

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

MISC. No. 07-22

IN RE: INTERNAL OPERATING PROCEDURES

ORDER

Per 38 U.S.C. § 7264, "the proceedings of the Court of Appeals for Veterans Claims shall be conducted in accordance with such rules of practice and procedure as the Court prescribes." In accordance with this statute, the Board of Judges has also adopted Internal Operating Procedures (IOPs), separate from and in addition to the Court's Rules of Practice and Procedure. These IOPs are promulgated for informational purposes and internal instruction and guidance. The Board of Judges may modify these IOPs at any time and for good cause.

Accordingly, it is

ORDERED, that the attached updated IOPs are hereby published and effective this date.

DATED: June 29, 2022

FOR THE COURT:

/s/Gregory O. Block
GREGORY O. BLOCK
Clerk of the Court

United States Court of Appeals for Veterans Claims

INTERNAL OPERATING PROCEDURES (IOPs)

Preamble

These IOPs are promulgated pursuant to 38 U.S.C. § 7264, which provides: "The proceedings of the Court of Appeals for Veterans Claims shall be conducted in accordance with such rules of practice and procedure as the Court prescribes."

These IOPs are separate from and in addition to the Court's Rules of Practice and Procedure and are adopted and promulgated for informational purposes and internal instruction and guidance. Nothing in these IOPs confers any rights or obligations upon parties or individuals, or the Judges, the Clerk of the Court, the judicial law clerks, or the staff of the Court, except where mandated by statute or by a judicial decision binding upon the Court.

The Board of Judges may modify these IOPs at any time and, for good cause, the Chief Judge may extend any time period established herein.

Adopted by the Board of Judges January 9, 1992
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DEFINITIONS

Author Judge. The Judge responsible for drafting an order, memorandum decision, or opinion of the Court.

Board of Judges (BOJ). The BOJ is composed of all Judges serving in regular active service.

Case. A matter pending or decided by the Court, based on the context of its use herein.

Central Legal Staff (CLS). The personnel whose primary responsibilities include conferencing with the litigating parties and preparing materials for Judges related to cases, motions, and votes.

Chief Judge. The Judge who acts as the head of the Court in accordance with 38 U.S.C. § 7253(d)(1).

Clerk. The Clerk of the Court.

Editors. The personnel who maintain the Court's *Style Manual* and review all final decisions of the Court to make non-substantive suggestions.

En Banc. All eligible and participating Judges acting on a matter together.

Issuance. Issuance occurs when an action of the Court is posted on the Court's docket.

Judge. Any person appointed by the President of the United States, by and with the advice and consent of the U.S. Senate, to serve on the Court. Except where context indicates otherwise, "Judge" as used herein includes a Judge serving in regular active service and/or a recalled Senior Judge.

Memorandum Decision. A nonprecedential final decision of the Court issued by a single Judge to dispose of an appeal.

Opinion. A decision of the Court issued by a panel of Judges. Unless otherwise noted, an opinion is a precedential decision of the Court.

Order. Any direction or ruling of the Court.

Order of Precedence. The Chief Judge shall have precedence over the Judges of the Court, and the other Judges serving in regular active service shall have precedence based on the date of their original commissions. A Judge serving in regular active service shall have precedence over a Senior Judge. Senior Judges shall have precedence among the Senior Judges based on the date of their original commissions.

Panel. A panel consists of multiple Judges (usually three unless the matter is en banc), acting on a matter together.

Presiding Judge on a Panel or Senior Judge in the Majority. The Judge on a panel having the highest order of precedence is the presiding Judge on the panel, and the Judge having the highest order of precedence of the Judges in the majority is the senior Judge in the majority.

Public Office. The personnel responsible for processing cases, assigning them to Judges, and interfacing with the parties.

Published. A decision of the Court is published electronically or hard bound, in accordance with Section VIII of this IOP.

Quorum. A majority of a multiple-Judge panel constitutes a quorum.

Screening Judge. The Judge initially assigned to review the merits of a matter.

Senior Judge. A recall-eligible retired Judge as contemplated in 38 U.S.C. § 7257. NOTE: "Senior Judge" does not refer to status as a presiding or senior Judge on a panel.

I. SCREENING PROCESS

(a) Case Assignment and Conferencing.

- (1) Separate rosters for assignment of matters to Judges in regular active service are maintained for appeals, petitions, motions, and requests for class certification and class action. Except as otherwise provided, all matters are assigned on a rotational basis.
 - (A) Any subsequent appeal of a Board of Veterans' Appeals (Board) decision on a matter previously remanded by a single Judge generally is referred to the author Judge of the remanded decision. *See* Section III(c)(1), below.
 - (B) If a Judge grants a motion to expedite, or denies a motion to file a late brief, that case generally is assigned to that Judge for screening. *See* Section IX(a)(2)(B), below.
 - (C) Any petition related to a case already acted upon by a Judge generally is assigned to that Judge. *See* Section XI(a), below.
- (2) Senior Judges generally are assigned screening cases and other matters on a rotational basis, proportionate to and commensurate with their period of recall service. *See* Policy for the Recall of Senior Judges.
- (3) When an appellant is represented in an appeal, CLS generally holds a conference with the parties to discuss the issues and encourage joint resolution of the appeal, in whole or in part. In appropriate circumstances, including at a Judge's request, CLS also may hold a conference when the appellant is pro se or on matters other than the merits of the appeal, such as on record disputes, petitions for extraordinary writs, or attorney fee disputes.
- (4) When joint resolution of the entire case cannot be reached at conference or otherwise, the case is briefed, and the record of proceedings is prepared and filed. The case is then sent to CLS where it is examined for any prior remands and evaluated for inclusion on the CLS trends report. With the exceptions noted above, the matter is then generally returned to the Public Office for assignment on a rotational basis to a Judge for screening. CLS may be asked by the assigned Judge to provide an evaluation of the case and a memorandum addressing the issues and possible disposition.

