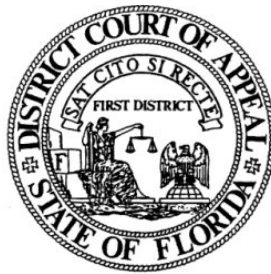


FLORIDA  
FIRST DISTRICT  
COURT OF APPEAL



INTERNAL OPERATING  
PROCEDURES

Revised November 2008

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## **Section 1 Introduction**

The Florida Rules of Appellate Procedure, the Florida Rules of Judicial Administration Rule 2.040 [new rule 2.210] and Chapter 35 of the Florida Statutes govern the operation of the First District Court of Appeal. The internal operating procedures set out herein are intended to supplement those rules and do not supplant the rules promulgated by the Supreme Court of Florida. This manual is designed to disclose the established practices in the court, to aid practitioners and others who come before court, and to orient new personnel of the court. These internal procedures do not and are not intended to create any substantive or procedural rights. A copy of these rules will be posted on the court's website. The master copy of these rules, with all current updates, will be kept by the clerk of the court.

## **Section 2 General Information**

### **2.1 Jurisdiction**

The court hears appeals from final orders and certain nonfinal orders entered by all court divisions of the 1st, 2d, 3d, 4th, 8th, and 14th circuit courts and from administrative orders entered by many state governmental agencies. County court decisions in certain circumstances are also subject to appellate review by this court. Additionally, this court has exclusive statewide jurisdiction to hear all appeals in workers' compensation cases, orders in insurance liquidation proceedings and other matters as provided by general law. The First District Court of Appeal also considers original proceedings governed by Florida Rule of Appellate Procedure 9.100, including petitions for certiorari, mandamus, prohibition, and habeas corpus.

The territorial jurisdiction of the court includes the following thirty-two counties: Alachua, Baker, Bay, Bradford, Calhoun, Clay, Columbia, Dixie, Duval, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Hamilton, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Nassau, Okaloosa, Santa Rosa, Suwannee, Taylor, Union, Wakulla, Walton and Washington.

## **2.2 Headquarters**

The headquarters of the First District Court of Appeal is located at 301 South Martin Luther King, Jr. Boulevard, Tallahassee, Florida. The mailing address is District Court of Appeal, First District, State of Florida, Tallahassee, Florida 32399-1850. The main telephone number is 850-487-1000. The clerk of the court's office telephone number is 850-488-6151.

## **2.3 Terms of Court**

The court holds two terms each year commencing on the second Tuesday in January and July in accordance with section 35.10, Florida Statutes.

## **2.4 Holidays**

The court is open from 8:00 a.m. until 5:00 p.m. on weekdays except for holidays. The court closes in observance of the holidays established by the Florida Supreme Court and additional discretionary holidays so designated by the chief judge. An administrative order is issued each year setting forth the dates when the court will be closed. The administrative order is available on the court's website.

## **2.5 Hours of Operation**

The public portions of the court are open from 8:00 a.m. until 5:00 p.m., Monday thru Friday, except for holidays and the dates the court is closed. These public areas include the foyer, the filing window in front of the clerk's office, and the commons which serves as the lawyers' waiting room. There is no public law library at the district court; however two large law libraries at the Florida Supreme Court and the Florida State University College of Law are open to the public and are within a block of the courthouse. On days when oral arguments are conducted, the courtroom is open to the public, subject to the sitting panel's right to close when authorized by law.

## **2.6 After-Hours Access**

After-hours use of court facilities for other than official court functions or business are generally limited to law-related groups or programs, including, but not necessarily limited to, use by law schools, state agencies, and bar association-

committee activities. After-hours use shall be limited to the hours between 5:00 p.m. and 12:00 p.m. on week nights. Applications for after-hours use of court facilities shall be presented in writing and are processed through the marshal who may be contacted at 850-487-1000. Approval for these types of uses requires the written approval of the chief judge.

