise in connection with that case. The Third Circuit does provide the chief judge with the power to address periodically "any imbalance in the caseload assignments". IOP Appendix 15.2, Panel Assignments, USCS Ct. App. 3d Cir. (January 1, 2000).

<sup>70</sup> ... In 1999, the circuit received 200 fully briefed pro se cases with approximately 40 assigned to each panel. These five panels are reconstituted each year. Letter from P. Douglas Sisk to Professor J. Robert Brown, jr., Feb. 8, 2000.

<sup>71</sup> ... See IOP Appendix 7.2, Assignment Following Remand, USCS Ct. App. 3d Cir. (January 1, 2000). The general rule is that a case on remand will be reassigned in the regular course. Nonetheless, the clerk will consult with the chief judge and the original panel. To the extent instructed, the case will be returned to the original panel. *Id.*

<sup>72</sup> ... Motions panels are created annually by the chief judge. See IOP Appendix 10.1, Motion Panels, USCS Ct. App. 3d Cir. (January 1, 2000). The chief creates four panels that sit the entire year. The panels can include both both active and senior judges.

<sup>73</sup> ... The motions panel decides. To the extent that the motion did not involve significant investments of time, the panel often sends the case back to the clerk's office for random assignment.

oral arguments by special order and not as part of the calendar process.<sup>74</sup> These panels are not, therefore, assigned other cases from the calendar.

Parties are notified of the possibility of oral argument four or five weeks in advance. They are told the tentative day the case may be heard but not the identity of the panel.<sup>75</sup> Counsel in the circuit knows, however, that the panel may change the date or ultimately decide not to schedule the case for oral argument. Once the clerk's office learns from the panel which cases will be heard and when, counsel is notified, including the identity of the panel.<sup>76</sup> This occurs not less than ten days in advance of the week in which oral argument will occur, although in practice parties usually receive notice two or three weeks before oral argument.<sup>77</sup>

***Fourth Circuit.*** In the Fourth Circuit, the court holds eight terms, usually the first week of the month.<sup>78</sup> During the term, all active judges hear cases. The panels do not remain constant for the week but are scrambled daily.<sup>79</sup> Each panel hears approximately four cases per day.

The process of determining the composition of panels begins as much as a year in advance. Judges are polled concerning availability for the upcoming terms. As part of the process, senior judges also indicate when and how often they wish to sit. With the

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<sup>74</sup> ... The case may be heard in the afternoon of a day when the court is hearing oral argument in calendared cases but not as part of the calendar process.

<sup>75</sup> ... Counsel will, at that point, notify the clerk's office of any conflicts that preclude oral argument during the week or on a particular day. The case will then be slotted for a day when no conflict exists.

<sup>76</sup> ... IOP Appendix 2.5, Notice to Counsel, USCS Ct. App. 3d Cir. (January 1, 2000). The notice of panel composition is given in all cases, including those not scheduled for oral argument.

<sup>77</sup> ... Given the short time before argument, the clerk's office will inform counsel by phone or fax, with a confirmation letter sent later.

<sup>78</sup> ... The court sits the first week (adjusted to avoid holidays and similar matters) during October, November, December, February, March, April, May and June. USCS Ct. App. 4<sup>th</sup> Cir., Local Rule 34(c)(1998).

<sup>79</sup> ... Internal Operating Procedures, 34.1, USCS Ct. App. 4<sup>th</sup> Cir., Local Rule 34(e)(1998)(composition of panel "usually changes daily").

information, the chief judge knows the number of slots on panels that must be filled with visitors, including district court judges sitting by designation.<sup>80</sup> Once the information is complete, the chief judge distributes to the court a listing of all judges sitting at each session.

Specific panels, however, are not determined on a yearly basis, but are done in advance of each session. To achieve random selection of panels and, in accordance with circuit requirements, to ensure that judges "sit with all other judges an equal number of times,"<sup>81</sup> the clerk's office uses a variation of the program first developed in the Tenth Circuit. The program randomly assigns judges to panels, giving consideration only to the number of times a particular judge is sitting with another judge in the current session or has sat with that judge in prior sessions and the unavailability of a judge on a particular day during the session.

The clerk's office first enters into the program the list of judges and the days they are sitting for the session.<sup>82</sup> The clerk's office then enters into the program any pre-existing panels. Preexisting panels include must panels,<sup>83</sup> death penalty panels, and remands from the Supreme Court. At the time they are entered, the clerk's office will include a statement of the panel's prior involvement in the case which required manual creation of the panel. The program maintains this statement as an audit trail showing the reasons that a panel was

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<sup>80</sup> ... As in other circuits, the Fourth Circuit attempts to have new district court judges sit by designation soon after joining the bench, a form of introduction to the judges and decision making process at the court of appeals. District court judges cannot hear appeals in cases they decided. 28 U.S.C. 47.

<sup>81</sup> ... IOP 34.1 provides that "[t]he varied assignment of judges to panels and the independent assignment of varied cases to panels is designed, insofar as practicable, to assure the opportunity for each judge to sit with all other judges an equal number of time, and to assure that both the appearance and the fact of presentation of particular types of cases to particular judges is avoided."

<sup>82</sup> ... Judges with scheduling conflicts during a session notify the chief judge. The chief judge notifies the clerk prior to the running of the program to determine panels.

<sup>83</sup> ... The must panels represent an attempt by the Fourth Circuit to allow judges who had already participated in a case to sit on the panel. Sometimes the must panel will consist of three judges with prior involvement. To the extent that a judge is no longer available (in the case of a visiting judge, for example), or that other scheduling needs preclude assignments of a particular judge, the "must" panel will have a mix of judges with and without prior participation.



created manually rather than generated automatically. Once all pre-existing panels have been entered, the remaining panels are generated by the program.<sup>84</sup>

The program will sometimes have difficulty producing panels that meet all of the variables established by the circuit.<sup>85</sup> As a result, manual changes in panel composition will sometimes be necessary. As in the Tenth Circuit, however, the court maintains an audit trail that preserves the reasons for any change. The audit trail is kept in the clerk's office and made available to any judge upon request.

Once panels have been determined, the clerk's office assigns cases. Cases are assigned through a computer program based upon the version developed in the Tenth Circuit. Unlike the Tenth Circuit, however, the Fourth Circuit does not assign cases based on "clusters." Instead, cases are assigned to each panel individually.<sup>86</sup>

The clerk's office first prepares a list of cases to be calendared for a particular session. The list is based upon the length of time a case has been mature for argument, with priority given to expedited cases, and with criminal cases receiving a priority over civil cases. The list of cases (called the tentative calendar) is prepared six to eight weeks before a session. The clerk's office notifies the parties that their case has been tentatively scheduled for a particular week and distributes to the judges disqualification reports for all cases on the list. The notice to counsel allows them to notify the clerk's office of any conflict.<sup>87</sup> In addition, the judges notify the clerk's office of any disqualification.

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<sup>84</sup> ... The remaining panels are formed by a "computer program designed to achieve total random selection." IOP34.1

<sup>85</sup> ... Disqualifications in particular cases will sometimes necessitate manual changes in panel composition. In these circumstances, however, the reason for the change is preserved in the audit trail.

<sup>86</sup> ... The Fourth Circuit's decision not to use clusters removes one area of discretion that exists in the Tenth Circuit in the case assignment process. See note 488 infra.

<sup>87</sup> ... Since the circuit has multiple panels operating on the same day, conflicts can include the obligation to argue appeals in more than one case simultaneously. Counsel has ten days to notify the court, permitting the clerk's office to devise a schedule that avoids any such conflict.

The clerk's office removes from the tentative calendar any cases which cannot be argued at that session. For the remaining cases, the clerk's office enters into the case assignment program all information regarding counsel's conflicts during the session and all information regarding judicial disqualifications. The clerk's office also manually assigns cases that must go to pre-existing panels. The case assignment program then randomly assigns all remaining cases. Any case assigned manually, either before or after the assignment program is run requires the creation of an audit trail stating the reasons for the manual assignment.

Briefs are circulated to the panels together with the final calendar. Infrequently, after reviewing the briefs, a judge will notify the clerk's office of a disqualification that was not apparent from the disqualification report. If another circuit judge is available to sit on that day, the clerk's office will ask that judge to sit in place of the disqualified judge. Absent an available circuit judge and if time permits, the clerk will contact local district judges to determine if they are available to sit by designation.<sup>88</sup> If time does not permit finding a replacement judge, the two remaining panel members can hear and decide the case by quorum as long as they both agree on the disposition.<sup>89</sup>

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<sup>88</sup> ... For last minute vacancies during a court session, most active judges have already been assigned to panels and will often be unavailable. As a result, efforts often focus on senior and district court judges. For vacancies on panels hearing cases by special order and not during a regular session, active judges will usually be available. In these circumstances, the clerk's office will generate a replacement randomly, either through the use of a computer program or by drawing a name manually from a pool of all eligible judges. In any event, the clerk's office typically arranges replacement judges after cases have been assigned to panel. Prior to that time, the task typically falls to the chief judge. The chief judge will in no circumstances select replacement judges in cases where he or she is disqualified or is sitting on the panel.