(b) Duties of the Screening Judge.

- (1) The screening Judge reviews the case and determines whether the matter warrants single - Judge decision, panel decision, or en banc review. At the start of a period of recall service, a Senior Judge must inform the Chief Judge whether or not he or she is potentially available to serve on self-initiated panels and/or panels assigned randomly pursuant to Section V(b)(1), below. An election of a Senior Judge to serve on panels will dictate whether sections 4, 5, or 6, below, apply. The Senior Judge will consult with the Chief Judge and the Clerk to determine a date after which the Senior Judge will no longer be eligible for

panel assignment. A Senior Judge potentially available to serve on self-initiated panels may decline to serve on some self-initiated panels on a case-by-case basis, generally based on the anticipated duration of the matter.

- (2) The Court has adopted the standard enumerated in *Frankel v. Derwinski*, 1 Vet.App. 23 (1990), to decide whether matters should be decided by a panel or by a single Judge. If the screening Judge determines that a matter is of relative simplicity and panel decision is not warranted under *Frankel*, then a single Judge may affirm, reverse, modify, set aside, vacate, or remand the decision of the Board.
- (3) If the screening Judge determines that a case is appropriate for single-Judge disposition, the screening Judge assumes responsibility for the decision and proceeds in accordance with Section II, below.
- (4) If the screening Judge is eligible to serve on a panel and determines that the case is appropriate for panel consideration, the Judge requests that the Clerk create a panel composed of the screening Judge and two additional eligible Judges selected at random and the matter proceeds in accordance with Section V, below. A screening Judge may determine that a matter is appropriate for panel at any time prior to entry of judgment in the case.
- (5) If a screening Judge in regular active service determines that en banc review is warranted, the screening Judge and CLS follow the procedure in Section VII(b)(2), below.
- (6) If a Senior Judge is not available to serve on panels and determines that a case assigned for screening is appropriate for panel consideration, the matter is returned to the Clerk for rotational assignment to a panel in accordance with Section V(b), to include a replacement for the Senior Judge.

II. SINGLE-JUDGE ACTION

(a) Policy. Generally, memorandum decisions are used for any decision by a single Judge disposing of an appeal, unless the action is taken pursuant to a motion, in which case an order is issued.

(b) Procedure.

- (1) *Circulation.* A screening Judge who determines that a matter is appropriate for single-Judge disposition assumes responsibility for the matter and drafts a memorandum decision or an order as appropriate. The screening Judge circulates the decision (except one dismissing a case for failure to pay the filing fee or to file a brief) to all Judges for review and comment for the period prescribed in Section X(b), below. Within that circulation period, any editorial comments are sent to the author Judge, any substantive comments or requests for panel consideration are sent to all active and recalled Judges, and any request

for en banc review is sent to CLS with copies to all active and recalled Judges pursuant to Section VII, below. A Senior Judge may not participate in calling a circulating case to panel unless the Senior Judge is the screening Judge on the matter.

- (2) *Call for Panel or En Banc Review.* If, during the circulation period or any extension thereof, two Judges in regular active service request panel consideration based on the criteria in *Frankel*, see Section I(b)(2) above, the screening Judge requests that the Clerk create a panel composed of the screening Judge and two additional eligible/available Judges selected at random, and the matter proceeds in accordance with Section V, below. If the screening Judge is a Senior Judge who is unavailable to serve on the panel, an eligible/available Judge will be substituted in the general random-rotational manner. See Policy for the Recall of Senior Judges. If any Judge in active regular service requests en banc consideration, CLS follows the procedure in Section VII(b)(2), below.
- (3) *Editor Review.* During the circulation period the Court's editors review the draft decision and provide non-substantive suggestions to the author Judge.
- (4) *Final Review and Issuance.* If there is no call for panel or en banc consideration, as soon as possible after the circulation period has expired and comments and edits have been considered, the screening Judge forwards the final memorandum decision or order to the Public Office for issuance.

III. RECONSIDERATION, REQUESTS FOR PANEL DECISION, SUBSEQUENT APPEALS, AND MATTERS REMANDED FROM THE FEDERAL CIRCUIT

(a) Rule 27.1 Motion for Initial Review by Panel.

- (1) Motions for initial review by panel will be assigned to a Judge pursuant to Rule 27.1. See also Section IX(a)(2)(B).
- (2) If the assigned Judge denies the motion for initial review by panel, the case proceeds in the normal course.
- (3) If the assigned Judge grants the motion for initial review by panel, the Judge requests that the Clerk create a panel composed of that Judge and two additional eligible Judges selected at random. See Section I(b)(4). The matter then proceeds in accordance with Section V, below.

(b) Rule 35 Motion for Reconsideration and/or Request for Panel Decision.

- (1) If a party timely moves for reconsideration of a single-Judge memorandum decision or dispositive order, the motion is sent to the author Judge for decision. Reconsideration will

be granted if the author Judge concludes that the movant has demonstrated that the single-Judge decision overlooked or misunderstood a fact or point of law.