The areas of the building and the equipment which may be available to these law-related groups for after-hours use is restricted to the following: all accessible parking lots, the courtroom, the commons, the commons kitchen equipment, and the bathroom facilities located in the basement of the courthouse.

This rule does not apply to, and approval is not required for, the use of the building by a judge or judges, clerk or marshal for purposes related to their position, nor does it apply to court activities and functions customarily carried on by court members and personnel, i.e. official court functions.

## **2.7 Sittings Away from Court**

The court complies with section 35.11, Florida Statutes, and seeks to conduct at least one oral argument session annually in each of its circuits, as caseload permits. As part of these efforts, the court schedules oral arguments in Pensacola once each calendar year and in Jacksonville twice each calendar year. The court welcomes requests to sit in any community within its district and attempts to coordinate with schools and civic organizations to make these special sessions useful to the community. Requests to sit in any community may be made to either the clerk or the chief judge. The court is also equipped to conduct oral arguments via video teleconference from the other Florida district courts of appeal and some circuit courts.

## **2.8 Accommodations for Persons with Disabilities**

The court is in compliance with the Americans with Disabilities Act (ADA) regarding facilities, services, and programs. The marshal's office can provide special accommodations to all people, including people with disabilities. Special accommodations may require up to 7 days advance notice.

## **2.9 Website**

The court maintains a website at [www.1dca.org](http://www.1dca.org). The court posts all written opinions of the court issued since August 2003. The website provides online access to the court's docketing information for the use of the general public, except for certain cases which are not available to the public by law, rule, or court policy or order. Oral argument calendars, administrative orders, information on high profile cases, employment opportunities, and a link to a live video feed of oral arguments while in progress appear on the website. The court's video web page has archived oral argument proceedings since January of 2004. The site contains profiles of the judges, clerk, and marshal. Directions to the courthouse and information on nearby parking are also on the website.

## **2.10 Court Property**

The marshal is the custodian of court property, except court files, and inventories it annually by number. No court property shall be removed from the court premises without the consent of the chief judge or marshal, or as approved by court policy or order.

## **2.11 Administrative Orders**

All administrative orders, as approved by the chief judge, are accessible through the clerk's page on the court's website. All original administrative orders shall be retained in the custody of the clerk. Administrative orders include, but are not limited to, court closures in addition to the holidays established by the Florida Supreme Court, video teleconferencing procedures, and record preparation procedures in collateral criminal proceedings.

# **Section 3 Court Personnel**

## **3.1 Judges and Judicial Staff**

The court is composed of fifteen judges. The personal staff of each judge includes a judicial assistant and two law clerks. Additionally the court has a central staff of attorneys who work pursuant to policies adopted by the court under the direction of the chief judge. The staff is composed of two units. One unit processes and makes recommendations on original petitions and motions filed with the court. The other unit of the central staff primarily provides jurisdictional

screening of cases and prepares substantive summaries on certain criminal and collateral criminal merits cases as directed by the chief judge pursuant to policies adopted by the court.

## **3.2 The Chief Judge**

### **3.2.1 Duties and Responsibilities**

The chief judge serves as the administrative officer of the court and has authority to manage the caseload and the business of the court in accordance with the provisions of rule 2.040(a)(2) [new rule 2.210(a)(2)] of the Florida Rules of Judicial Administration.

All matters of court policy are to be decided by the active judges on the court. The chief judge shall ensure that the various policies adopted by the judges of the court are given full force and effect. The court may decide court policy on any issue of interest to the court including policies on the selection, retention, employment, promotion, and compensation of employees; court budget; court facilities; or any other matter not governed by the Rules of Judicial Administration or these Internal Operating Procedures.

### **3.2.2 Term of Office**

The term of the chief judge shall be for two years beginning on July 1 of each odd-numbered year. In the event of a vacancy, the judges of the court shall promptly select a successor who shall serve as chief judge for the unexpired portion of the term.