<sup>89</sup> ... In addition, the Fourth Circuit appears to be the only one that vests the authority to assign opinions in the chief judge, whether or not the chief sits on the panel. Internal Operating Procedure, USCS Ct. App. 4th Cir., 36.1 Opinion preparation assignments (1998)("Opinion assignments are made by the Chief Judge on the basis of recommendations from the presiding judge of each panel on which the Chief Judge did not sit."). The authority is included primarily to permit the chief judge to even out workloads and is rarely invoked.

The Fourth Circuit has become the second circuit to rely on an audit trail that preserves the reasons for manual changes in the schedule of panels. The system is not, however, identical to that used by the Tenth Circuit. In the Fourth Circuit system, the audit trail only applies at the time the initial schedule is determined. Last minute changes due to illness, disqualification or scheduling conflict are not reflected in the audit trail.<sup>90</sup> In addition, the audit trail information remains in the clerk's office and is only provided to judges upon request.<sup>91</sup>

***Fifth Circuit.***<sup>92</sup> It was in 1963, as a result of the Houston Conference, that the Fifth Circuit put in place rules requiring a rigid separation between the panel schedule and the calendar of cases. The Circuit retains the separation. Nonetheless, the Circuit remains one of the few that assigns both tasks to the clerk's office.<sup>93</sup>

The Fifth Circuit determines the schedule a year in advance.<sup>94</sup> The rules allow the chief judge, "in his discretion" to appoint a panel "to review pending cases for appropriate assignment or disposition . . ." <sup>95</sup> Nonetheless, the authority has been delegated away to a scheduling proctor, a single judge responsible for determining the schedule in consultation with the chief judge.<sup>96</sup>

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<sup>90</sup> . . . The clerk's office does apparently maintain information on subsequent replacements. Nonetheless, the information would not, for example, include the reasons why a particular judge was appointed. The Tenth Circuit has protocols for designating subsequent replacements with the audit trail containing any explanation for deviations from the protocols.

<sup>91</sup> . . . In the Tenth Circuit, the information is routinely circulated to all judges on the court.

<sup>92</sup> . . . The information was obtained from Judge Politz during his tenure as chief judge. He stepped down in January 1999, replaced by Judge King. Judge Politz was one of the first to respond to a letter requesting information about the assignment process. See Letter from Chief Judge Henry A. Politz, 5<sup>th</sup> Judicial Circuit, to Professor J. Robert Brown, Jr., April 14, 1998. He also took the time to discuss the matter directly with Professor Brown.

<sup>93</sup> . . . At one time, panel assignment information was in the hands of the circuit executive, with the clerk's office responsible for assigning cases. The paneling function was transferred to the clerk's office in 1991.

<sup>94</sup> . . . Internal Operating Procedures, USCS Ct. App. 5<sup>th</sup> Cir., Local Rule 34, Judge Assignments (1998)(panels are created "for the entire year").

<sup>95</sup> . . . USCS Ct. App. 5<sup>th</sup> Cir., Local Rule 34.1, Docket Control.

<sup>96</sup> . . . During Judge Politz' tenure as chief, the scheduling proctor was Judge Davis.

The court sits the first week of each month unless punctuated by a holiday and uses 42-45 panels, a number that will vary depending upon the estimated number of appeals expected for the upcoming year.<sup>97</sup> Active judges sit on approximately seven oral argument panels during the year<sup>98</sup> and are expected to sit in each of the cities where the circuit regularly hears cases.<sup>99</sup> Panels hear cases four days a week, with as many as six cases scheduled each day.

The process begins in the Fall when the deputy clerk solicits from the active judges the dates they are unavailable to sit.<sup>100</sup> By December, the information has been obtained and a recommendation is made to the scheduling proctor and chief judge concerning the number and timing of sittings for the upcoming year.<sup>101</sup> Thereafter, the clerk's office produces an initial draft of the schedule.

In doing so, an effort is made "to avoid repetitive scheduling of panels composed of the same members."<sup>102</sup> As a result, the goal is to have judges sit with every other judge before repeating, although this can occasionally not be done.<sup>103</sup> In addition, an effort is made

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<sup>97</sup> ... Traditionally, the Circuit scheduled from three to five sittings each month, with four the average. Politz letter. The numbers depended in large part on the months judges indicated they were available to hear cases. In some instances when five panels were scheduled, there were not enough cases to guarantee a full week of oral arguments. As a result, Judge Politz ended the practice, limiting the number of panels to no more than four.

<sup>98</sup> ... The number is approximate. Occasionally, a senior judge will not hear cases the entire week, with the remaining days assigned to an active judge. An active judge may, therefore, hear cases only a half of a sitting and, as a result, not sit for seven full sittings.

<sup>99</sup> ... Most cases are heard in New Orleans. A growing number of sittings are, however, scheduled for Houston and Austin. In addition, occasional sittings are scheduled for Jackson and Dallas and the circuit has a tradition of scheduling one sitting each year at a law school. Cases have therefore been heard at LSU, Southern University (Baton Rouge), Baylor, Texas, Texas Tech, SMU and Ole Miss. Conversation between Professor Brown and Judge Politz, Feb. 22, 1999; Sept. 3, 1999.

<sup>100</sup> ... Judges can designate three months that they would prefer not to sit.

<sup>101</sup> ... Judge Assignments, Internal Operating Procedures, USCS Ct. Appl 5<sup>th</sup> Cir., Local Rule 34. See also Letter from Chief Judge Henry A. Politz, 5<sup>th</sup> Judicial Circuit, to Professor J. Robert Brown, Jr., April 14, 1998.

<sup>102</sup> ... Judge Assignments, Internal Operating Procedures, USCS Ct. Appl 5<sup>th</sup> Cir., Local Rule 34.

<sup>103</sup> ... Politz letter. The schedule is done manually. By the end of the process, it is not always possible to find pairs that have not already been used.

to make certain that judges do not sit more than three consecutive months.<sup>104</sup> The circuit, however, has an unofficial practice of including at least two active judges on every panel.

The schedule will include the senior judges willing to sit.<sup>105</sup> In general, they sit five times, usually for the entire week. The schedule will sometimes include visitors, although in recent years they have been used infrequently.<sup>106</sup> They include appellate judges from other circuits and district court judges within the circuit.<sup>107</sup> The Fifth Circuit attempts to ensure that all new trial judges sit sometime in the first two years following their appointment.

Once completed by the deputy clerk and reviewed by the Scheduling Proctor,<sup>108</sup> the schedule is sent to the entire circuit.<sup>109</sup> Thereafter, judges may request changes, usually by arranging to trade places with another member. In general, they must inform the scheduling proctor and provide the reasons.<sup>110</sup>

Not all panels are formed in this fashion. Death penalty panels are determined through a separate log of judges and consist only of active judges. Cases are assigned on a seriatim basis, with all subsequent matters in the case heard by the same panel. In addition,

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<sup>104</sup> ... In fact, the goal is two sittings in two consecutive months. To the extent, however, that judges express a preference to sit for more than two or three consecutive months, the schedule will reflect the preference to the extent possible.

<sup>105</sup> ... As in other circuits, senior judges can designate the particular months they want to sit.

<sup>106</sup> ... Given the heavy participation of senior judges, the court used visiting judges for only three days in 1998-99 court year. The following year, Judge Dube took senior status and reduced his number of sittings from seven to five. Visitors were invited to fill the openings on the two sittings.

<sup>107</sup> ... In general, it is the task of the Scheduling Proctor to arrange for visitors.

<sup>108</sup> ... The clerk and scheduling proctor consult on a continuous basis. The consultation may involve logistical or personnel matters. With respect to logistics, the clerk's office may sometimes recommend alterations in the schedule, with those ranging from a change in the number of panels scheduled for a particular week to the day of the week the cases will be heard. With respect to personnel matters, some active judges may sit less than seven full weeks. On all of these matters, the clerk's office will inform and seek advice from the scheduling proctor.

<sup>109</sup> ... To the extent that the schedule has deviations from the circuit's traditional policies (i.e. there are a number of panels that have the same pair of active judges), the clerk will note them for the scheduling proctor and for the chief judge.