- (2) If a party timely moves for panel decision in a case where a single-Judge decision has been issued, without first seeking reconsideration by the author Judge, the motion nevertheless is referred to the author Judge for potential sua sponte reconsideration. If sua sponte reconsideration is granted, the request for panel decision is mooted. Thereafter, if the moving party files a motion for reconsideration and/or panel decision of the reconsidered decision, the same procedures will be followed.
- (3) If a panel decision is requested and the author Judge of the single-Judge decision denies reconsideration, the panel motion is forwarded to CLS for preparation of a vote package containing a vote sheet and a draft order, as well as a recommendation if requested. The vote package is forwarded to a panel of three Judges that includes the author Judge of the single-Judge decision and two eligible/available Judges, selected in accordance with Section V(b)(1), below. If a panel had been previously composed and dissolved in the same matter, any subsequent motion for panel decision will be referred to the prior panel, with any vacancies filled in the normal process as described in Section V(b)(2).
- (4) On review by the assigned panel, the single-Judge decision will be withdrawn and a decision of the panel substituted therefor if a majority of the panel finds that the movant has demonstrated that
 - (A) the single-Judge decision overlooked or misunderstood a fact or point of law and that error was prejudicial to the outcome of the case, or
 - (B) the single-Judge decision is in conflict with precedential decisions of the Court, or
 - (C) the case otherwise raises an issue warranting a precedential decision.

If a majority of the panel finds that the movant has not demonstrated that the single-Judge decision should be withdrawn, the panel shall direct that the single-Judge decision remains the decision of the Court. In such instance, the panel's decision is nonprecedential and the single-Judge decision remains nonprecedential.

- (5) A request for panel decision should be given priority consideration, consistent with Section V, below.
- (6) If a case issued by a Senior Judge is subject to a motion by the parties for reconsideration or panel consideration, the Chief Judge shall determine whether the Senior Judge is available to consider the motion and serve on any resultant panel. *See* Policy for the Recall of Senior Judges.

(c) Subsequent Appeals.

- (1) *Of Single-Judge Remands.* For a matter that was remanded by a single Judge, readjudicated by the agency, and the subject of a subsequent appeal filed at the Court, CLS notifies the author Judge that the case appears to be related to one that was previously before the Judge. If the author Judge determines that the new appeal involves substantially the same issue(s) raised in the prior appeal, the Judge retains the case for appropriate disposition and directs CLS to have the case assigned to that Judge. If the author Judge determines that the new appeal involves new issues, the Judge returns the case for assignment to a Judge (potentially including that Judge) according to the normal process, as described in Section I(a)(4), above. If the author Judge is not available, the case is assigned according to the normal process, as described in Section I(a)(4), above.
- (2) *Of Panel-Ordered Remands.* For a matter that was remanded by a panel of Judges, readjudicated by the agency, and the subject of a subsequent appeal filed at the Court, CLS refers the matter to all available Judges who were part of the underlying decision (either panel or en banc). Those Judges decide by majority vote whether the matter involves substantially the same issue(s) raised in the prior panel decision and, if so, whether the matter should be decided by a single Judge or panel. The panel then directs the Clerk as to the appropriate assignment of the case. If none of the original panel Judges is available, the appeal is assigned according to the normal process, as described in Section I(a)(4), above.

(d) Matters Remanded from the Federal Circuit.

- (1) *Of matters that were originally decided by a single Judge.* For a matter that was decided by a single Judge, was appealed, and was subsequently remanded by the Federal Circuit, the Public Office, upon docketing after mandate, assigns the case to the original Judge, if available. If the original Judge is not available, the case is assigned according to the normal process, as described in Section I(a)(4), above.
- (2) *Of matters that were originally decided by a panel of Judges.* For a matter that was originally decided by a panel of Judges, was appealed, and was subsequently remanded by the Federal Circuit, the Public Office, upon docketing after mandate, refers the matter to all available Judges who were part of the underlying decision (either panel or en banc). Those Judges decide by majority vote whether the matter involves substantially the same issue(s) raised in the prior panel decision and, if so, whether the matter should be decided by a single Judge or panel. The panel then directs the Clerk as to the appropriate assignment of the case. If none of the original panel Judges is available, the appeal is assigned according to the normal process, as described in Section I(a)(4), above.

IV. ORAL ARGUMENT

- (a) **When Allowed.** Oral argument is held when ordered by the Court on motion of a party or sua sponte. Normally, oral argument is heard only by a panel. Only the Court sitting en banc may order or grant a request for oral argument en banc.
- (b) **Format and Time.** Argument may be held in person, fully remote, or as a hybrid of the two, with the method of participation decided by each panel. Each party usually is allowed 30 minutes in which to present argument. The panel makes any changes it desires in the format or order for presentation of argument, including adjusting the time allowed, limiting the argument to certain issues, or altering the usual order of presentation.

V. PANEL PROCESS

- (a) **Policy.** Generally, opinions are used for any decision by a panel disposing of an appeal, unless the action is taken pursuant to a motion, in which case the panel issues an order.
- (b) **Forming Panels.**
- (1) Panels generally consist of the screening Judge and two other Judges. *See* Sections I(b)(4) and II(b)(2), above. Panel selection is done by the Clerk and is typically random and rotational, with due regard to each Judge's availability.
 - (2) Substitution for an assigned panel member due to recusal or as directed by the Chief Judge is made by the Clerk at random, with due regard to workload and availability. For travel cases, the Chief Judge may direct substitution of panel members for reasons related to the nature and location of the travel.
 - (3) When a pro se case is forwarded for panel disposition, the matter is generally stayed for 30 days to permit possible representation of the unrepresented party. In addition, the panel may direct that participation of amicus curiae, notwithstanding the stay, be invited by order of the Court.
 - (4) Once a panel is composed, a vacancy does not impair its ability to conduct business so long as there is a quorum.
 - (5) Assignment of a case for panel decision generally is reflected on the public docket, including the names of the panel members.
- (c) **Managing the Panel.** After oral argument, or after designation of the panel in a case without oral argument, the presiding Judge of the panel generally convenes a conference to discuss and tentatively decide the case. At the conference, the senior Judge in the majority assigns authorship responsibility for the opinion. The senior Judge in the majority is responsible for monitoring the timely processing of the case.