### **3.2.3 Selection**

The chief judge shall be selected by the judges of the court on the basis of managerial, administrative, and leadership abilities, and not by rotation or seniority. Nominations for chief judge designate shall be open on February 1 of each even numbered year preceding the election and shall close ten days prior to the election, which will be held in March of that year. The election shall be by majority vote and the votes shall be cast by secret ballot. Voting by absentee ballot is permitted by notifying the chief judge of the intention to vote absentee and by providing the clerk, prior to the counting of the ballots, a sealed ballot on the uniform ballot form provided by the clerk for that election. The votes will be immediately counted by the clerk, with the assistance of the marshal, and the

winner will be immediately announced to the court. The winner will be the judge receiving at least 51% of the votes cast and shall be the chief judge designate until assuming office as the chief judge on July 1<sup>st</sup> of the following odd numbered year. The number of votes cast for each candidate will not be disclosed.

If no one receives a majority of votes, a run-off election will be conducted between the two judges receiving the most votes on the previous ballot. The absentee ballot will be counted in any runoff election as being cast for the same judge as in the original election if that judge is still a candidate in the runoff election. In the event that no candidate receives a majority vote of all the sitting judges in the run-off election and there are any absentee ballots being cast, then the run-off election will be postponed until such time as the judge(s) casting the absentee ballot(s) have an opportunity to participate.

### **3.3 The Clerk**

#### **3.3.1 Appointment**

The court shall appoint a clerk who shall hold office at the pleasure of the court and perform such duties as the court directs. Florida Rule of Judicial Administration 2.040(b) and section 35.22, Florida Statutes, [new rule 2.210(b)] provide details concerning the appointment and general duties of the clerk. The clerk's office shall be at the headquarters of the court. The clerk shall devote full time to the duties of the office and shall not engage in the practice of law or any other business while occupying the office of clerk.

#### **3.3.2 Court Files and Records**

The clerk of the court shall keep an official file on each case invoking the court's jurisdiction and the file shall contain the motions, records, briefs, and other papers filed with the court. In accordance with the requirements of rule 2.040(b)(2) [new rule 2.210(b)(2)], the official files shall remain in the custody of the clerk and shall not be removed from the court except to conduct oral argument at other designated locations, or by a judge or the clerk of the court pursuant to court policy and rules or by order of the court.

In addition to the official file, the clerk shall maintain a correspondence file for each case. Letters and other documents submitted to the court or any of the judges or their staff from an organization or person outside the court shall be

available for inspection by the public except those exempted by statute, rule or court order. The correspondence file shall also contain documents produced from within the court including the work papers, summaries, opinions not yet released, and all of the other materials that are the work product of the court. These materials shall not be available for inspection, except that the official opinion or order of the court shall be available for inspection when it has been filed in the official court file and sent to the parties.

### 3.3.3 Internal Operating Procedures

The clerk maintains a copy of the Internal Operating Procedures Manual as a court record. This record is available in the clerk's office for inspection by any interested person during business hours, or on the court's website at any time. The clerk reviews these procedures annually to ensure their accuracy and informs the court when there is a need to change these procedures to conform to any policy or practice.

### 3.4 The Marshal

The marshal holds office at the pleasure of the court and shall perform the duties and responsibilities identified in rule 2.040(c) [new rule 2.210(c)] of the Florida Rules of Judicial Administration and section 35.26, Florida Statutes, and other duties of the office as the court may direct.

## Section 4 General Policies and Procedures

### 4.1 Recusal and Disqualification of Judges

In order to facilitate the assignment of cases, the clerk maintains a list for each active judge of persons or entities who are likely to appear before the court and whose involvement in a proceeding will require the judge's recusal. Each judge is responsible to keep the clerk informed as additions to or deletions from this recusal list come to the judge's attention.

The court recognizes that the clerk's recusal list will not identify all cases involving conflicts. Parties may submit for information, on the docketing statement, a list of judges of this court who they believe should not be assigned to the case for conflict reasons. However, this listing on the docketing statement does not supplant the need to file an appropriate separate motion if a party seeks to disqualify a judge.