<sup>110</sup> ... The practice is for the chief judge to approve the change. Judge Politz indicated that he did not recall any instance where he did not do so. Nonetheless, unlike some other circuits, the right to trade places is not unlimited.

cases remanded from the Supreme Court and subsequent appeals from the district court in the case of a limited remand return to the same panel.<sup>111</sup> To the extent that oral arguments are scheduled in these cases, they are done by special order outside of the ordinary oral argument schedule and will not involve the panel hearing additional cases from the calendar.

In assigning cases, the function falls to the clerk's office. Cases have been screened in advance to determine those requiring oral argument.<sup>112</sup> About 60 days before a panel sitting, the clerk prepares the number of cases necessary for the upcoming panels.<sup>113</sup> Efforts are made to assign approximately 20 cases to each panel.<sup>114</sup>

The docket will include all cases having some type of priority.<sup>115</sup> Thereafter, cases will be added on a first in, first out basis.<sup>116</sup> They are divided evenly "by case type so that each panel for a particular month has more or less an equal number of different types of litigation for consideration."<sup>117</sup> In addition, the office attempts to provide each panel with a cross section of difficult and complex cases.<sup>118</sup>

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<sup>111</sup> ... Ordinarily, the screening panel or an oral argument panel will identify these cases.

<sup>112</sup> ... The Fifth Circuit relies on a screening panel to classify cases. Class I are cases deemed frivolous; Class II are those where oral argument will be neither required nor helpful. Almost 70% of the cases are decided without oral argument. A decision not to schedule oral argument must be unanimous. Cases assigned to Class III or IV will be scheduled for oral argument. Those in Class III receive 20 minutes per side; Class IV 30 per side.

<sup>113</sup> ... The Fifth Circuit generally schedules from three to five sittings each month, with four the average. Politz letter.

<sup>114</sup> ... The panels hear approximately five cases during each of the four days (Monday-Thursday) that they sit.

<sup>115</sup> ... Priorities are, for example, given to criminal, prisoner, grand jury and expedited cases.

<sup>116</sup> ... At one time, the circuit had a policy of assigning cases based upon geography. Thus, if judges sat in Houston, cases from that region would be assigned to the panel. Because some parts of the circuit produced higher proportions of particular types of cases (criminal cases, for example), panels assigned cases based upon geography did not always receive an adequate cross section of those available throughout the circuit. The circuit, however, recently abandoned the practice of assigning on the basis of geography (except in criminal cases using court appointed attorneys).

<sup>117</sup> ... Preparation and Publishing Calendars & Calendaring by Case Type, Internal Operating Procedures, USCS Ct. App 5<sup>th</sup> Cir., Local Rule 34. The panels receive a cross section of different types of cases scheduled for that particular month. Thus, if the clerk has three panels and 60 cases, they will be manually assigned in an effort to balance the different types that appear in that particular cluster.

<sup>118</sup> ... The deputy clerk will eyeball the cases based upon such factors as the number of briefs, issues and parties and try to distribute them to the different panels in a balanced fashion.

The dockets are then randomly assigned to the panel “totally without reference to the judges thereon.”<sup>119</sup> The deputy clerk responsible for assignment does so with the panel identified only by number, unaware of the particular judges scheduled to sit.<sup>120</sup> Only after the cases have been assigned will the identity of the judges be revealed. Nonetheless, both functions are performed by the clerk's office, although by different deputies.

Once the identity of the panel has been revealed, the clerk's office will adjust the docket to reflect any known conflicts or recusals. Thereafter, all judges will receive a recusal packet.<sup>121</sup> To the extent that recusals occur, cases are simply swapped among the different panels sitting that particular week.<sup>122</sup>

Occasionally judges will learn shortly before oral argument that they are unable to sit. This may result from scheduling conflicts, illness or last minute recusals. To the extent that conflict affects only one matter, the clerk's office will try to switch judges on panels for a single case.<sup>123</sup> To the extent this cannot be arranged or no other panel is hearing cases in that location, responsibility for finding a replacement rests with the scheduling proctor. In

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<sup>119</sup> ... Politz letter. Judges are sent the list of cases and given an opportunity to recuse themselves in the event of a conflict. “When a recusal occurs, the case involved is swapped with a case from one of the other panels.” Id. Judge Politz noted finally that: “Placing a judge on a particular panel or assignment of a case to a given panel, other than as noted above, are studiously avoided. We are quite satisfied that our system has worked for us and it is rarely a matter of discussion or concern to any of our judges.”

<sup>120</sup> ... Internal Operating Procedures, USCS Ct. App. 5<sup>th</sup> Cir., Local Rule 34, Separation of Assignments of Judges and Calendaring of Cases (1998)(“The judge assignments are made available only to the judges for their advance planning . . . To insure complete objectivity in the assignment of judges and the calendaring of cases, the two functions of (1) judge assignments to panels and (2) calendaring of cases are carefully separated. Judge assignments are performed by the scheduling proctor and the clerk, but this information is not disclosed within the clerk's office until the calendars of cases are actually prepared and approved.”).

<sup>121</sup> ... Judges will receive a copy of the docket, the identity of the parties and attorneys and the certificate of interested parties filed with the briefs.

<sup>122</sup> ... A judge recusing from a case would not, ordinarily, know which panel would receive the case. The clerk's office tries to find a comparable case on another panel and make the switch. Since most weeks have three or four panels, a judge would not know which panel would have a matching case. Given the existence of multiple panels, it is not the practice of the court to return cases to the clerk's office for reassignment to a later panel.

<sup>123</sup> ... They will schedule the case first on the docket of each panel. Once completed, the switching judges will return to their regularly assigned panel.

general, however, the practice is to ask a local circuit or district court judge to sit in on the one case.

Where the conflict affects more than one day, the practice is to have the scheduled judge remain with the panel and listen to the oral argument tapes.<sup>124</sup> In some cases, judges with scheduling conflicts will themselves arrange for a replacement among the circuit judges. As a last resort, the scheduling proctor, often with the assistance of the chief judge, will be responsible for locating a replacement.

At least five weeks before the session, briefs are distributed to the panels. At the same time, parties are told the date of oral argument, although not the identify of the panel. Litigants will learn the identity of the judges one week before oral argument.<sup>125</sup>

***Sixth Circuit.*** Headquartered in Cincinnati, the Sixth Circuit hears cases from Kentucky, Michigan, Ohio and Tennessee. The circuit has a slightly different structure than other courts, dividing the judges into two divisions. Active judges will only sit with other members of that division. The Sixth Circuit also separates the responsibility for scheduling panels and assigning cases to panels. The circuit executive's office assists in the scheduling of panels, the clerk's office assigns cases.

The Court adopts a master schedule each spring for the following calendar year. On the basis of its estimate of the number of cases that will sit, the number of weeks that each panel will sit and the number of cases to be assigned to each panel. Active judges generally are expected to sit eight weeks each year, with oral arguments heard on four days and motions on one.<sup>126</sup>

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<sup>124</sup> ... The clerk's office obtains the consent of the counsel before doing so, however.

<sup>125</sup> ... Internal Operating Procedures, USCS Ct. App. 5<sup>th</sup> Cir., Local Rule 34, Identity of Panel (1998).

<sup>126</sup> ... Oral argument is heard on Tuesday through Friday. In addition to the cases set for oral argument, panels will resolve as many as four cases per day without oral argument.



The court is divided into two divisions, each containing half of the active judges on the court. The judges within a division change every six months.<sup>127</sup> Judges are assigned to divisions with a view toward giving every judge the opportunity to sit with each other active judge at least once every six months. A division will meet four times during each six month period, with three panels scheduled each week to hear cases.<sup>128</sup>

Upon approval of the master schedule at the spring court meeting, senior and visiting judges will be recruited to fill expected vacancies.<sup>129</sup> Senior circuit judges of the Sixth Circuit select the days they wish to sit. In doing so, they know the identity of the active judges assigned to the particular division but not the identities of those sitting on any panel with a vacancy. The remaining open dates are sent to a number of district judges in the circuit and to select senior judges from other circuits.<sup>130</sup> These judges may sit for two or four days during a sitting week.

After a sufficient number of senior and visiting judges have designated dates, an assistant circuit executive prepares the panel assignments for each week. Every effort is made to insure that each active judge sits with as many other active judges as possible. Senior and visiting judges are scheduled for their requested time slots on a first come, first

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<sup>127</sup> ... The divisions remain in place for six months and change on January 1 and July 1.

<sup>128</sup> ... Depending on the number of ripe cases, an extra panel has occasionally been used. In 1999, the court on a number of occasions scheduled four panels for one of the divisions.