(d) Panel Action and Separate Statements.

- (1) As soon as possible after drafting responsibility for the opinion is assigned, the author Judge circulates the draft decision within the panel for comment. A panel member who plans to write a separate statement notifies the other panel members promptly and circulates the separate statement within the panel as soon as practicable. The panel majority may then modify the draft opinion, and the Judge writing separately may also modify his or her statement, until the panel is in agreement that the decision and any separate statement are ready to circulate.
- (2) The author Judge circulates the panel's draft, including any separate statement, to all Judges for review and comment, for the period prescribed in Section X(b), below. (In circumstances of exceptional delay, the majority of the panel may circulate the majority decision without the statement of a Judge writing a separate statement if the separate statement has not been provided.) Within 5 working days, any substantive comments are sent to all active and recalled Judges, and any request for en banc consideration is sent to CLS, with copies to all active and recalled Judges, for processing in accordance with Section VII.
- (3) During the 5-day circulation period the Court's editors also review the draft decision and provide non-substantive edits to the panel.
- (4) If any substantive changes are made to the panel opinion, order, or separate statement, the author Judge recirculates the entire decision for 3 working days to permit review and comment by the other Judges and the editors. *See* Section X(b)(2). Recirculation is not needed if only non-substantive changes are made.
- (5) Unless action is pending on an en banc request, and after any comments and suggested editing have been addressed, as soon as practicable the author Judge prepares the final opinion or order, with any separate statement, for issuance.
- (6) In circumstances of exceptional delay, the majority of the panel may provide notice that the majority decision will issue at the end of 5 working days, without any separate statement if such statement is not prepared at that time, unless an extension is granted by the Chief Judge for good cause. In instances where the Chief Judge is seeking the extension, the next most senior Judge will make the good cause determination.

(e) Dissolving Panels.

- (1) For cases sent to panel pursuant to Sections I(b)(4) or (6), or called to panel pursuant to Section II(b)(2), if the majority of the panel agrees, the case may be returned to the screening Judge of the panel for disposition.
- (2) Any case returned to a single Judge by a majority of a panel shall, upon circulation of the single-Judge decision, be subject to recall to panel by a vote of three Judges of the Court

in regular active service. In the event of recall to a panel, the case is assigned to the original panel for a panel decision on the matter.

VI. POST-PANEL PROCESS

- (a) **Reconsideration.** If a party moves for reconsideration of a panel action, the motion is referred to CLS and CLS personnel will prepare and send to the panel a vote package containing a vote sheet and a draft order, as well as a recommendation if requested.
- (b) **Review.** Any motion by a party for review of a panel decision by the en banc Court is processed in accordance with en banc procedures in Section VII, below.

VII. EN BANC PROCESS

- (a) **Policy.** Decisions by the Court sitting en banc are not favored except when necessary to secure or maintain uniformity of the Court's decisions or to resolve a question of exceptional importance. Generally, opinions are issued for any decision by the en banc Court disposing of an appeal unless the action is taken pursuant to a motion, in which case the en banc Court issues an order.
- (b) **Procedure.**

- (1) *Participation.*

- (A) Judges in regular active service may participate in a vote for en banc review, provided their votes are submitted within the times prescribed below. Whether or not an eligible Judge participated in the vote, all Judges serving in regular active service at the time of the vote may participate in consideration of the en banc matter. A Senior Judge may not vote on whether to hear a case en banc, but if serving in recall status, may elect to participate in consideration of an en banc matter only if the Judge was a member of the underlying panel being reviewed by the en banc Court, or if the Judge retired and thus became a Senior Judge after having voted on the en banc matter.
- (B) A Judge appointed to the Court after a case has been selected for en banc review may participate in that consideration provided oral argument (or conferencing without oral argument) has not taken place prior to the appointment of the Judge. The Clerk shall promptly inform any newly appointed Judge of the time and place of any en banc oral argument or conferencing scheduled to take place after appointment of the Judge, and the Judge may participate in any such consideration if available to do so, but if not so available, the Judge shall not be eligible to participate in the decision or any motion for reconsideration.

(C) A Judge who elects recusal from en banc consideration is not part of the en banc voting or panel review from the point of recusal forward.

(D) Assignment of a case for en banc review generally is reflected on the public docket.

(2) *Request for En Banc Review.*

(A) At the Request of a Judge. A screening Judge in active service who requests en banc review, or a Judge in active service requesting en banc consideration of a matter circulating prior to issuance (either by a single Judge or by a panel), notifies all Judges and submits to CLS a memorandum in support of the request. CLS then circulates to all Judges serving in regular active service formal notice of the request, the accompanying memorandum, and a vote sheet. The formal notice (1) advises that the request will fail unless, during the voting period of 5 working days, at least a majority of the Judges support the request, (2) advises that the case will not proceed to any pending disposition until the expiration of the voting period, and (3) specifies the last day of the voting period.

(i) If a majority of the eligible Judges do not support the request during the 5-day voting period, the case proceeds to disposition and a docket notation is made regarding the failed request for en banc review.

(ii) If at least a majority of the eligible Judges support the request, the matter proceeds in accordance with Section VII(b)(3), below.