If a judge identifies a conflict necessitating recusal from a case on which the judge has been assigned, the judge shall notify the clerk, who will designate a substitute judge based upon a system which assures equality in the distribution of cases. If the judge identifying the conflict is the primary judge on the case, the judge's staff will usually remain involved to assist the substitute judge to the extent possible or necessary.

#### **4.2 Disclosure of Assigned Judge**

No court personnel shall divulge to any person other than the judges of the court and other personnel of the court the identity of the judge or panel to which a case is assigned; nor the identity of the judge or panel in which a file is at any time reposed; nor the identity of the judge or panel in which any pending motion, petition, case or other matter which has not been scheduled to be orally argued is reposed or being considered; nor shall court personnel divulge the identity of the author of any signed opinions prior to the public release of the opinion; nor ever release the identity of the writer of an unsigned opinion.

The identity of the panel scheduled to hear oral argument in a case may be posted or otherwise revealed once the schedule for argument is posted or published on the court's website.

#### **4.3 Administrative Court Conferences**

Court conferences to consider administrative matters and the adoption of policies are scheduled by the chief judge as needed, generally on a monthly basis. Additional conferences for special matters are called by the chief judge or upon request of four or more judges. The presence of a majority of judges of the court constitutes a quorum. Whenever possible, the court attempts to act upon a consensus vote of the judges, but a majority vote of those present constitutes official action of the court, except as provided in section 4.4. The clerk serves as the secretary to the conference and is responsible for preparing the minutes. The marshal and senior career attorney also attend the conference. Other court personnel attend as necessary and upon the invitation of the chief judge.

Fourteen (14) calendar days prior to court conference, the chief judge shall email a reminder to each judge of the court, the clerk, the marshal, and the career attorney regarding the date and time of the court conference. The email shall also request submissions for the court conference agenda. The court conference

agenda, with any appropriate attachments, shall be distributed to the court by the chief judge seven (7) calendar days prior to court conference. Only matters appearing on the agenda shall be taken up at court conference unless a majority of those judges in attendance, upon a showing of good cause relating to the failure to timely include the matter on the court conference agenda, vote to consider other matter(s).

#### **4.4 Revocation or Amendment of Internal Operation Procedures**

An affirmative vote of a majority of the judges of the court is necessary to revoke these internal court policies or to enact amendments to them. Proposed amendments must be circulated to the judges of the court not less than seven days prior to any meeting at which a judge intends to call for a vote to add, amend, or revoke any of these internal court policies. These notice requirements may only be waived by unanimous affirmative vote of all active judges of the court.

### **Section 5 Proceedings Before a Panel**

#### **5.1 Scheduling and Assigning Cases**

The clerk prepares the court calendar and assignment of judges to panels under the supervision of the chief judge. In preparing the schedule, the clerk assigns the judges to merits panels, emergency panels, and writs and motions panels. The merits panel assignments are made using a blind draw system in a manner that neither judges, lawyers, nor litigants have any influence in selection of any judge or panel to consider any particular case. For merits panels, the clerk utilizes five three-judge panels sitting during each scheduled session during the year. The prime consideration in constructing the calendar is to ensure that each judge sits with each of the other judges of the court on merits panels at least once during the year but not more than twice. During the months of April, August and December, only writs and motions and emergency panels are assigned additional cases.

##### **5.1.1 Emergency Panels**

Emergency panels are designated weekly to address petitions, cases, and other pleadings requiring immediate attention. All judges are assigned to serve on these panels from time-to-time on a rotating basis and serve on 10 or 11 weekly

panels during the year. Summaries are prepared for cases assigned to the emergency panels by career attorneys on the court's central staff.

