TAKING IT TO THE BANC

by

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"En banc": "With all judges present and participating; in full court." *Black's Law Dictionary* 546 (7th ed. 1999)

The recent increase in the number of "en banc" proceedings in the Ninth Circuit Court of Appeals has focused attention on that previously little-used procedure. Here are some practical tips regarding Ninth Circuit en banc proceedings, and some curious aspects and outcomes of those proceedings.

The Ninth Circuit's Oxymoronic "Limited En Banc" Procedure

The Ninth Circuit does not ordinarily hear appeals en banc in the first instance. With thousands of appeals decided each year, it would be a logistical nightmare. Indeed, in a recent case the parties were startled when the court on its own motion suggested that the appeal be heard en banc in the first instance. Both sides objected that en banc review was not necessary. The court voted to hear the appeal en banc anyway. The parties then settled their dispute and the appeal was dismissed. *Foulon v. Klayman & Toskes, PA,* 520 F.3d 1009 (9th Cir. 2008).

Instead, in almost every case, a three-judge panel decides the appeal in the first instance. The party aggrieved by the outcome may then petition the full court for rehearing en banc.

The Ninth Circuit's version of an en banc rehearing is the "limited en banc." Like "giant shrimp" or "working vacation," "limited en banc" is an oxymoron, a contradiction in terms. It is not truly "en banc" because it is not the full court. There are twenty-eight active judgeships on the court, but the limited en banc consists of only eleven judges: The chief judge plus ten active circuit judges selected by lot. The en banc panel may or may not include judges from the three-judge panel.

The Ninth Circuit recently terminated an experiment with fifteen-member en banc panels. Besides the inherent logistical problems involved in coordinating a fifteen-judge panel, the court concluded there was little or no advantage to using more than eleven judges. From a pure probability standpoint, an eleven-member panel will likely reflect the views of a twenty-eight judge court. And from a practical standpoint, the majority in an eleven-judge hearing almost always includes enough votes to prevail as a majority in a fifteen-judge hearing.

Even with a limited en banc procedure, however, en banc rehearings have been few and far between. This is because en banc rehearing is reserved for appeals in which:

> (a) the panel decision conflicts with a Supreme Court decision or another Ninth Circuit decision, or
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> (b) the case presents an issue of exceptional importance, which may include a conflict with a decision in another Circuit on an issue of which there is an overriding need for national uniformity.

These are tough standards for the average appeal to meet. Thus, although the court has about fifteen thousand cases on its docket and twelve hundred petitions for rehearing en banc are filed each year, the Ninth Circuit usually

has only about two dozen appeals pending for en banc review at any one time.

As noted, in the past few months the Ninth Circuit has granted an unusually large number of rehearings en banc, albeit still a tiny number compared to the total number of appeals decided. (A list of all pending en banc Ninth Circuit appeals can be found on the Ninth Circuit's web site at http://www.ca9.uscourts.gov.) This increase could just be chance, a random blip in the number of appeals meeting en banc standards. Or, it could be a response to criticism that a court of Ninth Circuit's size – by far the largest and busiest Circuit in the nation – needs to work hard at preventing issue conflicts among its diverse three-judge panels.

How The "Limited En Banc" Works

Petitioning for rehearing en banc after a three-judge panel decision is relatively straightforward. The procedures are detailed in Federal Rules of Appellate Procedure rules 35 and 40, in the Ninth Circuit rules appended to Rules 35 and 40, and in the Ninth Circuit's General Orders. (*See* Fed. R. App. P. 35, 40; Gen. Orders 9th Cir. §§ 5.1 *et seq*.).

The en banc petition may be filed on its own or in conjunction with a petition for rehearing by the three-judge panel. The petition must be short and to the point; it may not exceed 4200 words, even if combined with a petition for panel rehearing. The petitioner must file an original plus fifty copies, and the panel decision must be attached as an appendix. Unless an extension of time has been granted, the petition must be received by the court by the fourteenth day after the panel's decision is filed. And, unless

the court requests a response to the petition, no response may be filed. This prohibition on filing a response may sound harsh, but it is in fact a benefit to the vast majority of responding parties because petitions for rehearing en banc are so seldom granted. Moreover, the court ordinarily will not grant rehearing or rehearing en banc without first soliciting a response.

What happens in the Ninth Circuit after an en banc petition is filed is not so simple as filing the petition. Indeed, the court employs an en banc coordinator specifically to oversee the process. First, the petition is circulated to all active judges. No vote on the petition is even taken unless a judge requests one. If, while the petition is circulating, the three-judge panel on its own grants rehearing, then the petition for rehearing en banc is deemed rejected without prejudice. If not, any judge may still request that the three-judge panel make known its recommendation as to granting rehearing en banc. In addition, because strict internal time limits govern en banc requests, any judge can "stop the clock" for a period of time to consider whether to request a vote on the en banc petition. Internal memoranda may then circulate among the judges. If a vote is taken, it requires a majority of sitting active judges (there are twenty-seven right now, so a majority would be fourteen), to grant rehearing en banc.