(B) On Motion of a Party.

(i) If a party moves for en banc review, CLS circulates to all eligible Judges the motion and a formal notice (1) advising that en banc consideration is either appropriate or inappropriate, (2) advising that the motion will be denied unless, during a voting period of 5 working days, at least four of the eligible Judges request that the Court seek a response from the other party, and (3) specifying the last day of the voting period.

(ii) If during the 5-day voting period fewer than four eligible Judges have requested that the non-moving party be ordered to file a response to the motion, no response is ordered and the motion is denied. When a motion for en banc consideration is denied without seeking a response from the non-moving party, CLS prepares a per curiam order of denial that is circulated to the participating Judges and published by the Chief Judge on the fifth working day after the order began circulation, unless otherwise directed for good cause. Separate statements are not encouraged and will not be issued with the Court's order unless submitted in time to be so issued. If a separate statement is not timely prepared, the denial order may be issued and any separate statement may be issued at a later time and published with the denial order; however, a separate statement may not be issued if not prepared and issued within

10 days of the issuance of the order denying the motion for en banc review, unless an extension is granted for good cause. Good cause determinations are made by the Chief Judge. In instances where the Chief Judge is seeking the extension, the next most senior Judge will make the good cause determination.

- (iii) If during the 5-day voting period at least four eligible Judges have requested a response from the non-moving party, the Clerk issues a standard order seeking a response as to the motion for full Court consideration. A majority of the eligible Judges may elect to modify the Clerk's standard order for a response. Once the response is filed (or the time period expires and no response is filed), CLS circulates to all participating Judges the motion requesting en banc consideration, any response, and a vote sheet directing all participating Judges to vote for or against consideration of the matter en banc. CLS provides for a voting period of 10 working days and will specify the last day of the voting period.
 - (a) If, upon the expiration of the 10-day voting period, at least a majority of the participating Judges do not vote to grant the motion, the motion is denied. When a motion for en banc consideration is denied after a response from the non-moving party has been sought, CLS promptly prepares the order of denial, which is circulated to the participating Judges. Any participating Judge intending to write a separate statement must notify the participating Judges of such intent within 5 working days from the date of circulation of the denial order and must submit such separate statement to the participating Judges no later than 10 working days after the date of circulation of the denial order. A Judge who wishes to join a separate statement must notify the participating Judges of the intent to do so no later than 3 working days after the separate statement is submitted. Any adjustments to the denial order will be made promptly and any adjustment to any separate statement must be made within the same amount of time taken to adjust the denial order. If a separate statement is not timely prepared, the denial order may be issued and any separate statement may be issued at a later time and published with the denial order; however, a separate statement may not be issued at all if not prepared and issued within 10 days of the issuance of the order denying the motion for en banc review, unless an extension is granted by the Chief Judge for good cause. In instances where the Chief Judge is seeking the extension, the next most senior Judge will make the good cause determination.
 - (b) If within the 10-day voting period at least a majority of the eligible Judges vote to grant the motion, the motion for en banc consideration is approved and the matter proceeds in accordance with Section VII(b)(3), below.
- (3) *En Banc Review Granted.* If an internal request for en banc review is granted, the Clerk generally issues an order to that effect. If a motion for en banc review is granted, the en banc Court issues an order to that effect, which also withdraws the prior decision. Thereafter the Chief Judge, as presiding Judge, generally convenes a conference or directs

the Clerk to schedule oral argument, as appropriate (*see* Section IV, above), to be followed by a conference. The senior Judge in the majority assigns authorship responsibility. If there is no majority, the presiding Judge on the en banc panel determines the consensus of the panel on how to proceed, and the panel so proceeds.

(4) *Drafting and Issuance of En Banc Opinion or Order.*

- (A) **Drafting.** As soon as possible after drafting responsibility is assigned, the author Judge circulates the initial draft to all participating Judges for comment. Judges promptly indicate whether they will join the circulated draft and, if joining, offer any edits or revisions.
- (B) **Circulation of the Majority Draft.** Once the majority agrees on a draft, it is circulated to all participating Judges. By 5:00 p.m. on the fifth working day after the proposed draft is circulated, any substantive comments are sent to all participating Judges and any Judge who intends to write a separate opinion or statement so notifies the en banc panel. Such separate statement is then circulated to the other participating Judges as soon as practicable but no later than 5:00 p.m. on the 10th working day after the day on which the proposed majority draft was circulated.
- (C) **Re-Circulation.** Within 10 working days after receipt of any separate opinion or statement, the majority decision may be modified in response and, whenever substantively modified, will be re-circulated to the en banc panel. Within 5 days of the re-circulation, any Judge who intends to write or modify a separate opinion or statement so notifies the en banc panel. Such separate statement is then circulated to the en banc panel as soon as practicable but no later than 5:00 p.m. on the 10th working day after the day on which the proposed en banc order or opinion was re-circulated. This cycle may be repeated as necessary. No separate opinion or statement will be issued unless timely circulated to all participating Judges and timely submitted for issuance with the Court's opinion. At the request of any participating Judge, for good cause the Chief Judge may extend the time to submit a separate opinion or statement for issuance with the Court's opinion or order, but the extension may not exceed an additional 30 calendar days. In instances where the Chief Judge is seeking the extension, the next most senior Judge will make the good cause determination.
- (D) **Editor Review.** The author Judge of the Court's opinion or order forwards to the editors for review a copy of the final opinion or order, with any separate opinion or statement, as soon as practicable after expiration of all time periods set forth above. Within 5 working days, the editors provide to the author Judge and to any other writing Judge any non-substantive suggestions.
- (E) **Issuance.** Upon incorporation of all final edits, and after all participating Judges have had the opportunity to review the final product, the author Judge of the Court's opinion or order prepares the final decision, with any separate opinion or statement, for issuance. Prior to issuance, the author Judge and any writing Judge may request an

additional review by the editors, particularly in instances where the draft has undergone significant revision since the editors' last review.