<sup>129</sup> ... The circuit has ~~18~~ 16 judges if up to full complement. Each division, therefore, will have eight judges, enough for three panels during each session. Senior and district judges are required whenever the circuit has fewer than a full complement or whenever an extra panel must be added to the session. The court currently has three vacancies with a fourth expected early next year.

<sup>130</sup> ... The judges receive only the open dates. They do not know the identity of the other senior or active Sixth Circuit judges already scheduled for those dates. The chief judge decides which district judges to invite. In general the decision is based upon the judge's prior performance on the circuit and the status of the judge's workload as demonstrated by the most recent report on pending motions, cases under submission and three-year-old civil cases.

served basis. Once the circuit executive has completed the schedule, it will be sent to the chief judge for review.<sup>131</sup>

Thereafter, all active and senior judges receive copies of the schedule. A visiting judge receives only a copy of the schedule of the session in which he or she is scheduled to sit. Judge on the Sixth Circuit may, however, freely swap sitting assignments.<sup>132</sup>

The circuit executive has the responsibility for filling any vacancy created by death, retirement or long term illness of one of the judges. In the case of a short term vacancy arising from illness or other minute emergency, the Sixth Circuit employs the use of backup judges. Backup judges are two active judges drawn from the session that is not sitting. They will be listed on the sitting schedule and will be expected to join a panel should a short-term vacancy result.<sup>133</sup>

With respect to case assignments, the clerk's office assigns cases as they become ripe.<sup>134</sup> The office will assign approximately six cases per day to each panel. Cases are assigned based upon age (with the oldest generally assigned first), type (criminal have a priority), variety (an effort is made to ensure a mixture of cases by type and geography) and, to the extent possible, similar difficulty (based upon a case weighting system undertaken by staff attorneys upon review of the parties' briefs).

The clerk's office assigns cases to a panel without awareness of the identity of the judges sitting. Only after dockets have been prepared for an entire week and cases assigned

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<sup>131</sup> ... The Sixth Circuit informally attempts to ensure that all judges sit with each other on a regular basis. The chief judge will sometimes make changes to promote this goal.

<sup>132</sup> ... Judges may swap places after cases have been assigned. Most, however, do so before the assignment of cases.

<sup>133</sup> ... To the extent the backup judges are unavailable, the circuit executive and chief judge will have the task of finding replacements. Often this means the use of an available senior judge or district judge with a current workload or a circuit judge in close proximity to Cincinnati.

<sup>134</sup> ... Cases will generally be ripe when the briefing schedule has been completed. In addition, the office will occasionally assign some expedited appeals even before completion of the briefing schedule.

to particular panels are the identities revealed to the clerk's office. Once aware of the identity, the calendar deputy will reassign cases involving a conflict or, where a district court judge sits on the panel, cases from that judge's district. Cases pulled from one panel may be reassigned to another or may be returned to inventory.

The clerk's office will circulate a draft calendar to the judges sitting during that week. This occurs approximately eight weeks before oral argument. Judges will identify any conflicts or other conflicts. To the extent a conflict exists, the clerk's office will either swap the case with another panel scheduled for the same day or return the case to inventory.<sup>135</sup> Thereafter, the clerk's office sends briefs, appendices, pending motions and other case related papers.

In the case of a recusal or other conflict after briefs have been sent, the calendar unit will remove the case from the calendar and returned to the queue awaiting assignment. If, however, counsel has already been notified of oral argument, the case will be switched with another panel scheduled to sit the same day. Similarly, when a panel postpones an argument or a matter settles long enough in advance, the calendar unit will attempt to assign an expedited or ripe case, preferably of the same type and weight.

The circuit uses preexisting panels in several circumstances.<sup>136</sup> In addition to death penalty cases,<sup>137</sup> the court will also return Supreme Court remands to the same panel. In two instances, however, the circuit relies on "must" panels. Panels will sometimes hear motions

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<sup>135</sup> ... Reassigning the case may not be possible because of conflicts with the other panel. Alternatively, the Sixth Circuit tries to balance panel workload by type and difficulty. If the case that gives rise to the conflict does not fit within this balance, it may be returned to inventory and a more appropriate case substituted.

<sup>136</sup> ... Preexisting panels generally hear argument, to the extent necessary, by special order. They are not inserted into a session and given additional cases.

<sup>137</sup> ... In the case of death penalty cases, the circuit executive maintains a separate roster of panels consisting of active judges and senior judges who agree to hear the cases. The panels are drawn randomly and cases are assigned by the clerk's office on a seriatim basis. The panel keeps all subsequent proceedings in the assigned case.

that require a “substantial review” of the case.<sup>138</sup> This occurs most often in the context of a motion for a stay or injunction pending appeal. For reasons of judicial economy, the panel will sometimes keep the case and hear the merit appeal, often on an expedited basis.

Similarly, subsequent appeals in the same case will often be returned to the panel where the new appeal raises the same or related issues. Once a previously argued case has been identified by the clerk’s office, the judges on the original panel will receive the briefs and determine whether hear the appeal or return it to inventory for assignment randomly to another panel.<sup>139</sup>

Parties are notified of the date of oral argument approximately five or six weeks in advance. They learn the identity of the panel approximately two weeks in advance of oral argument. The information is available from the clerk’s office or by accessing the court’s web page.<sup>140</sup>

*Seventh Circuit.* The assignment system in the Seventh Circuit has a number of unique aspects. It is one of only two circuits that do not expect active judges to hear cases throughout the week the court is in session.<sup>141</sup> Instead, judges are assigned to panels for one or two days of each week that the court is in session. The Seventh Circuit is also the only court to place both case and panel assignments in the hands of the circuit executive.

The circuit executive's office determines the cases that are appropriate for oral argument and assigns an amount of time based upon the perceived complexity. Six to eight weeks before oral arguments, the circuit executive's office prepares a calendar for the entire

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<sup>138</sup> ... Rather than have a separate system for the creation of these panels, motions are sent to merit panels for resolution. Motions are assigned as equitably as possible among panels sitting during the week.

<sup>139</sup> ... The process is informal and designed to promote judicial economy. To the extent a previous panel can no longer be reconstituted, perhaps because one of the judges is unavailable, the case will ordinarily be returned to inventory and reassigned on a random basis.

<sup>140</sup> ... The circuit’s web page address is [www.ca6.uscourts.gov](http://www.ca6.uscourts.gov).

<sup>141</sup> ... The other is the First.

week. Approximately six cases are scheduled for each day, although on some days judges will hear nine short argument cases. Cases are assigned using a modified, first in, first out system.<sup>142</sup> Although typically assigning the oldest cases first, special priority is given to criminal cases, preliminary injunctions, and matters of great public importance.

Once completed, the proposed calendar is sent to the judges on the court. The judges inform the chief judge's secretary of the days they cannot sit and the cases in which they are recused.<sup>143</sup> Judges who recuse typically identify the case but do not ordinarily explain the basis for disqualification.

With the information on recusals and availability, the circuit executive puts together the panels. Panels in the Seventh Circuit change daily. Judges are expected to sit on one or two panels during each of the approximately 23 weeks the court convenes, for a total of about 34 days of sitting each year.<sup>144</sup>

The circuit executive uses a matrix kept in the office of the chief judge to determine panels. This is done in the chief judge's office in the presence of the secretary to the chief judge. The matrix contains all possible three judge combinations.<sup>145</sup> The circuit executive will randomly choose unused panels from the matrix, with the selection done in the chambers of the chief judge in the presence of secretary. In general, once a panel

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<sup>142</sup> ... Eighteen days a year, judges will hear nine cases a day. Letter from Collins T. Fitzpatrick, Circuit Executive, Judicial Council of the Seventh Circuit, to J. Robert Brown, Jr., April 27, 1998.

<sup>143</sup> ... Unlike most other circuits, the judges do not receive a recusal package, including a statement of interested parties and the identity of the lawyers involved. They examine the briefs and court docket directly. The court recently developed an initial computerized screening system which notes recusals when an appeal is docketed.

<sup>144</sup> ... The system allows judges to prepare for 6-12 cases each week they hear oral argument, rather than the 25-30 for panels that meet the entire week.