### 5.1.2 Writs and Motions Panels

The writs and motions panels decide all motions not decided by the chief judge or acting chief judge which are filed prior to the time of the assignment of the case to a merits panel. In addition, the writs and motions panels dispose of petitions for writs of habeas corpus and other extraordinary writs on the merits and as many as nine other cases on the merits each week. These additional cases are pre-screened and often consist of criminal Anders-brief cases, petitions for writ of certiorari pursuant to *Sheley v. Florida Parole Comm'n*, 720 So. 2d 216 (Fla. 1998) and appeals from cases seeking relief under rules 3.800 and 3.850. Throughout the year, each judge of the court serves on 10 or 11 writs and motions panels in addition to sitting on merits panels. Summaries for the writs and motion panels are prepared by career attorneys on the court's central staff.

### 5.1.3 Merits Panels

Cases which have matured, meaning that all briefs have been filed, or the time for filing has passed, and the record has been filed, are assigned to one of the regular merits panels. Each merits panel is constituted to receive case assignments and hear oral arguments for one month, although the work of each panel may require many months to complete. Each regular merits panel receives approximately 70 cases per month. Each judge on a merits panel will be the primary judge on one-third of those cases, with the assignment of the primary judge being made in the clerk's office by random selection. When a judge is primary on a case, he or she makes the initial determination of whether oral argument will be granted, presents the case at conference or by circulation, and has responsibility for preparation and distributing a summary of the case to each member of the panel. The merits panel also rules upon any motions filed in the case after it is assigned to the panel. The summary is provided to the panel along with the briefs, any appendices, and other conference materials, which typically include excerpts from the record, copies of opinions, and copies of relevant statutes or rules.

### 5.1.4 Expedited Processing of Certain Cases Involving Children

Consistent with the Florida Court System's emphasis on cases affecting children, this court has accelerated procedures for processing appeals involving the

Termination of Parental Rights and Finding a Child Dependent. This court expedites certain other categories of cases, including Juvenile Delinquency, Family Law cases affecting child custody or support, Baker Act Appeals, Non Final Appeals and other cases individually expedited by court order. However, some of the categories of cases receiving the closest scrutiny and accelerated processing are those addressing termination of parental rights or child dependency. These two categories of cases are reviewed by the court staff immediately after they are filed to identify any jurisdictional defects and to determine if the case is properly classified as a termination or dependency case. The court then issues an order which: (1) expedites the case; (2) provides that extensions of time will not be granted to court reporters, lower tribunal clerks charged with preparing the record, or to the parties, except when emergency circumstances are shown; and (3) requires the appellant to notify the court of the name and address of the court reporter who is to prepare any transcripts. To help insure prompt identification of expedited cases by all court personnel, all termination of parental rights and dependency cases are placed in blue folders and other expedited cases are placed in red or yellow folders.

Prior to being assigned to a panel of judges for merits consideration, each dependency and termination case is reviewed weekly in the clerk's office to insure that it is proceeding in accordance with the rules. If action is required to assure that the case is treated by the parties as an expedited case, the court will issue any necessary orders. These expedited cases are assigned to regular merits' panels for a decision in certain predesignated expedited case slots that are held for sensitive cases. If even quicker action is required the case will be assigned to the weekly emergency panel. Further, law clerks, judges and panels are expected to review blue and then red and yellow files ahead of their other cases.

## **5.2 Oral Argument**

The members of the panel assigned the case are responsible for granting or denying oral argument. The judge who is primary on the case shall screen the oral argument requests within five days of receipt of the file from the clerk's office. If that judge concludes that the oral argument should be granted, he or she will grant it and assign the length of argument per side. If the primary judge believes the request should be denied, that judge will forward the file and recommendation to the other panel members who shall promptly notify the primary judge whether they agree or disagree with the recommendation. If any panel member disagrees with the recommendation to deny oral argument, the oral argument shall be granted. The primary judge shall be responsible for notifying the clerk's office of the panel's

decision. If the clerk's office is not notified within 14 work days of receipt of the file by the primary judge, the clerk shall set the case for oral argument allotting 15 minutes per side.

