

# **SECOND DISTRICT COURT OF APPEAL**



## **INTERNAL OPERATING PROCEDURES**

**JANUARY 18, 2005**

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## **Section 1.**

## **GENERAL RULES**

### **1.1 Scope and Purpose**

The Florida Rules of Appellate Procedure and Florida Rule of Judicial Administration 2.040 govern the operation of the Second District Court of Appeal. These internal operating procedures do not supplant those rules promulgated by the Supreme Court of Florida, nor are they intended to create any substantive or procedural rights. This manual is designed merely to disclose established practices in the court, to aid practitioners and the public at large to understand the structure and functioning of the court, and to orient new employees of the court.

### **1.2 General Information**

The headquarters of the Second District Court of Appeal is located at the Lawton M. Chiles, Jr., Courthouse, 1005 East Memorial Boulevard, Lakeland, Florida. The mailing address is P.O. Box 327, Lakeland, Florida 33802-0327. The telephone number for the headquarters is 863-499-2290, and the fax number for the headquarters is 863-413-2649.

A branch office was created by statute in 1981 and is currently located at the Stetson University College of Law, Tampa Law Center and Campus, 1700 North Tampa Street, Suite #300, Tampa, Florida 33602. The telephone number for the branch is 813-272-3430.

### **1.3 Jurisdiction of the Court**

The court hears appeals from final orders and certain nonfinal orders entered by all divisions of circuit court, including civil and criminal divisions, and from similar administrative orders entered by many governmental agencies. It also considers original proceedings governed by Florida Rule of Appellate Procedure 9.100, including

petitions for certiorari, mandamus, prohibition, and habeas corpus. It also has authority to grant review of orders that incorporate questions properly certified by county court judges. The territorial jurisdiction of the court covers the fourteen counties found in the Sixth, Tenth, Twelfth, Thirteenth, and Twentieth Judicial Circuits of Florida.

The court is comprised of fourteen judges who are selected by the merit retention system, under which qualified applicants apply to a nominating committee that provides a short list of nominees to the governor. The governor selects a new judge from the committee's list, and the judge then stands for merit retention by the voters at a general election approximately eighteen months after his or her selection. Thereafter the judge's name is placed on the ballot for merit retention every six years.

#### **1.4 Use of Court Facilities**

At the Lawton M. Chiles, Jr., Courthouse in Lakeland, portions of the court are open to the public from 8 a.m. until 5 p.m., Monday through Friday. These areas include the front desk of the clerk's office. There is no public law library. On days when oral arguments are conducted, the courtroom is open to the public and the lawyers' waiting room is also open. In the branch office, the court holds oral arguments in the William Reece Smith, Jr., Courtroom on the ground floor of the Stetson University College of Law. These proceedings are open to the public. No other court facilities are accessible to the public in Tampa, and the clerk does not maintain an office at that location. Organizations that may wish to use the courtroom or other facilities at this location must contact Kristina Macys at the Stetson University College of Law, 813-228-6625.

## **1.5 Website**

The court maintains a website at [www.2dca.org](http://www.2dca.org). The court posts all written opinions of the court on the website and provides online access to the court's docketing information for the use of the general public at this site. Court holidays, when the court is closed pursuant to the rules established by the Supreme Court of Florida, are posted on the court's website. Also posted on the website are oral argument calendars; employment opportunities with the court; links to research materials, including all rules of court promulgated by the Supreme Court of Florida; and directions to the court's two facilities. It contains profiles of the judges, clerk, and marshal. The marshal is responsible for appointing a webmaster. These internal operating procedures are available on the website.

## **1.6 Court Conference**

Monthly court conferences are conducted at a location designated by the chief judge. Additional conferences for special matters are scheduled by the chief judge or upon the request of two or more judges. The presence of a majority of judges of the court constitutes a quorum. Whenever possible, the court attempts to act upon a consensus vote of the judges, but a majority vote of those present constitutes official action of the court, except as provided in section 1.9. The clerk serves as the secretary to the conference and is responsible for recording the minutes. The marshal also attends the conference. The Director of Central Staff presents a regular report to the conference, and other employees of the court attend as necessary to inform the judges of their activities.

