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Motion Practice in the Ninth Circuit

This article addresses the nuts and bolts of motion practice in the Ninth Circuit Court of Appeals.

In the Ninth Circuit, a motion is defined in the General Orders as “an application to the court, or a member thereof, for procedural, summary, or discretionary relief.” Federal Rule of Appellate Procedure 27 requires that all motions must be in writing unless the court permits otherwise.

Civil motions include, but are not limited to, a petition for writ of mandamus or prohibition, a petition for permission to take an interlocutory appeal, an application for stay or application for an injunction, a motion to consolidate appeals, and a motion to dismiss for lack of jurisdiction.

Ninth Circuit Rule 27-7 provides that the court may delegate to the clerk or designated deputy clerks, staff attorneys, appellate commissioners or circuit mediators authority to decide motions filed with the court. Appendix A to the Ninth Circuit’s General Orders provides a comprehensive list of the motions that the clerk and the designated staff may decide. For example, the clerk may decide motions to consolidate, for an extension of time, to file an oversized brief, to strike a brief, and to expedite an appeal. These procedural motions are routinely disposed of by the court staff.

As discussed below, substantive motions usually are heard and decided by the Ninth Circuit’s motions panel or the merits panel for the case.

Emergency Motions

In the Ninth Circuit, an emergency motion is any motion requesting that the court take action in 21 days or less. The movant must certify that in order to avoid irreparable harm, it needs relief from the court in less than 21 days. Before filing the motion, the moving party must notify the clerk and opposing counsel. In addition, the motion must state prominently on the cover page “Emergency Motion Under Circuit Rule 27-3.”

Form And Content Of Motions

Federal Rule of Appellate Procedure 27 requires that the motion “must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.” The moving party must submit any necessary supporting information with the motion. Such information may be submitted by declaration with supporting exhibits. For motions seeking substantive relief, the motion must include a copy of the trial court’s opinion as a separate exhibit. Ninth Circuit Rule 26-1(2) requires

that if counsel for the moving party learns that a motion is unopposed, counsel must so advise the court. If a motion is the party's first filing in the appellate court, the motion also must include a corporate disclosure statement.

In the Ninth Circuit, the moving party does not need to file a notice of motion or a proposed order. Also, there is no filing fee for a motion in the Ninth Circuit. In general, motions must be filed and served electronically through the Ninth Circuit's Appellate Electronic Case Files.

Opposition To The Motion

The response or opposition to the motion must be filed within ten days of service of the motion. Any reply to the opposition must be filed within seven days after service of the opposition.

However, it must be noted that under the Federal Rules of Appellate Procedure, the Ninth Circuit may act on a procedural motion at any time without awaiting a response. If this happens, the party adversely affected by the court's action may file a motion to reconsider, vacate or modify that action. Even though a party may file a motion to reconsider, it is very important to file an opposition to a procedural motion as promptly as possible. Do not wait to the last day to file an opposition to a procedural motion!

How Are Motions To Dismiss Processed At The Court?

Motions are decided without oral argument unless the court orders otherwise. Substantive motions are determined by the motions panel or the merits panel for the case. For example, the motions panel rules on motions to dismiss, for summary affirmance, and similar motions. However, in cases that have been previously assigned to a merits panel, the substantive motions are submitted to the merits panel.

Each month, the court appoints a panel composed of three Ninth Circuit judges to serve on the motions panel. The monthly motions panel is normally scheduled during the same week as the court's San Francisco oral argument calendar.

Each month the names of the judges serving on the motions panel are posted on the Ninth Circuit's website at <http://www.ca9.uscourts.gov/content/motionspanel.php>. The court's motions attorneys and designated deputy clerks prepare the motions for presentation to the motions panel. For some motions, the moving papers will be sent to the panel in advance of the presentation. In complex matters, legal memoranda will be prepared in advance of the presentation.

All three judges on the motions panel participate in ruling on motions that dispose of the appeal. Other substantive motions are presented to two judges, and if those two judges are in agreement, they decide the motion. The third judge participates in the

determination only if (1) one of the other judges is disqualified or otherwise unavailable; (2) the two judges disagree on the disposition of the motion; or (3) the other judges request the participation of the third judge.

Do Motions Effect The Schedule On Appeal?

Ninth Circuit Rule 27-11 provides that the filing of certain motions suspends the schedule of the appeal. The schedule for record preparation and briefing is stayed pending the court's disposition of the following motions: (1) dismissal; (2) transfer to another tribunal; (3) full remand; (4) in forma pauperis status in the Ninth Circuit; (5) production of transcripts at government expense; and (6) appointment or withdrawal of counsel.

Conclusion

When filing or responding to a motion in the Ninth Circuit the first step is to identify whether the motion is procedural or substantive. This distinction will determine who decides the motion. For the moving party, this distinction may impact the strategy on the motion because the motion should be drafted for the particular audience or decisionmaker. For the responding party, the distinction may dictate how quickly an opposition must be filed to get full consideration by the court.

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