### **5.3 Panel Conference**

After the judges have had an opportunity to review the summaries, briefs and attachments, and undertake any other research (and after oral argument, if there is oral argument), the case is conferenced by the panel. At conference, the panel decides the cases. At conference, the primary judge speaks first and presents the case. Following the presentation, the other judges may ask questions of the primary judge or the clerk who has prepared the summary. The next judge to speak is the junior in terms of length of service on the court of the two other judges, followed by the senior of the two non-primary judges. Once each of the judge's views are finally expressed, determinations are made regarding the drafting of opinion(s).

### **5.4 Opinions**

#### **5.4.1 Preparation**

Usually, the primary judge is also responsible for writing the opinion, if an opinion is written. If the primary judge is in the majority, he or she will write the majority opinion. If the primary judge is in the minority, the senior judge in the majority will assign responsibility for writing the majority opinion to either himself or herself or the other judge in the majority.

#### **5.4.2 Circulation and Release**

Once the panel completes the opinion, except in the case of per curiam affirmed, per curiam denied, citation and en banc opinions, it shall be provided to all members of the court for review during a seven-business-day period prior to public release. An opinion designated for expedited release shall be circulated for three full days, and an opinion designated for emergency release shall be released on the same day it is initialed or, if that is not possible, on the next day.

Expedited release and emergency release shall be reserved only for those cases which, of necessity, should not be delayed for the normal pre-release period. Requests for expedited release or emergency release shall contain the initials of at least two panel members, and must be approved by the chief judge. In the case of

the absence of the chief judge, and when the majority of the panel believes approval should not be delayed, approval of the acting chief judge is required. If there is no acting chief judge appointed or available, approval of the most senior judge of the court who is available and who is not a member of the panel on the opinion being considered must be obtained.

Along with the request for expedited or emergency release, the panel or the primary judge must include a written explanation of the necessity for expedited or emergency treatment. The request should show, at the least, 1) expedited or emergency treatment will prevent harm to the parties or to the public; 2) the justice of the cause requires expedited or emergency treatment; and, 3) the necessity for emergency or expedited treatment outweighs the benefit normally gained by circulation for seven business days. The justification for the expedited or emergency release will be attached on top of the opinion which is circulated to the court. These procedures do not apply to en banc opinions because they are released immediately upon approval of the chief judge and without being recirculated to the court.

During this pre-release period, any judge on the court can contact the primary judge or other judges on the panel with comments and suggestions or make a request for en banc consideration.

#### 5.4.3 Withdrawal

A panel member may withdraw a panel opinion at any time before release for consideration of corrections or changes in a majority or dissenting opinion, or for the purpose of requesting en banc consideration.

If a non-panel member desires to withdraw an opinion for the purpose of recommending a change, clarification, or correction, he or she may request any panel member to do so or in the absence of all members of the panel, may request the chief judge or acting chief judge to withdraw the opinion.

Any opinion in pre-release that requires a change other than to correct a typographical, grammatical, or spelling error, correct the counsel on the case or to correct the case style or case number, must be withdrawn and recirculated on pre-release. If the changes are minor and the panel desires an early release, they can use the expedited or emergency release procedures to shorten the time the opinion is on pre-release.

The chief judge shall have the authority to delay the release date on any opinion when it appears there are matters which the panel should address and neither the primary judge nor another panel member is available prior to the scheduled release date.

(added 11/5/08) In the event a judge becomes concerned that an opinion on prerelease is inappropriate because it may be unprofessional, may damage collegiality on the court, or may otherwise have a negative impact on the public trust and confidence in the court, the judge shall promptly advise the Chief Judge, who will withdraw the opinion before release. Within 5 days of receiving information concerning such a matter, the Chief Judge shall appoint a Committee to investigate and seek to resolve the matter. The three members of the Committee shall be the Chief Judge, the most senior judge on the court, and the most junior judge on the court. If the matter should involve any of those judges, the involved judge shall be replaced on the Committee with the Chief Judge-elect replacing the Chief Judge, the second most senior judge replacing the most senior, and the second most junior judge replacing the most junior. The Committee shall have the authority and discretion to delay the release of that opinion for a period not to exceed 30 days from the date it was withdrawn by the Chief Judge, unless a shorter period of time is voted by the majority of the court.