## **1.7 Judicial Recusal**

In order to facilitate the assignment of cases, the clerk maintains a list for each active judge of persons or entities who are likely to appear before the court and whose involvement in a proceeding will require the judge's recusal. Each judge is responsible for keeping the clerk informed as additions to or deletions from this recusal list come to the judge's attention. Parties may inquire of the clerk to determine whether any judge is recused in their case.

The court recognizes that this list will not identify all cases involving conflicts. If a judge identifies a conflict necessitating recusal from a case on which the judge has already been assigned, the judge shall notify the clerk, who will designate a substitute judge. If the judge identifying the conflict is primary on the case, to the extent possible the judge's staff will remain involved to assist the substitute judge. Postponement of a scheduled oral argument shall be a last resort in solving problems associated with late-detected conflicts requiring recusal.

## **1.8 Court Property**

The marshal is the custodian of court property and inventories it annually by number. Judges, legal staff, and the clerk may check out books, court files, and portable electronic equipment. No other court property may be removed from the premises without consent of the marshal.

## **1.9 Enactment and Amendment of Court Policies**

An affirmative vote of a majority of the judges of the court is necessary to amend these policies or to enact amendments to them. Proposed amendments must be circulated to the judges of the court not less than seven days prior to any meeting at

which a judge intends to call for a vote to amend this manual or the clerk presents proposed changes to the manual.

#### **1.10 Terms of Court and Holidays**

The court is open from 8 a.m. to 5 p.m. weekdays throughout the year, except for holidays. Holidays, as established by the Supreme Court of Florida, are posted on the court's website. It should be noted that legal holidays, which are used to compute time for the filing and service of documents in the appellate courts, are identified in Florida Rule of Appellate Procedure 9.420(e). That list is more extensive than the list of holidays used for closure of the courthouse. The court holds two terms annually, as prescribed by statute, commencing on the second Tuesday of January and July. Oral arguments are not scheduled during the month of July.

#### **1.11 Sittings away from the Court Headquarters and Branch Office**

The court complies with section 35.11, Florida Statutes, and conducts at least one oral argument session annually in each of its circuits. It welcomes requests to sit in any community within its district and attempts to coordinate with schools and civic organizations to make these special sessions useful to the community. Requests to sit in any community may be made to either the clerk or the chief judge.

## **Section 2.**

## **CHIEF JUDGE**

### **2.1 Selection of the Chief Judge and Duties of Office**

Prior to July 1 of each odd-numbered year, the judges of the court elect a chief judge, who serves a term of two years. This election, under normal circumstances, occurs no less than four months prior to the expiration of the sitting chief judge's term. Details regarding succession in the event a judge does not complete the term, as well as a description of the duties of the chief judge, are set forth in rule 2.040(a)(2).

### **2.2. Workload**

The chief judge's administrative responsibilities can affect this judge's ability to handle and resolve a normal caseload on a timely basis. Accordingly, the chief judge may, as he or she determines, be excused from participating in motions panels and may direct the clerk to make appropriate reductions in the assignment of the judge's oral argument, oral argument waived, or central staff panels. In order to maintain an adequate workload for the staff of the chief judge, associate and senior judges may work with his or her staff attorneys as needed.

### **2.3 Committee Assignments**

The chief judge assigns judges of the court to internal committees designed to enhance administration of the court. Standing committees on budget, long-term planning, central staff, technology, liaison, and case management exist with no fewer than two judges. Temporary committees are created at the discretion of the chief judge as necessary to accomplish the effective administration of the court.

### **2.4 Administrative Orders**

All administrative orders issued by the chief judge, as well as those received from the chief justice, are maintained in the custody of the clerk.

## **Section 3.**

## **CLERK**

### **3.1 Appointment and Duties**

Rule 2.040(b) provides details concerning the appointment and general duties of the clerk.

In addition to those enumerated in the above-noted rule, the following additional measures pertain to the clerk of the Second District Court of Appeal. The clerk shall direct litigants and practitioners that filings are to be undertaken at the Lakeland headquarters. Only by specific consent of a judge or the clerk may a filing be made in any location other than the Lakeland headquarters. Filing by facsimile or e-mail transmission is not permitted without the specific consent of a judge or clerk of the court, and in those cases where it is permitted a hard-copy filing must follow.

### **3.2 Handling of Judicial Emergencies**

The clerk assumes initial responsibility to screen motions and original proceedings to determine whether they may qualify for immediate judicial attention. The clerk is guided by the following definition of "emergencies" and other guidelines that follow to determine whether a matter should be brought to the attention of the director of central staff for prompt attention.