<sup>145</sup> ... The matrix includes all combinations of active and some senior judges on the Seventh Circuit. The matrix usually must be replaced approximately every two years. At that time, 20 or so panel combinations will typically remain unused. In resorting to a new matrix, the circuit executive's office will endeavor to employ these unused combinations first.

combination has been used, it will not repeat until all other panels on the matrix have been used.<sup>146</sup>

Once the panels have been determined, a schedule will be circulated by the chief judge's secretary to all of the judges on the court. To the extent that a judge cannot sit (due to illness or late recusals), the circuit executive has the responsibility for finding a replacement.<sup>147</sup> In general, efforts are made to locate a judge who can sit for the entire day, often by switching with someone else sitting the same week. In some cases, however, the circuit executive will arrange for a replacement judge only for the case that gave rise to the conflict. Finally, oral argument in a case might be postponed on motion of a party or sua sponte and rescheduled on a later date.

In determining the schedule, the circuit executive will sometimes be required to include panels formed outside of the matrix system. This occurs where the panel decides to hear a subsequent appeal in the same case or receives a case on remand from the Supreme Court.<sup>148</sup> Similarly, death penalty cases are assigned randomly at the time an appeal is docketed rather than at the time the calendar is determined. The panel will then be responsible for all subsequent matters arising in that case.<sup>149</sup>

Preexisting panels may hear cases during a week the court is in session or can set the matter for a hearing separately. To the extent heard during a regular session of the circuit, five additional cases may be assigned in addition to the case that gave rise to the formation

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<sup>146</sup> ... Panels will repeat, however, where some judges cannot sit and combinations with eligible judges have already been used.

<sup>147</sup> ... While judges will sometimes arrange to trade places, in general this does not occur.

<sup>148</sup> ... United States Court of Appeals for the Seventh Circuit Operating Procedure 6.

<sup>149</sup> ... USCS Ct. App. 7<sup>th</sup> Cir., Internal Operating Procedures, Rule 22(a)(2), Death Penalty Cases (1998).

of the panel. In those circumstances, the circuit executive will assign "run of the mill" cases to round out the panel's allotment.<sup>150</sup>

Counsel is told the date of oral argument approximately three weeks in advance.<sup>151</sup> The members of the panel, however, will only be revealed on the day of oral argument.

***Eighth Circuit.*** The Eighth Circuit has perhaps the most traditional assignment system. The circuit still relies on an assignment judge to determine panels. Cases are assigned by the clerk's office, with the clerk aware of the identity of the panels.

The circuit meets for ten terms each year, consisting of one week every month except July and August. Active judges are expected to participate in eight terms.<sup>152</sup> Because the entire circuit meets during the same week, multiple panels will be scheduled each day of the session.<sup>153</sup> Unlike other circuits where all judges hear cases the same week, however, the Eighth does not scramble the panels daily or determine composition prior to each term. Instead, panel composition is determined at least a year in advance.

Before the panels are set, judges give their scheduling preferences. Senior judges can specify preferred dates and locations.<sup>154</sup> Active judges specify the month in the Fall and Spring that they prefer to remain "in chambers" and not hear cases. Once this has been done, the assignment judge determines the composition of the panels.

The schedule will then be circulated to all of the judges on the court and given to the clerk's office. Once the schedule is completed, the expectation is that judges will not change

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<sup>150</sup> ... Letter from Collins T. Fitzpatrick, Circuit Executive, Judicial Council of the Seventh Circuit, to J. Robert Brown, Jr., April 27, 1998.

<sup>151</sup> ... USCS Ct. App. 7<sup>th</sup> Cir., Circuit Rule 34(b)(1), Oral Argument (1998).

<sup>152</sup> ... The circuit meets for one week a month from September through June. Judges are expected to participate in four Fall terms (Sept. – Jan.) and four Spring terms (Feb. –June). Letter from Circuit Judge Roger L. Wollman, U.S. Court of Appeals, 8<sup>th</sup> Circuit, to Professor J. Robert Brown, Jr., June 26, 1998.

<sup>153</sup> ... During each term, three – four panels will meet daily, often in two different locations.

<sup>154</sup> ... In general, senior judges do not sit an entire week. In that case, the panel composition will change during the week.

panels.<sup>155</sup> To the extent that a judge cannot sit due to illness or other reasons, the clerk's office will either switch the case with another panel or find a substitute judge.

In addition, however, the schedule will be modified to include "special assignment" panels. These include death penalty panels, cases remanded from the Supreme Court, decisions by the administrative panel to keep a case, subsequent appeals in the same case and three school desegregation cases. "Special assignment panels" are added to the schedule and, in addition to the case that gave rise to the panel, hear cases from the calendar.

With respect to case assignments, the clerk's office screens them and designates those that will be set for oral argument.<sup>156</sup> They are not assigned a rating for complexity but do receive an allotment of time for oral argument (10 to 30 minutes per side) based in part on the perceived difficulty of the issue or issues.<sup>157</sup> In general, the clerk's office tries not to schedule more than one 30 minute case per panel per day.<sup>158</sup>

In making the assignments, criminal cases are assigned first, then civil. In addition, the clerk's office attempts to balance the type of cases heard by each panel. The office does not apply a predetermined formula but seeks to balance the specific pool of cases calendared for that term.<sup>159</sup>

Once cases have been assigned, judges on the panel will receive a copy of the preliminary schedule, the screening sheets and certificates of interested parties. To the

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<sup>155</sup> ... Judges could agree to switch months. To do so, however, would generally require approval of the presiding judge of the panel and the chief judge.

<sup>156</sup> ... To the extent not assigned for oral argument, the case will be referred to a screening panel. The panel can order a case set for oral argument. In addition, parties can object and request that a case be set for oral argument.

<sup>157</sup> ... Gans Letter. Each panel receives 160-180 minutes of argument each day. On Tuesdays, the schedule includes six 10 or 15 minute cases for each panel.

<sup>158</sup> ... In addition, the court allocates the largest number of cases on Tuesday, with six ten or fifteen minute cases assigned to each panel. Gans Letter.

<sup>159</sup> ... Thus, if the pool contains a large number of appeals involving Social Security disability determinations, an effort will be made to equitably spread the cases to all panels hearing matters during the week.



extent that a judge recuses, another case will be substituted.<sup>160</sup> The removed case will go back into the pool and be reassigned, often for the next term.<sup>161</sup>

After panel assignment occur, the clerk's office informs the parties of the identity of the judges. They therefore know about four to six weeks in advance of oral argument. Only the DC Circuit notifies litigants earlier. The Eighth Circuit implemented the practice primarily for administrative convenience.<sup>162</sup> The clerk's office will notify parties of any change in composition and, on a weekly basis, updates the calendar (including the panel assignments) on the web page.<sup>163</sup>

*Ninth Circuit.* The process in the Ninth Circuit is notable both because of its geographic diversity (hearing cases in locations ranging from Hawaii to Anchorage)<sup>164</sup> and the number of judges (28 when there are no vacancies).<sup>165</sup>

In the Ninth Circuit, the authority for both case and panel assignments falls to the court clerk.<sup>166</sup> Panel assignments are done at least a year in advance. Each judge must sit

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<sup>160</sup> ... Judges usually, but not always, inform the clerk of the reasons for the recusal.

<sup>161</sup> ... In some instances, the clerk's office will arrange a swap with another panel meeting the same day. This occurs most often for older cases in which additional delay is deemed unwarranted.

<sup>162</sup> ... Rather than respond to a high volume of phone calls about composition, the clerk's office notifies parties at the same time they are given a date for oral argument. The judges on the court did debate whether earlier notice would result in increased requests for a continuance as parties tried to avoid particular panel. According to the clerk's office, however, the practice has not resulted in any noticeable increase in such motions. For a possible concern with early notification, see note 324 supra.

<sup>163</sup> ... See <http://ls.wustl.edu/8<sup>th</sup>.cir/calendar>. Notification is currently done by mail. In the future, the circuit expects to provide such notice by some form of electronic communication.

<sup>164</sup> ... The Circuit typically hears cases during the first two weeks of the month. Every month, panels convene in Seattle and Pasadena during the first week and San Francisco during the second. In addition, the circuit hears cases in Portland seven months a year, Honolulu two and Anchorage one (in August).

<sup>165</sup> ... The circuit has put in place a number of administrative mechanisms designed to address these factors, including a system of en banc hearings that involve less than a majority of the judges on the court. For a discussion of these procedures, see Marybeth Herald, *Reversed, Vacated and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 *Oregon L. Rev.* 405, 476-479 (1998).

<sup>166</sup> ... The Clerk of the Court has primary responsibility for case management and maintenance of the docket. For a brief description of the tasks of the clerk, see Richard H. Deane & Valerie Tehan, *Judicial Administration in the United States Court of Appeals for the Ninth Circuit*, 11 *Golden Gate University L. J.* 6-7 (1981).

seven or eight weeks a year,<sup>167</sup> with one or two additional weeks on a screening panel.<sup>168</sup> Panels remain intact throughout the week and cases are heard all five days.

