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Tenth Circuit Notes

TENTH CIRCUIT NOTES

In an effort to adapt the Annual Tenth Circuit Survey to the interests of the practicing bar, the Board of Editors has added to our annual survey this section of general interest items about the circuit. We express our appreciation to Emory Hatcher, Circuit Executive, and Richard Banta, Senior Staff Attorney for the Tenth Circuit, for their cooperation and assistance in preparing this section.

A. *Local Rules*

The Judicial Council for the Tenth Circuit amends the Rules of Court for the Tenth Circuit Court of Appeals¹ in response to suggestions from the bench, bar, and staff and according to the needs of the court. The most recent compilation of the local rules, as amended to November 12, 1975, reflects changes in rules 9, 8, 7, and 10.²

Rule 9 provides for four calendar assignments, designated A, B, C, and D. After reviewing the docketing statement, the court assigns each case to one of the four calendars according to criteria such as: Number, complexity, and novelty of issues presented; length of the record; cross appeals and number of parties involved; and applicability of recent Supreme Court decisions.

By amendment dated May 1, 1975, the Circuit Council inserted the following statement into rule 9:

The assignment of a case to a particular calendar is a procedural classification only for the convenience of the court and does not reflect an opinion by the court as to the importance or substantive merit of the issues raised.

Additionally, rule 9(d) was amended to read:

(d) Calendar D cases shall consist of those cases in which notice

¹ A complete copy of these rules, adopted November 13, 1972, and as amended through October 24, 1974, appears at *Tenth Circuit Survey*, 52 DENVER L.J. 421-35 (1975). These rules are hereinafter cited as the local rules, and all citations to rules in this section are to the local rules as amended to November 12, 1975, unless otherwise indicated.

² Rule 10, Reproduction of the Record and Appendix to the Briefs, was amended by the Circuit Council on May 20, 1975, to include the following provision:

Whenever, anywhere in these Rules, the requirement of an appendix is dispensed with and the Clerk is required to mail the record to counsel so that it may be duplicated, he shall tax a fee of \$15.00 to cover the cost of clerical time and postage expense.

has been given pursuant to Rule 8(d) that the appeal will be considered without oral argument on the record of the proceedings in the District Court. Within 15 days after receiving such notice the parties may simultaneously file a memorandum in quadruplicate in support of their respective positions. Counsel shall serve copies of any memorandum filed on all parties.³

Rule 7 establishes the criteria for the docketing statement which must be filed within 30 days after filing the notice of appeal in the district court. Paragraph (c) requires that the appellant attach to each copy of the docketing statement a copy of the docket sheet of the court from which the appeal is taken, a copy of the judgment or order sought to be reviewed, a copy of any opinion or findings, and a copy of the notice of appeal. On November 12, 1975, the Circuit Council adopted the following addition to rule 7:

(f) Failure to comply with paragraph (c) of this Rule may result in dismissal of the appeal pursuant to Rule 14(a) of these Rules.

B. *Index to Unpublished Opinions*

Among the amendments to the local rules adopted during 1974 was the rule allowing unpublished opinions to be cited as precedent. Rule 17(c) now provides, in pertinent part:

³ Previously, rule 9(d) provided:

(d) Calendar D cases shall consist of those cases in which a motion to affirm or dismiss has been filed pursuant to Rule 8(a) of these Rules and those in which notice has been given pursuant to Rule 8(d) of these Rules that the court is considering summary action on its own motion.

(1) Within 15 days after receiving notice that the court is considering summary action pursuant to Rule 8(d) on its own motion, the appellant may file in quadruplicate and serve on all parties to the appeal a memorandum addressing the merits, opposing such summary action.

(2) The appellee may simultaneously file in quadruplicate and serve on all parties to the appeal a memorandum addressing the merits supporting summary action.

(3) The same procedure and form as the preceding two paragraphs will be followed in those cases where manifest error is noted by the court pursuant to Rule 8(d), except that the appellee may oppose and the appellant may support summary action.

On November 12, 1975, the Circuit Council correspondingly amended rule 8(d) by deleting the following language:

Whenever the court, after reviewing an appeal, concludes that manifest error requires reversal or vacation of a judgment or order of the district court, or remand for additional proceedings, the court may enter an appropriate order after notice to the parties.

Unpublished opinions, although unreported and not uniformly available to all of the parties, can nevertheless be cited, if relevant, in proceedings before this or any other court. Counsel citing same shall serve a copy of the unpublished opinion upon opposing counsel.⁴

Rule 17(c) was adopted in response to concern from the bench and practicing bar about the inability to cite unpublished opinions. During the 12-month period covered by this annual survey, the Tenth Circuit wrote 474 opinions. Approximately 55 percent of those opinions were not published.⁵ Opinions not selected for publication are

(1) cases where the outcome depends on facts and presents no legal issues not previously decided by the Tenth Circuit or by the Supreme Court of the United States; and (2) diversity cases where the outcome depends on established state law.⁶

Nevertheless, the adoption of rules such as rule 17(c), permitting

⁴ Previously, this portion of rule 17(c) provided:

Unpublished opinions, since they are unreported and not uniformly available to all parties, cannot be cited or otherwise used in any proceedings before this or any other court, in unrelated cases.