#### **(A) "Emergencies" Defined**

The court screens the following motions or proceedings to determine if they qualify for immediate judicial attention:

- (a) Any filing describing itself as an emergency in its title.
- (b) Motions to stay lower tribunal proceedings.
- (c) Petitions for writ of habeas corpus (excepting those petitions seeking belated appeals or challenging the effectiveness of

appellate counsel per rule 9.141(c) that have been mislabeled as habeas corpus petitions).

- (d) Petitions for writ of prohibition.
- (e) Motions to review the denial of supersedeas bond in criminal appeals per rule 9.140(g)(4).

**(B) Fee-Readiness and the Certificate of Service**

To qualify for emergency treatment, the proceeding in which the filing is undertaken must be "fee-ready," meaning that the appellate filing fee has been paid or waived according to applicable statutes or constitutional provisions. Additionally the party filing the motion or proceeding must certify that opposing counsel has been served either by hand delivery, by e-mail, or by fax. If this has not been done, the court will advise the filing party by telephone that a conforming, amended certificate of service must be provided to the court that confirms that the opposing party is in actual possession of the document before the matter will be considered further.

**(C) Place of Filing**

Filing of all emergency matters should be accomplished by mailing or hand delivery to the clerk's office in Lakeland. The branch office in Tampa has no office of the clerk. Accordingly, emergency matters delivered without prior authorization to the Tampa branch of the court will receive no special attention and will not be considered until they arrive in Lakeland, which is usually during late morning of the following business day. Occasionally, delivery in Lakeland of an emergency matter filed in Tampa may be delayed even beyond these guidelines.

The clerk and the judges of the court may authorize the filing of an emergency in Tampa on matters that are "fee-ready," but filings in Tampa that require the simultaneous remission of a check for the filing fee will not be authorized. Only highly

compelling and unusual circumstances will justify deviating from the principle that emergencies must ordinarily be filed with the clerk in Lakeland.

The clerk or a judge of the court also may authorize the filing of an emergency by facsimile to Lakeland (followed by hard copy), provided a check for the filing fee is not required to accompany the filing. Again, only highly compelling circumstances will justify approving a filing of an emergency matter by facsimile. The clerk may authorize the filing of an emergency by a document attached to an email under conditions specified by the clerk.

#### **(D) The Processing of Emergencies**

Once a genuine emergency is identified by the court, normal communications by mail or hand delivery are commonly not practical and the court frequently authorizes fax transmissions for responses and replies. Court-authorized faxes by the parties to the court must be followed by hard-copy filings. The court commonly faxes orders during the pendency of emergencies to the parties and attorneys. These same principles apply when transmission by e-mail is approved.

### **3.3 Orders of Disposition**

In all proceedings disposed of by order, except voluntary dismissals, the clerk identifies on the face of the order the names of the participating judges on the case, listing first the chief judge if a panel member, with all other judges listed in order of seniority.

### **3.4. Scheduling and Assignment of Cases**

The clerk schedules and assigns cases under the supervision of the chief judge and the case management committee. Oral argument and oral argument waived panels are randomly selected in most cases, and the assignment of cases to these panels is

undertaken in a manner that guarantees that litigants, attorneys, and judges have no part in the assignment of a case to a panel or a primary assignment of a case to a judge. Occasionally, by order of the chief judge, a case is assigned to a panel because that panel has already been randomly assigned to a related case. Panels for special sittings in locations to comply with section 35.11, Florida Statutes, are not always randomly created. Except to the extent that the calendar clerk may attempt to balance the assignment of large-volume appeals among the judges, assignments of cases to panels are undertaken randomly.

Decisions regarding the number of panels established by the court per month and how many cases are assigned to each panel are made jointly by the case management committee and the chief judge with information provided by the clerk. If the case management committee and the chief judge decide that an existing backlog of cases requires that more than twenty-one cases be placed on oral argument waived panels, or more than six cases on oral argument panels, or that each judge receive more than two oral argument and two oral argument waived panels per month, they will obtain the approval of a majority of the judges before scheduling cases in such a manner.

The clerk is directed to assign an equal number of oral argument panels to Lakeland and to Tampa. Judges are assigned to panels in Lakeland and in Tampa without consideration to the location of the judge's office.