The assignment system starts in late August or early September for the following calendar year. Judges are sent a questionnaire by the clerk's office seeking the preferred months judges wish to remain in chambers and not hear cases.<sup>169</sup> Where possible, the preferences will be (and usually are) honored in the scheduling process.<sup>170</sup>

The clerk's office will also obtain the preferences of visiting and senior judges. Senior judges<sup>171</sup> may designate that dates they will hear cases and the number of days and cities where they will sit.<sup>172</sup> Similarly, the circuit has a number of visitors who sit regularly.<sup>173</sup> As part of the scheduling process, the clerk's office will ordinarily contact them for their preferred weeks and locations.<sup>174</sup> In addition, the circuit attempts to schedule new district court judges to sit sometime during their first year on the bench.

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<sup>167</sup> ... Judges can elect whether to sit on two screening and seven oral argument panels or one screening and eight oral argument panels.

<sup>168</sup> ... The screening panel will actually convene in San Francisco and review cases, usually in conjunction with a presentation from staff attorneys. To the extent the panel decides that the screening process is inappropriate, the case will be set for oral argument.

<sup>169</sup> ... Judges receive three months off from hearing cases, one month for vacation and two to catch up on opinion writing. [ANYTHING ELSE ON QUESTIONNAIRE?]

<sup>170</sup> ... The circuit hears cases year round. As a result, the number of panels during the summer decreases only slightly. While some judges would prefer not to hear cases in the summer, the more common request is for two months of hearings followed by one month off. Thus, the open months are typically scheduled throughout the calendar year.

<sup>171</sup> ... The use of senior judges is significant. The Ninth Circuit currently has 17 senior appellate court judges, most of whom still hear cases.

<sup>172</sup> ... To the extent senior and visiting judges hear cases less than five days, the clerk's office typically fills the remaining days with district court judges from within the circuit. The circuit executive's office maintains a list of district court judges willing to sit and will provide names of available individuals upon the request of the clerk's office.

<sup>173</sup> ... In general, visitors are arranged at the time the schedule is created. In some instances, however, this is not possible. The schedule will therefore include a visitor slot that will be filled later by the chief judge. In addition, the schedule will sometimes have positions for new judges not yet confirmed. The schedule will therefore reflect a place on a panel for a new judge but otherwise omit his or her identity.

<sup>174</sup> ... Approximately 8% of the panels in the Ninth Circuit include visitors.

In making panel assignments, the clerk's office relies on a computer program. The computer program accumulates historical data in an effort to ensure that each judge sits together regularly and to provide balance in the geographic locations where the judges sit. All judges are expected to "ride" the circuit by sitting in all significant locations where the circuit hears cases and to do so in roughly equal amounts.<sup>175</sup> They also must sit with each other at least once over a two or three year period. The "aim" of the scheduling is to allow "each active judge to sit with every other active and senior judge approximately the same number of times . . . "<sup>176</sup>

Once the computer program has been run, the clerk may make some refinements<sup>177</sup> and then will circulate it to the judges on the court.<sup>178</sup> The schedule may contain some blanks for new judges whose confirmations are expected or for additional visitors. Following distribution of the schedule, judges can exchange panels only if they arrange the exchange and obtain the approval of the chief judge.<sup>179</sup>

As in other circuits, the Ninth Circuit sometimes resorts to predetermined panels. Cases remanded from the Supreme Court will be reheard by the same panel. In the case of a subsequent appeal in the same case, the panel will be notified and given an opportunity to

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<sup>175</sup> . . . This does not, however, apply to panels hearing cases in Hawaii and Alaska.

<sup>176</sup> . . . Court Procedures for Processing and Hearing Cases & Selection of Panels, USCS Ct. App 9<sup>th</sup> Cir., FRAP 1. As in some other circuits, the Ninth Circuit views the requirement primarily as a positive rather than negative. Rather than limiting the number of co-sits, the court seeks to ensure that all judges sit with each other on a regular basis.

<sup>177</sup> . . . The clerk's office may, for example, manually enter panels that violate its guidelines or where conflicts or unavailability make the use of panels that do meet the guidelines impracticable.

<sup>178</sup> . . . The exception are the panels arranged in Anchorage and Honolulu. The panels consist of one new member of the court and two additional active judges, with the selection based upon seniority. The clerk's office will notify judges of their eligibility to sit on the panels. They can decline, in which case the next judge on the list based on seniority will be notified. Assuming that no judge declines to sit, panels in these locations can be predicted from year to year with some degree of certainty.

<sup>179</sup> . . . The clerk's office indicated that exchanges will be permitted only for good reasons. The reasons will be given to the chief judge. Moreover, the culture of the circuit is to treat the schedule as fixed, with the expectation that exchanges will not be common.

hear the case.<sup>180</sup> The panel may and often does decline, however, with the case returned to the pool for random assignment.

To the extent that a panel retains a case and opts for oral argument, matters are handled outside of the usual scheduling process. As a result, the panel will specially schedule a hearing in the case, often in the afternoon.<sup>181</sup> The panel does not, therefore, receive additional cases to hear at the time of the special hearing.

About 11 or 12 weeks before a sitting, cases ripe for review are assigned to a case management unit ("CMU"). The CMU assigns a weighting of 3, 5, 7 or 10.<sup>182</sup> Each panel will hear 24 points a day and 120 points during the entire week.<sup>183</sup> As with judges, cases are assigned by a computer program. In general, the Ninth Circuit uses a first in, first out system, with the oldest cases assigned first. As in the other circuits, however, exceptions exist. Some appeals (including criminal) are entitled to a statutory priority. Geography plays a role in the assignment process. Appeals heard in Seattle will be from Washington, Montana and Alaska; those heard in Pasadena will be from South and Central California.<sup>184</sup>

In addition, panels will generally not be assigned more than one ten weight case per sitting. The clerk's office will also sometimes refrain from assigning a case that includes a

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<sup>180</sup> ... The approach recognizes that, even though the panel had prior involvement in a case, the passage of time may have obviated any efficiencies that might have arisen by reassigning the case to the same judges.

<sup>181</sup> ... Cases heard as part of the ordinary calendar process are heard in the morning. Often, judges on a predetermined panel will be hearing cases in the same city. They will typically arrange to rehear the case in the afternoon of one of the scheduled hearing days.

<sup>182</sup> ... Criminal appeals presumptively receive a 3 and civil a 5. Only 1-2% receive a 10; 5% receive a 7. The CMU includes a staff attorney who assigns the weighting. Five or six staff attorneys are responsible for assigning weightings to all cases, providing some level of expertise and consistency.

<sup>183</sup> ... To the extent that

<sup>184</sup> ... On some occasions, a geographic imbalance has existed in the number of appeals. In these circumstances, the Ninth Circuit does not assign cases from another geographic area to a sitting, something that would require considerable travel by the litigants. Instead, the court will sometimes move the panel to the city where the appeals are located.

dispositive legal issue<sup>185</sup> already under consideration by another panel.<sup>186</sup> Finally, cases that generate a known conflict with one of the judges on the panel will be eliminated.

Unlike some other circuits, the Ninth Circuit does not have a practice of attempting to ensure that each panel hears a cross section of cases ripe for review. Since multiple panels often sit the same week, it is possible that one could hear a substantially greater number of criminal cases than the other. Indeed, to the extent that cases raise common legal issues, the clerk's office will cluster them and assign them to the same panel.<sup>187</sup>

The panel receives a list of cases about nine or ten weeks before the sitting.<sup>188</sup> Approximately seven or eight weeks before hearing, the panel receives the briefs. The judges then have approximately one week to indicate recusals.<sup>189</sup> To the extent that recusal occurs during this period, the case will be exchanged with a similarly weighted case from another panel scheduled the same week or, in the event that no other panel is scheduled, sent back into inventory.

In the case of more last minute recusals, a replacement judge will be appointed to hear the one case. The clerk's office makes the arrangement, pulling judges sequentially

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<sup>185</sup> ... Similarly, to the extent that a case pending before the Supreme Court may decide dispositive issues, the clerk's office may refrain from assigning a case to a panel until a decision has been rendered. This occurred, for example, in connection with cases at the Supreme Court addressing Double Jeopardy in the context of civil forfeiture laws.

<sup>186</sup> ... More than any other circuit, the Ninth attempts to track issues to ensure consistency with circuit precedent. The Case Management Unit identifies relevant legal issues. To the extent that the issue is already under consideration, both panels will be notified. In those circumstances, the panel that first received the submission will decide the issue. The other panel will either issue and order delaying disposition pending the decision or will simply sit on the case until the other panel has ruled.