VIII. PUBLICATION OF COURT ACTIONS

- (a) **Policy.** All dispositive panel actions are submitted for publication in the *Veterans Appeals Reporter* and for electronic publication on WESTLAW and LEXIS, except that dispositive panel actions based on an uncontested motion to dismiss, terminate, or remand a matter will not be submitted for publication in the *Veterans Appeals Reporter*. Nondispositive panel actions are ordinarily sent only to the parties. However, any nondispositive panel action may be submitted for publication in the *Veterans Appeals Reporter* and/or for electronic publication on WESTLAW and LEXIS at the direction of the panel. All single-Judge dispositive actions are submitted for electronic publication. All nondispositive single-Judge actions are sent only to the parties unless they are designated for electronic publication by the single Judge.
- (b) **Designation for Publication.** Designation of an action of the Court for publication in the *Veterans Appeals Reporter*, other than as noted above, may be requested by any Judge. The requesting Judge circulates a justification statement to all Judges serving in regular active status and the matter is published upon majority approval of the BOJ.

IX. MOTIONS, CONSOLIDATION

(a) Motions.

- (1) *Action by the Clerk.* The Clerk disposes of uncontested or routine procedural motions in accordance with the Court's *Rules of Practice and Procedure* and as otherwise determined by the Court.
- (2) *Action by the Court.*
- (A) Motions filed in a case generally are assigned by the Public Office to the Judge next in rotation, except that
- (i) if the case is pending before a panel or a screening Judge, the motion generally is sent directly to that panel or screening Judge for disposition, and
- (ii) if a Judge has acted on a previous motion in the case, and the case is not yet before a panel or a screening Judge, the motion generally is sent to the Judge who acted on the previous motion in the case.
- (B) If a Judge grants a motion to expedite, denies a motion to file a late brief, or is assigned a motion for initial review by panel, that case generally is assigned to that Judge for screening.

(b) Consolidation. In the interest of judicial economy, matters pending before the Court may be consolidated by order of the Court sua sponte or on motion of a party.

(1) *Consolidation by a Single Judge.* A single Judge acting as a motions or screening Judge may consolidate cases involving the same appellant, or cases where different appellants are contesting the same decision of the Board, provided none of the proposed cases to be consolidated is assigned to another Judge. A Judge who grants a consolidation motion will not necessarily be assigned the consolidated case: Screening assignment will be made by the Clerk in the normal process.

(2) *Consolidation approved by the en banc Court.* Any case may be consolidated with any other case(s) with the concurrence of a majority of the en banc Court. Notice of the proposed consolidation shall be provided to the en banc Court and is deemed approved after 5 days, absent objection by at least one-half of the Judges. For cases consolidated at panel, the consolidated matter generally shall proceed before the panel that was first constituted, unless the Chief Judge, in consultation with the en banc Court, determines otherwise based on judicial economy, availability of Judges, or any other appropriate basis. If none of the cases proposed for consolidation were at panel, the consolidated matter generally shall proceed before the screening Judge, if any, assigned the matter having the oldest docket number. If none of the cases proposed for consolidation were assigned to a screening Judge, the Clerk generally shall assign a screening Judge, and panel members if appropriate, in the normal process.

(3) *Issuance of Consolidation Order.* When consolidation is proposed by the Court sua sponte, the Clerk generally shall issue a "Notice and Order of Consolidation," advising the parties that absent objection within a defined period of time (generally 7 days), consolidation will become effective on a date certain.

X. INTERNAL CIRCULATION OF DECISIONS

(a) Policy. Certain matters are circulated to all Judges for the period indicated in Section X(b), below, and shall not issue until after the circulation period has ended. The purpose of circulation is to keep each Judge informed of the decisions being issued by other Judges, to allow time for any Judge to provide comments or request panel or en banc consideration as appropriate, and to provide the editors with sufficient time to review and provide non-substantive suggestions to the author Judge.

(b) Procedure.

(1) Generally, matters are circulated for 5 working days. This includes the following:

(A) Single-Judge memorandum decisions and dispositive orders;

- (B) Panel opinions, dispositive orders, and precedential non-dispositive orders;
 - (C) Orders granting extraordinary relief; and
 - (D) Non-dispositive orders granting equitable tolling.
- (2) The following matters are circulated for 3 working days:
- (A) Re-circulated decisions and orders; and
 - (B) Decisions and orders in cases where briefing was expedited.
- (3) Single-Judge and panel orders granting uncontested motions to dismiss, terminate, or remand a matter are circulated for 1 working day.
- (4) En banc decisions may not need to be circulated, as the draft will not be final until all participating Judges have approved it, but the final draft is sent to the editors for non-substantive suggestions.

XI. PETITIONS FOR EXTRAORDINARY WRITS

(a) Policy. Petitions for extraordinary writs generally are assigned to a screening Judge in the normal course, except that for judicial efficiency purposes, the processes for assignment of subsequent appeals will also apply to subsequent petitions. *See* Sections I(a)(1)(C) and III(c).

(b) Procedure.

