LOS ANGELES
Daily Journal
TUESDAY, FEBRUARY 1, 2005

© 2005 DAILY JOURNAL CORPORATION ALL RIGHTS RESERVED 915 EAST FIRST STREET, LOS ANGELES, CA 90012 (213) 229-5300 • OFFICIAL NEWSPAPER OF THE CITY OF LOS ANGELES AND THE COUNTY OF LOS ANGELES • $2.50

9th Circuit Made Only Minor Changes in Its Rules for 2005

By Benjamin G. Shatz

Each new year, federal appellate practice changes as the courts adopt new rules and procedures. While this year is no exception, the changes taking effect in 2005 are relatively minor.

Changes to the 9th U.S. Circuit Court of Appeal's rules usually take effect in July and January. There were no changes to the 9th Circuit's local rules or general orders in July 2004, but several changes took effect Jan. 1. These revisions appear on the 9th Circuit's Web site (www.ca9.uscourts.gov), and those most relevant to civil practitioners are summarized in this article.

The 9th Circuit's annual report shows that parties proceeding without the benefit of counsel are on the rise. In fact, unrepresented litigants (often called pro per or pro se parties) compose a third of all civil filings. In 2002, the circuit formed a Task Force on Self-Represented Litigants, and in November, that task force issued an interim report proposing recommendations for addressing pro per issues.

Pro pers almost invariably are unfamiliar with court rules and procedures. The 9th Circuit has a number of rules and policies in place to assist these litigants. For instance, they need not file briefs in the traditional sense but instead may file check-the-box briefs. In accord with the court's policy of excusing pro pers from certain technical requirements, starting this year pro pers no longer need file excerpts of record. New Circuit Rule 30-1.2; see also New Circuit Rule 17-1.3(a) (applicable to appeals from agency orders). This rule makes sense because preparing proper excerpts can be a difficult and expensive task that pro pers often do poorly. Excerpts prepared by pro pers typically were incomplete and suffered from formatting flaws ranging from the trivial to the severe.

Furthermore, if a pro per appellant does not file excerpts of record (as now allowed by new Rule 30-1.2), any supplemental excerpts of record filed by the appellee is limited to the District Court docket sheet, the notice of appeal, the judgment or order appealed from and any specific portion of the record cited in the appellee's brief. Revised Circuit Rule 30-1.6.

In addition to pro per appeals, another burgeoning area for the 9th Circuit is immigration appeals. In 1994, the circuit had 400 immigration appeals; that number dramatically rose to 6,000 in 2004. Under new Circuit Rule 17.13(b), petitioners challenging a Board of Immigration Appeals order need no longer file excerpts, and respondents need not file excerpts, either. This rule makes sense because the board provides the Court of Appeals with a full record, anyway.

Moreover, to help the court prioritize consideration of immigration matters, a new circuit rule requires petitioners in immigration appeals to state whether the petitioner is detained in the custody of the Department of Homeland Security. New Circuit Rule 15-4. Other new and revised rules of interest to immigration practitioners are 27-8 and 27-8.2.

Finally, revised Circuit Rule 17.1.4 requires that the excerpts of record supporting a petition seeking review of an agency ruling regarding the grant or denial of benefits must include the entire reporter's transcript of proceedings before the administrative law judge.

In accord with the court's policy of facilitating pro per litigants' access to the court by eliminating nonessential technical requirements, under revised Circuit Rule 31-1, pro pers need file only an original and seven copies of their brief. Parties represented by counsel, however, must continue to file an original and 15 copies of their brief.

Circuit Rule 39-1 regarding recoverable items in a bill of costs has been revised to clarify that costs will be awarded only for briefs and excerpts of record. Mandatory Circuit Form 10 also has been revised to reflect this change and to update its language, so practitioners should be sure to use this current version of the form.

Before this revision, the language in Rule 39-1.1(1) allowed costs for "briefs and other documents," and the "bill of costs" form included a row for inputting "other" documents. This was vague enough to have allowed parties to seek costs for various items beyond briefs and excerpts, such as motions filed in conjunction with the appeal. Bear in mind that a cost bill seeking other expenses related to an appeal, such as reporter's transcript fees, filing fees or an appellate bond premium, must be filed in the lower court after the mandate issues.

Furthermore, the revised rule reduces the maximum amount the court will award from 20 cents per page to only 10 cents per page. Circuit Rule 39-1.3. The purpose of this amendment was to reduce the reimbursement rate to private-sector market rates. The circuit's newly issued 2005 fee schedule notes that the court itself charges 50 cents per page for copying documents.