<sup>187</sup> ... This occurs most often where a series of cases raise issues under newly adopted legislation. The practice attempts to avoid assigning cases to different panels that could result in inconsistent decisions. It is also designed to conserve judicial resources.

<sup>188</sup> ... Judges receive only the names. They are not told the weighting or legal issues involved and do not receive certificates of interest. Recusals at this stage, therefore, are rare.

<sup>189</sup> ... The requirement is informal. Nonetheless, the judges on the panel know that the failure to adhere to the limit will result in delays in notifying litigants of the date of oral argument.

from a list.<sup>190</sup> Where time is extremely short, the practice is to designate the next judge on the list from the city where the panel will sit. In the case of a judge who becomes sick or otherwise cannot sit during a scheduled week, efforts are made to leave the panel intact. Where possible, the missing judge will participate by phone or listen to the tapes after oral argument. To the extent this is impractical, the clerk's office has the primary responsibility to find replacements. Often this will entail pressing an accommodating senior judge into service.

Parties are notified of the identity of the panel about one week before oral arguments. Specifically, the court makes the information available on the Monday of the week before oral argument.

***Tenth Circuit.*** The Tenth Circuit has the most transparent method of assigning judges to panels, although the system is still under development. The circuit relies on a newly created software program to make the assignments.<sup>191</sup> The system has been designed to minimize judicial discretion in the selection process. Most significantly, however, the system retains a record of the reasons for any exception from random assignment of judges to panels.

The Tenth Circuit meets for five terms each year. A term lasts one week and amounts to a convocation of the entire circuit. Cases are heard each day, usually by four different panels. Panel configurations change daily; the same panels do not meet throughout the week.

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<sup>190</sup> ... The list reduces the amount of discretion in the process of designating replacement judges. Nonetheless, the practice appears motivated more by a desire to ensure that the work load is balanced and that the same judges do not receive a disproportionate amount of this extra duty.

<sup>191</sup> ... The system was used for the first time in 1998. Professor Brown had the privilege of witnessing the system in practice in Sept. 1998 when the circuit executive's office ran the program for the November term.

Assignments are made six to eight weeks before each term. The system begins with a request to judges concerning the number of days that they can sit during the term.<sup>192</sup> Active judges are expected to sit for four days, while senior judges may sit less. In addition, judges will identify any conflict with a particular day.<sup>193</sup> With the information, the circuit executive runs the program assigning judges to panels.<sup>194</sup>

The program itself includes a number of parameters. The program is designed to equalize the number of sittings for each active judge and the number of co-sits (the number of times two judges sit together on the same panel). Moreover, the program builds up a history of co-sits to promote the goal of equalization over a longer period.<sup>195</sup>

The program also permits the circuit executive to enter manually a pre-existing panel of judges. This occurs where a panel had been previously selected to hear a particular case, something most often arising in the context of death penalty cases.<sup>196</sup> In those circumstances, the panel would be scheduled for one day in the upcoming term and assigned in accordance with predetermined protocols.<sup>197</sup>

Perhaps most significantly, the program creates an audit trail. The system allows for human intervention but requires that the reasons for any deviation be preserved. The audit trail requirement applies whether the chief judge has ordered a change in a panel or a judge

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<sup>192</sup> ... They inform the circuit executive of their unavailability but do not provide the reasons. Even if they did, the system is not designed to create an audit trail in these circumstances.

<sup>193</sup> ... Thus, if they have to give a speech on a particular day, they will indicate a willingness to sit four days but request that one of them not be the day of the speech.

<sup>194</sup> ... See Letter from Chief Judge Stephanie K. Seymour, U.S. Court of Appeals, 10<sup>th</sup> Circuit, to Professor J. Robert Brown, Jr., May 6, 1998.

<sup>195</sup> ... The program will look back two years in determining co-sits. Co-sits are determined for all active and senior judges. It is not maintained for visitors.

<sup>196</sup> ... Death penalty cases are assigned through a separate computer program which designates panels for the entire year. The panel that hears the first appeal will hear all matters arising out of that death penalty case. As a result, the death penalty panel will be known at the time the panel assignment software is run and will need to be entered manually.

<sup>197</sup> ... Any manual entry would, however, require an audit trail that would explain the reasons for doing so.

has indicated an inability to participate on a panel after the program has been run. In that sense, it is the only transparent system for judicial assignments.

Once the program has been run and the panels formed, cases will be assigned to panels through another computer program. Cases are manually divided into clusters.<sup>198</sup> At the time the clusters are formed, the clerk's office does not know the identity of the panels, preserving the separation between case and panel assignments.<sup>199</sup> Once the panels have been determined, clusters are assigned randomly. The program accounts for conflicts and will not assign a cluster to a panel where a judge has indicated he or she cannot hear one of the cases.

A tentative calendar is then sent to all judges, including a list of parties and attorneys, to determine conflicts. Since panels have been formed and cases distributed, any conflict will require a change in panel composition.<sup>200</sup> As a result, the audit trail will reflect the change and note the reasons.<sup>201</sup> Moreover, the judge with the conflict has no latitude to designate a replacement. The circuit executive relies upon a series of protocols to fill vacancies.<sup>202</sup> Litigants can learn the identity of the panel a week before oral arguments.

The system is more transparent than those used by the other circuits. Changes in the system of random assignment would be noted in the audit trail. Moreover, the audit trail is circulated to the other judges, creating a greater likelihood that unusual practices in the case or panel assignment area would be noticed and stopped.

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<sup>198</sup> ... Cases are divided into criminal, civil and mixed clusters.

<sup>199</sup> ... There is, however, a significant exception. Preexisting panels designated to hear a particular case are sometimes added to the regular term. See text at notes 485-486 supra. At the time of the assignment of the case that gave rise to the panel, the clerk's office knows the identity of the panel. The same panel will receive other cases as part of a cluster. At the time of formulation of the cluster, therefore, the clerk's office does know the identity of the judges who will be hearing the matter.

<sup>200</sup> ... Any change would need to be noted, whether an unexpected speaking engagement, illness or a conflict of interest.

<sup>201</sup> ... In the case of a recusal, the audit trail would note "recusal," without specifying the reasons for the recusal.

<sup>202</sup> ... For example, in the case of a conflict, the number two judge on a panel (based upon seniority) will be switched for the day with the number two judge on the next numbered panel from the same day.



The system is not fail proof. The audit trail currently permits vague explanations. Entering “recusal” into to program does not provide enough information to verify whether this was or was not the true reason for avoiding a panel.<sup>203</sup> To the extent a judge was aware of the protocols for selecting a replacement, unexplained recusals might provide some opportunity to change panels after cases have been assigned. Mostly, however, the program relies upon enforcement by other judges in the circuit. The information about changes in panel compositions and the audit trail are not given to litigants.

*Eleventh Circuit.* The Eleventh Circuit places assignments in the hands of the circuit executive and an assignment committee. It is the only circuit that has a collective body of judges who review the schedule before circulation to the entire court.<sup>204</sup> The circuit also maintains a strict separation between case and panel assignments, no real surprise since it is also the heir to the procedures adopted as a result of the Houston Conference in 1963.<sup>205</sup> At the time of case assignments, the clerk’s office does not know the identity of the panel.<sup>206</sup>

The court sits approximately 30 weeks each year and uses 42-45 panels.<sup>207</sup> Active judges sit on seven oral argument panels during the year and are expected to sit in each of

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<sup>203</sup> ... The recusal explanation would occur after panels have been formed and cases assigned. Thus, the judge exiting the panel and the judge joining the panel would know the particular cases to be heard .

<sup>204</sup> ... The court has used an assignment committee since inception in Oct. 1981. The number of judges serving on the committee has, however, varied, sometimes with only a single judge.

<sup>205</sup> ... The Fifth Circuit originally consisted of six southern states, Alabama, Florida, Georgia, Mississippi, Louisiana, and Texas. In 1980, the Circuit divided, creating the New Fifth (Mississippi, Louisiana, and Texas) and the Eleventh (Alabama, Florida, Georgia). The Eleventh Circuit is headquartered in the Elbert Parr Tuttle Courthouse in Atlanta, Georgia. The Fifth Circuit is headquartered in the John Minor Wisdom Courthouse in New Orleans, Louisiana.

<sup>206</sup> ... The clerk’s office will assign 20-22 cases per panel. When the requisite number has been accumulated, the office will ask the circuit executive for the identity of the panel in order to know who should receive the briefs.

