



**APPELLATE
INSIGHT**

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The Ninth Circuit Moves to Mandatory Electronic Filing

Effective January 2, 2009, use of the Ninth Circuit's Case Management/Electronic Case Files ("CM/ECF") system will be mandatory for all attorneys and all court reporters unless they are granted an exemption. Use of the CM/ECF system will remain voluntary for all pro se parties litigating in the Ninth Circuit without counsel.

Background

On September 2, 2008, the Ninth Circuit Court of Appeals began its electronic filing program. Starting in September, parties and court reporters were allowed to file certain documents using the CM/ECF system. The program continues to be a voluntary program for litigants until the end of the year.

Registration Is Required For Electronic Filing

Registration is required to obtain a login and password for use of the appellate CM/ECF system. Anyone who wants to be able to electronically file at the Ninth Circuit must register in advance. If you practice in the Ninth Circuit, you may have previously registered for electronic noticing earlier this year. This is NOT the same as registering for electronic filing (which also includes electronic noticing).

To register, log onto PACER Service Center website (http://pacer.psc.uscourts.gov/announcements/general/ea_filer.html) and follow the instructions for registration. The Ninth Circuit's website warns that the processing of your registration can take up to 10 business days. Even if you have already registered for PACER or for ECF in other federal courts, you must register for electronic filing with the Ninth Circuit. During registration for the Ninth Circuit, you may choose the same user login and password used for other Circuits via the centralized Appellate ECF registration hosted on the PACER Service Center website.

When your registration has been processed, you will receive an email from the PACER Service Center confirming your registration.

Anyone who practices in federal court will want to register immediately so that the registration is taken care of well in advance of litigat-

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ing any appeal or writ in the Ninth Circuit.

What is the procedure for filing and serving briefs electronically?

On November 11, 2008, the Ninth Circuit adopted interim provisions to govern the filing of documents electronically. These provisions are contained in the "Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases." This order is available on the Ninth Circuit's website, www.ca9.uscourts.gov. Rule 6 sets forth the procedure for filing appellate briefs electronically.

Rule 6 provides that a party must submit its brief electronically by the due date. The Court will then review the brief for any deficiencies. If the brief contains no deficiencies, the Court will order the party to file 10 paper copies of the brief, accompanied by a certification that the paper copies of the brief are identical to the version submitted electronically. This order will be transmitted electronically via email notification. The party must then send the paper copies of the brief to the Court within 5 working days of the Court's order.

If the brief contains any deficiencies, the Court will order the party to cure the deficiencies and submit a revised brief electronically within a specified time. Rule 6(f) provides that "failure to comply with the Court's orders regarding the filing of the brief may subject the case to dismissal."

At the time a party submits the brief electronically, the party must also serve the brief. However, the filing party is not required to serve a paper copy of any electronically-filed document on any party who has registered for the Ninth Circuit's CM/ECF system—those parties will receive notice of the filing electronically. The filing party must serve a paper copy of any electronically-filed document on any party that is not registered for electronic filing. All electronic filings require a Certificate of Service. The Ninth Circuit has a sample Certificate of Service for documents filed using CM/ECF on its website.

The CM/ECF system generates a "Notice of Docket Activity" when any document is filed in a case. A Notice of Docket Activity is an email notice which is sent when a docket transaction requires that notice be sent to attorneys, parties or Court personnel. The Notice of Docket Activity is sent to the participants in the case that have registered for electronic filing. The notice represents service of the document on those parties. Registration for the appellate CM/ECF system constitutes consent to service through the Notice of Docket Activity.

Before filing an electronic brief, a close review of the rules is advisable. One significant difference from most federal district court's rules is that the electronic version of the brief filed at the Ninth Circuit must be generated by publishing to PDF from the original word processing file, so that the text of the electronic version of the brief may be searched and copied. Also, special rules apply to the electronic filing of petitions for rehearing en banc, or a

combination petition for panel rehearing and rehearing en banc, i.e. the filer does not need to file paper copies after electronically filing the petition.

What is the procedure for filing excerpts of record?

By the due date for the brief, the party filing the excerpts of record must serve four paper copies of the Excerpts of Record on the Court. The party must also serve a paper copy of the Excerpt of Record on opposing counsel. The Excerpts of Record are not filed electronically.

What types of documents cannot be filed electronically?

Rule 4 of the Ninth Circuit's Administrative Order sets forth that certain types of documents cannot be filed electronically including case opening materials, Excerpts of Record, sealed documents, motions for permission to file a document under seal, Criminal Justice Act vouchers, and any motion filed before a Ninth Circuit case number has been assigned. Case opening materials include a petition for permission to appeal, a petition for review of an agency order or application to enforce an agency order, a petition for writ of mandamus or prohibition, and an application for leave to file a second or successive habeas corpus petition.

Training And More Information

The Ninth Circuit is offering training for the electronic case filing. Training is held at 12:00 noon and 1:00 p.m. every Tuesday at San Francisco's James R. Browning Courthouse at

95 Seventh Street in San Francisco. The Court also has an excellent "Frequently Asked Questions" on its website.

Conclusion

As with the transition to electronic filing in the federal district courts, there will undoubtedly be some glitches as the program is fully implemented. The Ninth Circuit's electronic filing program has several advantages and, perhaps, a few disadvantages. All those procrastinators and last minute filers now have until 11:59 p.m. on the due date to electronically file their appellate brief. Another advantage is that you no longer have to file 50 paper copies of a petition for rehearing en banc. At the moment, the system seems to have some redundancy by requiring paper copies of briefs to be delivered to the Court. There is also the practical issue that the Excerpts of Record must be delivered to the Court on the due date for the brief and then a second delivery of the ten copies of the briefs is required once an order issues stating that the brief is not deficient. Overall, this transition to electronic appellate filing is a great development. For those practitioners that enjoy the accessibility to documents that PACER provides, most Ninth Circuit appellate filings now will be equally accessible on PACER.

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