PUBLISHED AND UNPUBLISHED OPINIONS
TENTH CIRCUIT

September 1, 1974 through August 31, 1975

	REGULAR OPINIONS		PER CURIAM OPINIONS		TOTAL OPINIONS	
	Pub-lished	Unpub-lished	Pub-lished	Unpub-lished	Pub-lished	Unpub-lished
Sept. 1974	23	7		8	23	15
Oct. 1974	18	10	3	21	21	31
Nov. 1974	12	6	1	2	13	8
Dec. 1974	26	14		13	26	27
Jan. 1975	19	10	2	10	21	20
Feb. 1975	18	8	4	8	22	16
March 1975	17	8	1	15	18	23
April 1975	17	4		8	17	12
May 1975	9	14	1	16	10	30
June 1975	18	2	1	17	19	19
July 1975	13	23	1	8	14	31
Aug. 1975	13	10	3	12	16	22
TOTALS	203	116	17	138	220	254
					TOTAL OPINIONS — 474	

⁶ Rule 17(e).

counsel to cite unpublished opinions, has caused some to suggest that it is inequitable for certain parties to have greater access to the increasing number of unpublished opinions.⁷

Partially in response to this inequity, the central staff of the Tenth Circuit is preparing an ongoing index of unpublished Tenth Circuit opinions. The initial volume will index all unpublished opinions issued from August 1972 through February 1975. This compilation includes between 600 and 700 opinions. A second volume will contain an index to all unpublished opinions from March 1975 through December 1975. Thereafter, the index will be supplemented each year by a quarterly index and by a cumulative annual supplement. The index will be made available within the circuit as soon as possible to all judges and magistrates, offices of the United States Attorneys and federal public defenders, and all public and private law libraries. Each district court clerk's office within the Tenth Circuit will have a complete index for reference use. Additionally, copies of the index will be available to the practicing bar at a minimal charge through the Tenth Circuit clerk's office. Reprints of individual unpublished opinions are available upon request from the clerk's office for \$2 per opinion.

C. *Practitioner's Guide to the Tenth Circuit*

The staff attorney's office of the Tenth Circuit is presently completing a final draft of a publication described as a practitioner's guide to practice before the Tenth Circuit.⁸ Similar guides are available in other circuits, although most of these publications were prepared and distributed through local bar associations. Prepared in outline form, the practitioner's guide is designed to provide a step-by-step procedural outline on how to bring an appeal to the Tenth Circuit and will provide a basic overview of internal processing of appeals.

The booklet will include the Federal Rules of Appellate Procedure and selected forms, and the local rules of the Tenth Circuit. For the novice, the staff has provided a convenient map of

⁷ Talesnick, *Understanding the United States Court of Appeals for the Tenth Circuit: A Guide for the Practitioner, Tenth Circuit Survey*, 52 DENVER L.J. 375, 401 (1975); COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 114 (June 1975) [hereinafter cited as COMMISSION REPORT (June 1975)].

⁸ For another practitioner's guide, see Talesnick, *supra* note 7.

downtown Denver, practical aids on how to prepare an appellate brief and how to present oral argument, and charts and checklists on "when to do what."

The Tenth Circuit's plan for implementation of the Criminal Justice Act is described, along with practical pointers for appointed counsel.

The final draft will be circulated within the Tenth Circuit for comment and revision before the guide is published and generally available to the practicing bar.

The central staff has also drafted and distributed for comment and revision a set of standard forms for use by pro se litigants in civil rights suits and prisoner petition cases. The Circuit Council is considering the advisability of requiring the use of such forms as well as uniform rules and procedures for district court disposition of these specific cases.

D. *Central Staff*

The Tenth Circuit presently has five staff attorneys.⁹ The utilization of central staffing, a relatively recent innovation, is already in wide use, and every circuit but the First employs staff attorneys to consider pro se motions and petitions.¹⁰ The Commission on Revision of the Federal Court Appellate System has recommended increased congressional funding to develop optimal utilization of central staffs by the courts of appeals for research, preparation of memoranda, and the management and monitoring of appeals to assure that cases move toward disposition with minimum delay.¹¹

Several years ago the Judicial Conference of the United States recommended to Congress that appropriation be made for the position of Senior Staff Attorney in each circuit court of appeals. In 1974 Congress created the position and in 1975 authorized the necessary appropriation.

The Tenth Circuit was among the first to act pursuant to this congressional authorization when the Circuit Council appointed Mr. Richard Banta to the position on November 12, 1975. The

⁹ Staff attorneys for the Tenth Circuit are: Richard J. Banta, Esq.; Thomas D. Carter, Esq.; John K. Kleinheksel, Esq.; Edward A. Lewkowski, Esq.; and Elizabeth D. Page, Esq.