### **3.5 Scheduling of Court Sittings away from the Court**

The liaison judge for the county of a planned out-of-town oral argument sitting coordinates details with the clerk and marshal.

### **3.6 Voluntary Dismissals and Continuances**

From time to time cases are resolved or postponed after assignment and before oral argument or conference. At such time as the primary judge determines that a case will not be considered on the scheduled date, notification of this circumstance is promptly made to the clerk. If thirty or more days remain before the argument or conference, the clerk assigns a substitute case to the primary judge. If the case has not been disposed of by voluntary dismissal, at such time as the case is again ready for assignment, the clerk shall assign the case back to the same judge to whom it was originally assigned if that judge requests it. Otherwise the case will be randomly reassigned.

### **3.7 Reports**

The clerk prepares reports to assist the court in the timely resolution of cases. The clerk prepares a monthly report that identifies all cases that have been assigned but not yet decided within ninety days of conference or oral argument (within forty-five days in the case of dependency, termination of parental rights, and nonfinal appeals, and certiorari petitions), and this list is appended to the court conference agenda. A similar report is prepared for rehearings and rehearings en banc that have been pending for more than sixty days. The clerk also collects a report from each judge's judicial assistant at the close of the month that inventories the cases held in the judicial suite. The clerk distributes these reports to all suites. Consistent with the requirement of Florida Rule of Judicial Administration 2.085(f), the clerk provides quarterly reports to the chief justice of the Supreme Court of Florida identifying cases that have not been decided and for which 180 days have passed since argument or conferencing. Copies of these reports are appended to the court conference agenda.

### **3.8 Maintenance of the Internal Operating Procedures Manual**

The clerk maintains an original copy of the Internal Operating Procedures Manual as a court record. This record is available for inspection by any interested person during business hours. The court also maintains a copy of the manual on the court's website. It is the clerk's responsibility to review the manual periodically and present proposed changes to the court.

## **Section 4.**

## **MARSHAL**

### **4.1 Appointment and Duties**

Rule 2.040(c) provides details concerning the appointment and general duties of the marshal. The marshal's responsibilities also include:

- (a) Preparing an annual budget to be approved by the court for submission to the legislature.
- (b) Controlling monies which the legislature appropriates to the court.
- (c) Making or authorizing purchases for the operation of the court.
- (d) Paying bills owed by the court.
- (e) Initiating payroll changes and distributing payroll to employees.
- (f) Serving as personnel officer of the court, including maintaining personnel records and providing orientation for new employees.
- (g) Maintaining the library facilities of the court.
- (h) Maintaining a court receptionist-switchboard operator in Lakeland and a switchboard operator in Tampa.
- (i) Providing for the security of the Lakeland building and grounds.
- (j) Maintaining a record of all assets of the court.
- (k) Providing security and personnel to open and close court during sessions of oral argument and other open sessions of the court.

### **4.2 Purchases**

No person is permitted to make purchases or incur obligations on behalf of the court except the marshal or the chief judge.

### **4.3 Compliance with the Americans With Disabilities Act**

The court endeavors to comply fully with the Americans With Disabilities Act and welcomes suggestions from anyone concerning methods to make its facilities, proceedings, and procedures more accessible for those with disabilities. The marshal's staff

provides accommodations to people with disabilities for appearances at oral argument, as well as for any other needs that are required by individuals visiting the court or communicating with its personnel.

## **Section 5.**

## **CENTRAL STAFF**

### **5.1 Director of Central Staff**

The director of central staff is hired by the court upon recommendations provided by the court's central staff committee and the chief judge. The director and the employees of central staff are employed by the entire court and serve at its pleasure.

### **5.2 Duties of Central Staff**

- (a) Screen all original proceedings and, in concert with judicial assistance, determine the necessity to solicit a response from the respondent; undertake research, prepare memoranda, and assist the court with the disposition of these proceedings.
- (b) Review, undertake research, and prepare memoranda to assist the court with the disposition of all summary postconviction appeals.
- (c) Prepare and present all motions on unassigned cases to the judges' motions panels.
- (d) Review all emergency motions and original proceedings and make expedited presentations to judicial panels of these matters (see section 4.2 of this manual).
- (e) Undertake any other research and writing obligations assigned to it by the chief judge or the court.
- (f) Monitor the status of proceedings in appeals from dependency orders, orders terminating parental rights, and other expedited appeals.