## **5.5 Rehearing Motions**

All rehearing motions are held by the court for 17 days from the date filed to allow time for the opposing party to file a response in accordance with Florida Rule of Appellate Procedure 9.300(b). If there is consent by opposing counsel indicated in the motion or a response is filed sooner than the 17 days, the rehearing motion is circulated for review to all panel members of the panel that was originally assigned the case and is usually resolved by memoranda among the panel. If one of the judges believes that the rehearing motion has merit, however, or that further discussion is warranted, the case may be reconferenced by the panel. Copies of motions for rehearing en banc are provided to all members of the court and any member of the court can move for en banc consideration.

## **Section 6 En Banc Proceedings**

### **6.1 Party Request**

A party may file an original and 15 copies of a motion for rehearing en banc in accordance with the Florida Rules of Appellate Procedure. The clerk shall promptly distribute a copy to each judge.

Ten business days shall be allowed for circulation and consideration of the motion by members of the court. The clerk shall neither issue a panel order denying rehearing nor release the mandate prior to the expiration of ten days after the motion for rehearing en banc is filed. An order denying the motion for rehearing en banc shall be issued by the clerk if no timely request for a vote on the motion is made by a judge or the court.

No vote will be taken on the motion for rehearing en banc unless requested by a judge, which request, barring extraordinary circumstances, is to be made within the time for rehearing or within ten business days after a motion for rehearing en banc is filed.

### **6.2 Judge Request**

Any judge in regular active service may request en banc consideration of a panel decision prior to issuance of mandate in the case.

### **6.3 Panel Request**

When the majority of a panel decides to recede from a prior opinion of this court, whether that prior opinion is in the same case or in a different case, the primary judge or the senior judge of the panel shall request an en banc vote of the court.

### **6.4 Grounds**

En banc hearings and rehearings shall not be ordered unless the case is of exceptional importance or unless necessary to maintain uniformity in the court's decisions. A decision to grant or deny en banc review on either of these grounds is within the discretion of the court.

## **6.5 Procedure**

Prior to requesting en banc consideration, either sua sponte or after a party request, a judge may confer with the panel(s) on the opinion(s) in question in an attempt to better understand and resolve the differences and to verify the jurisdictional basis for en banc consideration. Requests for en banc vote shall be made by memorandum with a copy to each judge, the clerk, and the career attorney. The memorandum shall set forth the basis of the conflict or potential conflict or describe why the case is of exceptional importance.

## **6.6 Clerk Notification**

When a judge requests en banc consideration either on a party motion or on a judge or panel sua sponte request for en banc consideration, the judge shall promptly notify the clerk. The clerk shall immediately mark and identify the case file as one containing a judge's request for en banc consideration, and no order denying rehearing shall issue until notice from the chief judge to the clerk.

If the clerk is notified of a request for en banc consideration prior to release of a panel opinion, the opinion shall not be released until conclusion of proceedings on the en banc request by the court.

## **6.7 En Banc Panel**

The en banc panel of the court shall consist of each judge in regular active service on the court who is not recused. If a judge in regular active service (including a judge who has been recused) leaves the court during the pendency of an en banc proceeding, and that judge's successor assumes office prior to conclusion of the en banc proceeding, the successor judge may participate in the en banc proceeding in the procedural posture it is in when the successor judge assumes office.

## **6.8 Vote on Request for En Banc Consideration**

Within ten business days, commencing three business days after a judge's request for en banc hearing or rehearing, all judges in active service shall indicate their vote or recusal for cause by written notice to the court, the clerk and the career attorney.

The time for voting may be extended by the chief judge for any judge who is absent from the court for all or substantially all of the voting period. Any regular active judge who does not timely vote shall be deemed to have abstained.