Last year saw many improvements to the 9th Circuit's Web site. The court's Web site now provides not only published decisions and orders but also unpublished decisions (called memorandum dispositions or memdispos).

Moreover, the Web site now allows the public to listen to audio files of 9th Circuit arguments. Oral-argument cassette tapes remain available for $26, but savvy practitioners will download arguments from the Web free. The Web site also contains the court's local rules, general orders and the names of the judges serving on the monthly motions and screening panel.

Other useful additions to the Web site include an updated (September 2004) version of the Standard of Review guide and a new 102-page outline on asylum law. The 500-page Standard of Review guide is useful for any type of 9th Circuit appeal, and the Asylum Guide joins several other immigration law outlines posted on the Web site.

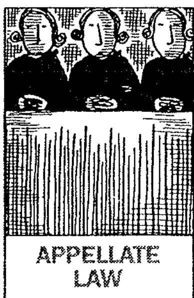
In addition to the 9th Circuit's very useful Web site (www.ca9.uscourts.gov), the Office of the Circuit Executive also has a useful Web site (www.ce9.uscourts.gov) addressing issues affecting the circuit.

As useful as the court's Web sites are, they do not make dockets publicly available. For that, practitioners must rely on other methods, such as Westlaw, Lexis or the government's service known as Public Access to Electronic Records, at http://pacer.login.uscourts.gov. At the start of this year, PACER fees increased from 7 cents per page to 8 cents per page.

At the direction of the Judicial Conference of the United States, all federal circuit courts of appeal now must collect a $150 fee for new bar admissions. This is in addition to the ordinary admission local fee charged by the circuit. Thus, admission to the 9th Circuit now costs $190: the 9th Circuit's $40 fee plus the new $150 national fee.

This national fee applies for each admission to each circuit court. Thus, a lawyer seeking admission to both the 9th and 2nd circuits must pay the $150 national fee to both the 9th and 2nd circuits, in addition to each circuit's local fee. (The national fee does not attach to re-admission required by certain circuits, such as the 5th and 11th circuits.)

Speaking of admission to the 2nd Circuit, for years the New York-based circuit had the strictest admission criteria of all the circuits. Until recently, applicants had to have argued three appeals in other courts and have attended oral argument in two 2nd Circuit appeals.



While the rules changes effective for 2005 may be prosaic, the prospects for more interesting changes to the 9th Circuit this year appear assured.

In mid-November, however, the court amended its admission criteria and deleted these requirements. Now, 2nd Circuit admission is obtained as easily as admission to any other circuit and can be done by mail from California without the need for a personal visit to watch the court in action.

The 9th Circuit also has increased the cost of a duplicate admission certificate and a certificate of good standing from $10 to $15.

While this year's changes to federal appellate practice are rather prosaic, some very interesting issues are on the horizon. One concerns the hotly contested question of publication and citability of Court of Appeals decisions.

In May 2004, by a vote of 7-1 (with one abstention), the Advisory Committee on Appellate Rules of the U.S. Judicial Conference approved a new proposed federal rule, Federal Rule of Appellate Procedure 32.1. (See www.uscourts.gov/rules/app0803.pdf#page=30).

Proposed Rule 32.1 would require that all federal appellate opinions be citable. After vigorous opposition, primarily from lawyers and judges in the 9th Circuit, the rule was put on hold in June 2004 by the conference's Standing Committee on Rules of Practice and Procedure. The proposed rule was sent back to the advisory committee for further study, and a report is expected by mid-2005.

The deadline for commenting on the proposed rule is Feb. 15. (See www.uscourts.gov/rules/comment2005/Memo_to_Bench_Bar_and_Public.pdf.)

Another controversial and perennial topic is that of splitting the 9th Circuit. Last year, a bill to break up the circuit passed in the House but did not reach the Senate, and this year two such bills are pending. Also last year, this issue took an unusual public turn with several 9th Circuit judges publishing their conflicting views in the Wall Street Journal. Thus, far from being a technical issue of court administration, the issue has political undertones that have attracted the attention of mainstream media.

A final controversial issue is that of judicial appointments. This year, four 9th Circuit judges are taking senior status and two more are eligible to do so, thus creating at least four new openings on the court. This could lead to more filibusters and other political shenanigans this year.

Thus, while the rules changes effective for 2005 may be prosaic, the prospects for more interesting changes to the 9th Circuit this year appear assured.

Benjamin G. Shatz is a certified appellate specialist in the appellate department of Manatt, Phelps & Phillips in Los Angeles.