- (1) A petition for an extraordinary writ may be granted by a single Judge or, based on the criteria in *Frankel* (*see* Section I(b)(2), above), by a panel. Before the Court grants extraordinary relief, the respondent(s) will be afforded the opportunity to respond or to show cause why the petition should not be granted.
- (2) Proceedings on petitions generally are given priority by the Court.

XII. APPLICATIONS FOR ATTORNEY FEES AND EXPENSES

(a) Procedure. If an application for award of attorney fees and expenses is not contested, it is generally handled by the Clerk. If the Secretary opposes any part of the application, the Public Office notifies CLS that action is required. CLS evaluates the contested case and if reasonableness of the requested fee is the only contested issue, CLS conducts a conference with the parties to attempt to resolve the disagreement. If the Secretary contests an issue other than or in addition to reasonableness, the application is returned to the Public Office for

assignment to a Judge. All actions relating to an application will carry the designation "(E)" after the docket number.

(b) Judge or Panel Assignment in Contested Matters.

(1) *Single Judge.* If the Judge who decided the underlying appeal or petition is available, the application is assigned to that Judge. If the Judge who decided the underlying appeal or petition is not available, or if the application stems from a matter that was handled by the Clerk, a Judge is assigned in the normal process. The assigned Judge serves as the screening Judge on the matter.

(2) *Panel.*

(A) If a panel issued the underlying decision, the application is assigned to the author Judge of the panel if available. If the author Judge is not available, the application is assigned to another available member of the panel based on seniority. If none of the original panel Judges is available, the application is assigned in the normal process.

(B) If the assigned Judge determines panel consideration is appropriate, or if the single-Judge decision is called to panel on circulation, the application is assigned to the same panel that decided the underlying matter, with Judges assigned as needed, in the normal process.

(c) Bifurcated Applications. In the interest of judicial efficiency, if some but not all issues in a case have been disposed of and a judgment has been entered, a timely application pursuant to 28 U.S.C. § 2412 for attorney fees and expenses regarding those issues normally is held in abeyance until all issues on appeal have been resolved and an application for attorney fees and expenses for the remainder of the appeal is timely received or the time for such an application has elapsed. This does not prevent the parties from settling the initial application without judicial intervention.

(d) Finality. Once final action has been taken on an application, judgment and mandate in connection with the application are entered in accordance with the Court's *Rules of Practice and Procedure*. This is done in addition to the judgment and mandate associated with disposition of the merits of the case.

XIII. COURT GOVERNANCE, MANAGEMENT, AND LEADERSHIP

(a) Governing Principles. Court governance policies, procedures, and organizational mechanisms provide a means for

- fostering institutional cohesiveness,
- establishing and maintaining communication channels,
- defining decision-making authorities and processes for making decisions,

- planning for and overseeing the effectiveness of Court programs and operations,
- identifying institutional issues and problems and recommending solutions.

Court management is a shared responsibility among all Court officials. This IOP spells out a number of these responsibilities in more detail. However, the Court should always act consistently with the following supporting principles:

- The Court should take advantage of the talent and experience of its Judges and other personnel; for example, in considering appointments to committees, the unique prior experience of Judges is a relevant factor, among others, to be considered.
- The Court should seek to foster a cooperative working environment in which good ideas are readily shared and where potential problems are discussed before they become serious.
- The Chief Judge should meet regularly with unit executives, other Judges, and top managers to discuss important Court-wide issues and to coordinate approaches across organizational lines.

(b) Board of Judges. The BOJ is the Court when acting on all matters in which authority or responsibility is given to the "Court" by statute. *See* 38 U.S.C. § 7254(c)(1) ("A majority of the judges of the Court shall constitute a quorum for the transaction of the business of the Court."). The Chief Judge is a member of the BOJ and acts as the head of the Court in accordance with 38 U.S.C. § 7253(d)(1). Senior Judges are not part of the BOJ.

(c) Statutory Authority of the Board of Judges and Chief Judge. Certain roles and responsibilities for the Board of Judges (Court) and the Chief Judge are prescribed by statute. These are summarized as follows:

(1) *The Board of Judges (Court):*

§ 7253(g)(1)-(3): Prescribe rules regarding judicial misconduct complaints, including awards of fees or costs.

§ 7254(b): Determine whether cases are heard by individual Judges or panels and may establish procedures for assigning Judges to each panel.

§ 7262: Set the maximum amount for the Court filing fee and establish procedures for waiving the filing fee.

§ 7263(b): Allow persons to practice before the Court who are not members of the Court's bar.

§ 7264(a): Prescribe rules of practice and procedure.

§ 7268(c): Prescribe rules to protect privacy and security relating to all filings and to public availability.

§ 7269(a): Provide for the publication of decisions or non-publication of decisions, with the option of transferring the power to except decisions from publication to the Chief Judge.

§ 7281: Appoint a clerk, approve the clerk's deputies and employees, fix and adjust rates of pay, and procure the services of experts or consultants.

§ 7282: Submit the budget and make expenditures in order to execute the functions of the Court.

§ 7284: Fix a fee for comparing, preparing, or copying any record, entry, or transcript.

§ 7285: Impose registration fees and determine their frequency and amount, and use these fees for investigating disciplinary matters or for defraying the costs of conferences and public engagements.

§ 7287: Exercise the authority provided to a court of the United States for purposes of management, administration, and expenditure of Court funds, if not inconsistent with §§ 7251 et seq.

(2) *The Chief Judge:*

§ 7256: The Chief prescribes the times and places of sessions of the Court.

§ 7257(b)(1), (3): The Chief may recall, if eligible, retired Judges and may remove Judges from recall-eligible status in certain instances.

§ 7265(b): Request a U.S. marshal at any session.