At the end of the en banc voting period the career attorney shall tabulate the votes and notify all judges and the clerk of the results. Upon an evenly divided vote on a request for en banc consideration, any judge may call for conference discussion of the issues and may poll the members of the court for a vote on reconsideration. If the court remains evenly divided, the request for en banc consideration fails.

When there is a vote by the majority of the judges participating in favor of en banc consideration, the clerk: (1) shall not thereafter send the panel opinion to West Publishing Company or, if already sent, shall notify West to withhold the publication of same, and (2) shall take no further action on the case except at the direction of the chief judge or of the court en banc.

If the vote is against en banc consideration or if the en banc proceeding is dissolved and the case returned to the panel, the chief judge shall notify the clerk and the case shall proceed as a panel case.

#### **6.9 En Banc Order; Party Notice**

An order may be entered at the direction of the court advising the parties of a determination to consider the case en banc, with or without oral argument. Upon request of one-third of the participating judges, the court may require supplemental briefs and/or additional copies of briefs already filed for distribution to all judges.

#### **6.10 Dissolution of En Banc**

A participating judge may move to dissolve en banc consideration at any time before final disposition by the en banc court. En banc consideration of a case may be terminated upon a majority vote of the judges participating.

#### **6.11 En Banc Conference**

If there is a vote approving en banc consideration, the chief judge shall schedule the case for en banc conference. All matters properly presented for final disposition at an en banc conference, including a vote on jurisdiction and on the merits, shall be resolved by majority vote of judges participating in the en banc.

Any judge recused on the issue of en banc consideration is also recused on the merits. Conference shall proceed with the following: (1) an opportunity for presentation by the judge requesting en banc consideration or another judge deemed appropriate; (2) an opportunity for presentation in opposition by an appropriate judge designated by the chief judge; (3) opportunity for discussion, in order of seniority, by all participating judges; and (4) vote on the merits in order of seniority. Absence from the en banc conference shall not thereafter preclude participation in disposition of the case. A judge who will be absent from the en banc conference may notify the chief judge, the clerk, and the career attorney that another named judge is authorized to cast a vote or votes on behalf of the absent judge at the en banc conference.

### **6.12 En Banc Disposition**

The court may limit the issues to be considered en banc. If no prior panel decision has been released, the entire case shall be decided en banc.

### **6.13 En Banc Opinion**

The chief judge shall assign the case to an appropriate judge for drafting an en banc opinion, which shall be so captioned and shall include the names of the judges participating in the en banc proceeding.

Following the en banc conference, the file will be provided to the judge assigned to write the majority opinion. It shall thereafter be circulated to judges of the court who are participating in the en banc proceeding in the following sequence unless otherwise agreed upon by the court:

- a. Judges who have stated an interest in writing a concurring opinion;
- b. Judges who have stated an interest in writing an opinion concurring in part and dissenting in part;
- c. Judges who have stated an interest in writing a dissenting opinion;
- d. At this point the file will be returned to the judge who wrote the majority opinion to sign off on or note the other opinions and make any changes deemed appropriate to the majority opinion. The file will then recirculate to the other writing judges (in the same order) to concur with or note the other opinions and make changes to his or her

opinion. If there are changes to any opinions, the file will continue to recirculate to the writing judges until all revisions are completed and the writing judges have initialed all written opinions.

e. The file will then be circulated to the judges who did not state an interest in writing an opinion.

Within each category set forth above, the file shall be circulated in order of seniority, beginning with the most junior judge.

(revised 11/5/08) An opinion or opinions dissenting from the court's denial of a request for en banc consideration shall be permitted.

The career attorney shall be responsible for verifying that all judges have voted, that all initials have been properly transferred to the original opinion(s), and that all opinions have "release" signatures. En banc opinions will be released by the clerk without being required to be recirculated to the court with other pre-release opinions.

#### **6.14 Absence of a Majority Decision**

A majority vote of the participating judges shall be necessary for the issuance of any en banc decision. In the absence of such a majority the case shall revert to the originally assigned panel of three judges; the order granting en banc consideration shall be vacated and the case finally disposed of by the original three-judge panel.