If rehearing en banc is granted, the en banc panel may or may not solicit additional briefing, and may or may not hold oral argument, before issuing its decision.

"Limited En Banc" Oddities

The Ninth Circuit's "limited en banc" procedure can lead to strange results and, occasionally, entertaining reading.

- Fourteen Judges may vote for rehearing en banc because they believe the panel decision was wrong. But theoretically, the eleven judges on the en banc panel, ten of whom are chosen at random from the full court, may come to a different result. Indeed, six judges, a simple majority of the eleven-member en banc panel, could vote to reaffirm the three-judge panel decision that fourteen judges who voted for en banc rehearing would have reversed, thus establishing Ninth Circuit law that a majority of the Ninth Circuit judges does not support.

- Because it takes a vote of fourteen judges to hear an appeal of a three-judge decision en banc, the three-judge panel's decision may become law of the Circuit even though a substantially larger number of judges disagree with it. For example, in *Molski v. Evergreen Dynasty Corp.,* 521 F.3d 1215 (9th Cir. 2008), nine judges voted for rehearing en banc of a three-judge decision affirming an injunction barring an alleged vexatious litigant from filing new cases without permission. The nine judges couldn't convince another five judges to get involved, however, and the three-judge panel's decision stands as the law in the Ninth Circuit.

- Sometimes, even if the court does vote to hear an appeal en banc, the eleven-judge en banc panel cannot muster a majority decision. This recently occurred in *Bradley v. Henry*, 518 F.3d 657 (9th Cir. 2008). Bradley was convicted of murder in state court. The state court of appeal affirmed her conviction, rejecting Bradley's multiple contentions that she was denied constitutional rights. The federal district court denied Bradley's

habeas corpus petition. On a two-to-one vote, a Ninth Circuit panel found Bradley had been denied constitutional rights on two grounds and ordered the district court to issue the writ. After rehearing en banc by an eleven-judge panel, five judges voted to grant habeas corpus on both grounds, four judges voted to grant habeas corpus on only one of the grounds, and two judges voted to deny habeas corpus altogether. Thus, a majority of nine favored granting habeas corpus, but there was no majority in agreement on the exact ground that it should be granted. In this situation, the four-judge decision, because it was reached on the narrowest ground, became the holding of the case. In other words, the four-judge plurality decision trumped the five-judge plurality decision as the rationale for the reversal and is the law in the Ninth Circuit.

- In cases where some judges may vote for rehearing en banc, but not enough for the required fourteen-judge majority to grant, there may be dueling opinions written in conjunction with the denial of rehearing. A judge who supports rehearing en banc may file a written dissent from the denial, either to lay the groundwork for reconsideration of the issue in some future appeal or to "send a message" to the Supreme Court that this case warrants a careful appraisal. On the other hand, a judge who thinks the panel decision is correct may file a concurrence in the denial, answering the dissenter.

Dissents and concurrences on denial of rehearing en banc can be shrill. For example, in *Defenders of Wildlife v. U.S. EPA*, 420 F.3d 946 (9th Cir. 2006), the three-judge panel reversed an Environmental Protection Agency ruling and remanded the cause to the Agency for reconsideration.

Rehearing en banc was denied, 450 F.3d 394, but not without a heated tussle among those who grant rehearing and those who would not.

In *Defenders of Wildlife*, six judges dissented from the denial of rehearing en banc. The principal dissenter harshly criticized the three-judge panel's decision for making "five fundamental blunders," embarking on "a 17-page boondoogle," ignoring "at least six prior opinions of our own court," drawing a "nonsensical" conclusion, and reaching a "superfluous holding" that "flies in the face" of a recent Supreme Court decision.

Those were fighting words, and a fight did ensue. In reply, the three-judge panel opinion's author wrote a concurrence in the denial of rehearing en banc. The panel judge bemoaned the fact that written dissents from denial of rehearing en banc have become "a matter of routine" in the Ninth Circuit. According to the panel judge, such dissents "pose a dilemma for those who believe the original opinion correct, as they may raise issues not addressed by that opinion because not articulated by the parties before the petition for rehearing stage -- or ever." In this case, the panel judge wrote, "[t]he problem is that [the dissenter's] accusations are either flat wrong or indicate a misunderstanding of the holdings in the panel opinion. As the author of the panel opinion, I have no choice but to try to set the record straight . . . ." Among other things, the concurring panel judge wrote that the reason the panel did not address the recent Supreme Court decision relied on by the dissenter was that the dissenter "is so wrong that there was no reason we would have addressed [the dissenter's] argument in the first instance."

For now, despite a clear difference of opinion on the court, the concurring panel judge has prevailed. Until rehearing en banc is granted in another case raising the same issue, the panel decision is the law of the Ninth Circuit. And it may be a while. You can banc on it.

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