§ 7281(g): If there are not at least two other Judges of the Court, the Chief exercises the power to adjust pay and hire certain employees, such as the Clerk of the Court.

§ 7282(c): Designate certifying officers.

§ 7286: Summon Judges to an annual judicial conference.

§ 7288: Submit an annual report to Congress concerning the workload of the Court, including statistics on cases filed, dispositions, and the Court's efficiency.

§ 7292(b)(1): Certify interlocutory appeals of legal questions to the Federal Circuit.

§ 7296(d)(3), (g)(1): Transmit information to OPM on retired pay and furnish certificates of disability to the President if a Judge retires because of a disability.

§ 7297(d)(1), (h), (i): Set conditions and amount of annuity deposits and assist with next of kin determinations and other estate matters.

§ 7298(d), (e): Undertake periodic reviews of the Judges' retirement fund and submission of information, as required, to the President.

(d) Additional Delegated Powers. In addition to the Chief's statutory powers, the BOJ has, on three occasions, delegated powers to the Chief: (1) On September 26, 1989, the BOJ adopted a resolution authorizing the Chief to hire or approve the hiring of subordinate Court personnel who are not heads of offices. (2) On September 25, 2003, the BOJ adopted a resolution granting the Chief the power to "exercise supervision over the work of the Clerk of the Court . . . on behalf of the [BOJ]" unless the BOJ has specified otherwise for a particular matter. The same resolution requires the Clerk to report and communicate to the BOJ through the Chief Judge. (3) On April 18, 2016, per BOJ Resolution 01-2016, the BOJ delegated to the Chief Judge the authority to submit the Court's budget request each year, and the authority to direct expenditures as necessary to execute the functions of the Court, with some limitations.

(e) Meetings. The BOJ meets at the call of the Chief Judge or any three members of the BOJ, and meetings may be called to address general business or for limited discussion on a specific issue. The BOJ may meet in Executive Session to discuss topics that generally will not be recorded with regular meeting minutes. Generally, the BOJ should be provided 30 days' notice of a meeting date, and with that notice, should be advised of a reasonable window of time during which agenda topics may be submitted. Any Judge in regular active service may timely add an

agenda item for discussion at a general meeting, and at the close of the agenda-submission window, an agenda will be disseminated to the BOJ. Agenda topics submitted after the reasonable time window provided will only be included on the agenda if supported by three members of the BOJ. BOJ meetings will generally be held quarterly, on the last Wednesday of January, April, July, and October. Any Senior Judge may attend any BOJ meeting and, at the invitation of the Chief Judge in consultation with the BOJ, may attend any Executive Session of the BOJ. Any Senior Judge may submit an agenda item for consideration, and such item will be added to the agenda upon the assent of three members of the BOJ. Unless excused by the BOJ, the Clerk of the Court and the Counsel to the BOJ attend BOJ meetings. Minutes of the BOJ meetings are approved and kept by the BOJ.

- (f) **Committees.** To assist the BOJ and the Chief Judge, the Chief Judge shall appoint volunteer Judges to standing committees on Legislative Affairs, Budget and Finance, Policy and Personnel, Information Technology (IT), and Facilities, and any additional committees deemed helpful by the Chief Judge or the BOJ. The purpose of these committees is to gather information and suggest courses of action to further the effective operation of the Court. Committees shall meet as necessary and operate by consensus. Committees are free to and should consult with the Clerk of the Court and any member of the Court's staff as may be helpful. Each committee will advise and consult with the Chief Judge and full Board of Judges as necessary and the Chief Judge will keep the BOJ apprised as to Judges appointed to each Committee. The Chief Judge shall bring any significant issues to the appropriate committee in a timely manner. The Chief Judge shall submit the Congressionally required annual report concerning the workload of the Court to the Budget and Finance Committee and the full Board of Judges for their review and comment before submission to Congress.
- (g) **Representation.** As head of the Court, the Chief Judge frequently represents the Court in external matters, including legislative matters and discussions with Congress and members of the Congressional staff. Only the BOJ, however, may authorize the external representation of a position on any matter for which authority or responsibility is given to the Court by statute. If any Judge, including the Chief Judge, is asked for or is otherwise presenting a policy or legislative position externally on any such matter that has not been approved by the BOJ, or on which the Judge has a position not in accord with that of the BOJ, the Judge should make clear to the audience that the BOJ has not rendered a position yet or has a differing view.
- (h) **Resolutions.** Formal decisions of the BOJ may be implemented by issuance of numbered and dated BOJ Resolutions or through adoption of policies.

XIV. STANDING PANEL ON ADMISSION AND DISCIPLINE

Pursuant to Misc. Order 1-05 and BOJ Resolution 01-2011, Judges serve on a rotational basis on the Court's Standing Panel on Admission and Discipline to review matters arising under the Court's *Rules of Admission and Practice*.

XV. REQUEST FOR CLASS CERTIFICATION AND CLASS ACTION

(a) Policy. Requests for class certification and class action (RCAs) are decided by panels.

(b) Procedure. If an appeal or petition is not already assigned to a screening judge when an RCA is filed, the RCA will be assigned by the Clerk to the Judge next in rotation on the class action roster; if the case is assigned to a screening judge, the RCA will be assigned to that Judge. In both scenarios, the Clerk concurrently assigns two additional panel members from the class action roster. The panel proceeds to act on the RCA pursuant to Rule 23, taking and directing action and issuing orders as appropriate. After granting or denying an RCA, the panel determines whether the matter should continue at panel or whether the panel should be dissolved and the matter proceed before a single Judge. *See* Section V(e).