¹⁰ COMMISSION REPORT (June 1975) at 118.

¹¹ *Id.* at 119-20.

Circuit Council has also authorized appointment of one additional staff attorney for the circuit.

The Tenth Circuit is considering the assignment of a member of the clerk's staff to the position of ombudsman to assist the office of the Clerk of the Court and the Circuit Executive in checking on problem areas in processing appeals to eliminate unnecessary delays.

E. *Judicial Conference of the Tenth Circuit*

Pursuant to 28 U.S.C. § 333,¹² the Tenth Circuit adopted local rule 19 which provides for the establishment of an annual judicial conference of the circuit. Although many circuits limit participation in the judicial conference to bar association officials, selected law school personnel, and persons nominated by circuit judges, membership in the Judicial Conference of the Tenth Circuit is open to

[e]very member of the Bar of the Court of Appeals for the Tenth Circuit who is in good standing and who shall declare in writing his intention to become a member of the Conference¹³

The mailing list for the Judicial Conference presently exceeds 900 members, including all judges within the circuit and members of the state judiciaries.

Except for executive sessions [a]ll other meetings of the Conference shall be open to all members of the Conference and shall be devoted to a program designed to improve the administration of justice in the Tenth Circuit. All members of the Conference may participate in the discussions and deliberations. The Conference may take appropriate action on any matter presented to it.¹⁴

The 1975 Judicial Conference of the Tenth Circuit was held July 24-26 in Santa Fe, New Mexico. The 1976 meeting, a com-

¹² This statute provides for the establishment of a judicial conference for each circuit:

The chief judge of each circuit shall summon annually the circuit and district judges of the circuit, in active service, to a conference at a time and place that he designates, for the purpose of considering the business of the courts and advising means of improving the administration of justice within such circuit. He shall preside at such conference, which shall be known as the Conference of the circuit.

. . . .
The court of appeals for each circuit shall provide by its rules for representation and active participation at such conference by members of the bar of such circuit.

¹³ Rule 19(b)(2).

¹⁴ Rule 19(e).

bined conference with the Eighth Circuit, will be held on June 27-30 in Hot Springs, Arkansas.

F. *Advisory Committee on Tenth Circuit Procedures*

In 1972 Congress established the Commission on Revision of the Federal Court Appellate System.¹⁵ The Commission was given two major assignments. Under section 1(a) of the Act the Commission was

to study the present division of the United States into the several judicial circuits and to report . . . its recommendations for changes in the geographical boundaries of the circuits as may be most appropriate for the expeditious and effective disposition of judicial business.

On December 18, 1973, the report pursuant to that mandate was submitted.

Under section 1(b) of the Act, the Commission was

to study the structure and internal procedures of the Federal courts of appeal system, and to report . . . its recommendations for such additional changes in structure or internal procedure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeal, consistent with fundamental concepts of fairness and due process.

In June 1975 the Commission presented its report on structure and internal procedures. Input for the Commission's report came in part from testimony at hearings and from an extensive survey of attorneys. In part the Commission concluded: (1) That there is a value in permitting the several circuits to respond independently to the needs of the bar with solutions tailored to their own particular problems;¹⁶ and (2) that the bar can play a creative and constructive role in fashioning circuit procedures.¹⁷ These conclusions led the Commission to recommend "that each circuit court of appeals institute a mechanism for formulating, implementing, monitoring and revising circuit procedures."¹⁸

Specifically, the Commission recommended creation of an advisory committee within each circuit to provide input from the

¹⁵ 28 U.S.C.A. § 41 (Supp. 1974).

¹⁶ COMMISSION REPORT (June 1975) at 96.

¹⁷ *Id.* at 97.

¹⁸ *Id.* at 98.

bar and others who may be affected by procedural change. In response to that recommendation the Tenth Circuit has already established the Advisory Committee on Tenth Circuit Procedures. The committee consists of Chief Judge David T. Lewis; District Judge Frederick A. Daugherty; Emory Hatcher, Circuit Executive; and one member of the practicing bar from each state within the circuit.¹⁹ Membership on the committee has recently been finalized, and the group plans to begin organizational meetings early in 1976.

G. *Filing Statistics*

The increase in appeals brought to the Tenth Circuit in the past 5 years is reflected in the following table.

*TENTH CIRCUIT
CALENDAR YEAR FILING STATISTICS*

YEAR	APPEALS FILED
1970	729
1971	783
1972	900
1973	977
1974	898
1975	1,002

¹⁹ The members of the practicing bar from the six states are: William C. McClearn, Esq. (Colorado); Leonard O. Thomas, Esq. (Kansas); William A. Sloan, Esq. (New Mexico); John W. Raley, Jr., Esq. (Oklahoma); Harold G. Christensen, Esq. (Utah); and Henry A. Burgess, Esq. (Wyoming).