<sup>207</sup> ... Generally only one panel sits each week. In some instances, however, two panels will sit. Perhaps once a year, three panels will sit the same week. Panels do not sit during the December holidays and a reduced number sits during the summer, from the middle of June through Labor day.

the four cities where the circuit regularly hears cases.<sup>208</sup> Each panel meets for four days, with the composition remaining the same throughout the week.<sup>209</sup>

The process begins with a recommendation by the clerk's office on the overall number of sittings for the year and the number for each city in which the circuit regularly sits.<sup>210</sup> Thereafter (usually in January or February for a term beginning the following October), the circuit executive will solicit from the active judges the dates they are unavailable to sit.

The scheduling process involves the selection of pairs of active judges for panels.<sup>211</sup> The pairs are "drawn by lot from a matrix for the entire year."<sup>212</sup> In selecting these pairs, the circuit takes into account a judge's unavailability for particular weeks and attempts to ensure that each judge sits with all other members of the court over a two year period. Once the pairs have been determined, senior judges (both from the circuit and visitors) and district court judges will be added to the schedule to fill the remaining vacancies.<sup>213</sup>

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<sup>208</sup> ... The court hears cases in Atlanta, Miami, Jacksonville and Montgomery.

<sup>209</sup> ... More accurately, the two active judges remain constant throughout the week. Visiting senior judges and senior judges from the circuit constitute the third member of the panel. On occasion, the court has employed the services of active district court judges but who, when used, sit only two days. ." Letter from Norman E. Zoller, Circuit Executive, U.S. Court of Appeals, 11<sup>th</sup> Circuit, to Professor J. Robert Brown, Jr., Oct. 27, 1998.

<sup>210</sup> ... See 11<sup>th</sup> Circuit, Rule 34-4, Oral Argument Calendar, IOP, 2. Oral Argument.

<sup>211</sup> ... Most panels have two active judges. Where necessary to ensure that all judges sit seven times each year, however, some panels during the year will be composed entirely of active judges.

<sup>212</sup> ... Oral Argument, Internal Operating Procedures, USCS Ct. App. 11<sup>th</sup> Cir., Rule 34-4. The matrix consists of pairings of judges who have not yet sat together the requisite number of times.

<sup>213</sup> ... District court judges may sit at the court of appeals every five years or so, assuming they are current on their caseload and dependent upon the needs of the court of appeals. They typically sit two days.

The draft schedule is prepared on behalf of the panel scheduling committee.<sup>214</sup> The scheduling committee consists of three to five active judges appointed by the chief judge.<sup>215</sup> They will review the proposed schedule in a closed session, with changes rare. The committee sends the schedule to the chief judge in the form of a recommendation. The chief judge then distributes it to active judges.<sup>216</sup>

Once determined, the culture of the Eleventh Circuit is to treat the schedule as fixed. Judges may arrange to exchange places on panels among themselves but the practice is rare.<sup>217</sup> To the extent exchanges occur, notification will need to be given to the chief judge and the chair of the scheduling committee.

Only the judges and the circuit executive know about the schedule. The clerk does not receive the information until after the calendar has been prepared.<sup>218</sup> Indeed, the procedures of the circuit specifically require that the assignment of judges and calendaring of cases be "intentionally separated."<sup>219</sup>

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<sup>214</sup> ... The circuit executive's office actually does the first draft of the schedule. The circuit does not use a computer program but does use a random system. The initials of all judges are placed on a slip of paper and randomly selected. To the extent that judges are selected and cannot sit on a particular panel because they are unavailable or the co-sit requirement would be violated, the name is returned to the array and another judge selected. The schedule is determined during a single working day and judges can and sometimes do attend and witness the process.

<sup>215</sup> ... The committee consists of active judges. Internal Operating Procedures, USCS Ct. App. 11<sup>th</sup> Cir., Circuit Rule 34-4.2(a), Oral Argument (1998). As the circuit executive described: "[M]any members of the court have served on it from time to time rotating on and off about every three to four years. The circuit has determined that scheduling of panels is an important, recurring function requiring on-going oversight." Letter from Norman E. Zoller, Circuit Executive, U.S. Court of Appeals, 11<sup>th</sup> Circuit, to Professor J. Robert Brown, Jr., Oct. 27, 1998.

<sup>216</sup> ... The Schedule is actually issued by the chief judge. Theoretically, the chief judge could alter the committee's recommendation. The practice, however, is to distribute what the committee recommends.

<sup>217</sup> ... The practice occurs once or twice a year. Because the schedule is set so far in advance, judges will sometimes learn of an unexpected conflict and arrange the exchange with a member of a panel sitting at approximately the same time.

<sup>218</sup> ... Internal Operating Procedures, USCS Ct. App. 11<sup>th</sup> Cir., Circuit Rule 34-4.2(b), Oral Argument (1998).

<sup>219</sup> ... Internal Operating Procedures, USCS Ct. App. 11<sup>th</sup> Cir., Circuit Rule 34-4.2(b), Oral Argument (1998).

Panels hear cases four days a week, with as many as six cases scheduled each day.<sup>220</sup> In the absence of any special priority, cases are assigned on a first in, first out basis. The clerk's office prepares a calendar of cases about one month prior to the hearing. Cases scheduled for oral argument are assigned to Class 3 or Class 4.<sup>221</sup> Class 3 cases receive 15 minutes of argument per side; class 4 twice that amount.<sup>222</sup>

After the cases have been identified, a recusal packet will be sent to each judge on the panel.<sup>223</sup> To the extent a judge has a conflict, he or she will indicate the fact to the clerk's office, with the case dropped from that panel's repertoire.<sup>224</sup> The case will be scheduled for the next available slot, which often means the next panel to be hearing cases.<sup>225</sup> In the case of an unexpected illness or other inability to sit on a panel, the clerk's office notifies the circuit executive who finds a replacement.

The circuit does rely on panels formed outside of the ordinary scheduling process. Death penalty panels are determined through a separate log of judges and consist only of active judges. Cases are assigned on a seriatim basis. All subsequent matters in the case are heard by the same panel. In addition, cases remanded from the Supreme Court and subsequent appeals from the district court in the case of a limited remand return to the same

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<sup>220</sup> ... Internal Operating Procedures, USCS Ct. App. 11<sup>th</sup> Cir., Circuit Rule 34-4.3(d), Preparation and Issuing of Calendars (1998).

<sup>221</sup> ... Class 1 are for appeals deemed frivolous. Class 2 are for those that are decided by a screening panel without oral argument.

<sup>222</sup> ... Moreover, the Class 4 cases will count as two in computing the allotment for a particular panel.

<sup>223</sup> ... The packet includes the certificate of interested parties submitted by the parties and the attorneys involved. At the same time the notice goes to judges, counsel will be contacted to make certain that no inalterable conflict exists with the tentative date of oral argument.

<sup>224</sup> ... Sometimes the composition of a panel will vary during the week. For instance, a panel may have a visitor or senior judge for part of the week and another visitor or senior judge the other part. To the extent the recusal notice comes from a visitor or senior judge, the case will be rescheduled for later in the week when that judge no longer sits on the panel.

<sup>225</sup> ... It is possible, however, that the next panel will have no open slots, having already been assigned a full allotment of cases. In those circumstances, the case would be given to whatever panel had the next available slot.

panel.<sup>226</sup> To the extent that oral arguments are scheduled in these cases, they are done by special order outside of the ordinary oral argument schedule and will not involve the panel hearing additional cases from the calendar.

The rules of the circuit provide that efforts will be made to ensure that all panels for a particular week have "an equitable number of different types of litigation for consideration."<sup>227</sup> As a result, panels will generally receive a mix of both criminal and civil cases based upon those fully briefed cases available for assignment to a calendar by the clerk. Parties learn about the date of oral argument at least three weeks in advance. The identity of the panel, however, is only made known a week before oral argument.<sup>228</sup>

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<sup>226</sup> ... To the extent a judge is unavailable, the clerk's office selects a replacement through reference to a log of judges. The logs list all active judges in order of seniority. As judges recuse, new members are selected in order from the log. See Letter from Norman E. Zoller, Circuit Executive, U.S. Court of Appeals, 11<sup>th</sup> Circuit, to Professor J. Robert Brown, Jr., Oct. 27, 1998 ("In instances where the matter is submitted to a panel and any panel member other than the initiating judge recuses, the next judge available on the replacement log is assigned to take the recused judge's place.").

<sup>227</sup> ... Internal Operating Procedures, USCS Ct. App. 11<sup>th</sup> Cir., Circuit Rule 34-4.3(b), Preparation and Issuing of Calendars (1998).

<sup>228</sup> ... Internal Operating Procedures, USCS Ct. App. 11<sup>th</sup> Cir., Circuit Rule 34-4.7, Identity of Panel (1998).