### **5.3 Responses from the Attorney General in Summary Postconviction Appeals**

The court may order a response from the Attorney General on any summary postconviction appeal. The court orders responses as a matter of course in any appeal where reversal is contemplated, except those involving an award of pretrial jail credit or those that reverse for an evidentiary hearing or for further attachments to the order denying the postconviction motion. The Attorney General is encouraged to notify the

court of issues or cases in which it wishes to appear without regard to the nature of the issue.

## **Section 6.**

## **THE DECISION-MAKING PROCESS**

Three judges constitute a panel for the consideration of every proceeding, excepting those that are considered en banc. Appeals are generally not assigned to panels until perfected. Matters requiring judicial attention prior to perfection are prepared by central staff attorneys and presented to regularly scheduled motions panels. Emergency panels are convened for especially time-sensitive concerns. The means of considering the disposition of proceedings in the court may be classified into three categories, addressed in sections 6.1, 6.2, and 6.3 following.

### **6.1 Oral Argument Cases**

If a party makes a timely request, the court permits oral argument as a matter of course in appeals from most final orders. In the following classes of cases, oral argument is not generally permitted:

- (a) appeals in which a pro se party is incarcerated,
- (b) unemployment compensation appeals,
- (c) original proceedings brought pursuant to rules 9.100 and 9.141(c),
- (d) postconviction appeals,
- (e) specified final appeals and nonfinal appeals brought pursuant to rule 9.130, and
- (f) motions.

Even in these classes of cases, oral argument may be permitted if the litigant files a motion that complies with the instructions in the court's "Notice to Attorneys and Parties." A copy of the "Notice to Attorneys and Parties" is available on the court's website.

Unless a panel grants a motion to alter the time for argument, each side in an oral argument case is allotted twenty minutes of argument. A party is not required to use all of its allotted time but is encouraged to provide an argument limited to the essential points. Attorneys are advised to prepare for oral argument so that they are familiar with the content of the record and the applicable law. The court often asks questions during oral argument and prefers to engage the lawyers in a discussion of the issues. The appellant may reserve no more than five minutes for rebuttal.

Oral argument panels generally consider six cases, with two cases assigned to each judge who assumes primary responsibility for those cases. The primary judge's staff is responsible for preparing a summary for the benefit of the panel. The summary reduces the briefs filed to one document, organized by issues presented. The staff attorney preparing the summary attempts to verify the accuracy of citations to the record and the representation of critical case holdings. The staff attorney highlights misrepresentations and legal errors within the briefing so that the judges are not misled by these mistakes. Summaries are distributed to panel members approximately two weeks in advance of the scheduled argument. In most cases, the staff attorney prepares no formal analysis or recommendation for the panel prior to oral argument. The judges assigned to a panel do not meet prior to oral argument to discuss the case and do not discuss the merits of the case or how they plan to vote in the case until the oral argument is concluded.

Following arguments, the panel convenes for preliminary discussion about dispositions of the cases argued. For those cases requiring a written opinion, the primary judge assumes responsibility for its preparation and circulation provided it reflects the majority view; otherwise, the senior member of the other judges on the

panel has the option to either assume responsibility for initial drafting of the opinion or assign that task to the junior member of the panel.

## **6.2 Oral Argument Waived Cases**

The number of cases assigned to any oral argument waived panel varies depending upon the volume of perfected cases ready to be assigned. The preparation of cases for these panels mirrors those for oral argument cases, except that the primary judge's staff is also responsible for the preparation and distribution of a legal analysis of the issues in the proceeding, which must be distributed to panel members one week prior to the scheduled conference. The assigned staff attorney attends the conference and presents his or her analysis orally. Protocol for opinion drafting in oral argument waived cases is the same as that observed in oral argument cases.

## **6.3 Summary Postconviction Appeals and Original Proceedings**

Summary postconviction appeals are initially screened by central staff attorneys. Select proceedings considered to be devoid of any merit are presented to pre-assigned panels that convene twice monthly. Those proceedings that survive these panels, as well as the other postconviction appeals not presented to those panels, are assigned to random three-judge panels by the clerk, with an assigned judge designated. Original proceedings are screened by central staff, and if a response is ordered in a certiorari proceeding the matter is assigned to an oral argument waived panel unless the matter is time-sensitive or the response conclusively demonstrates that the petition is without merit. Formal assignment of other original proceedings, as warranted, mirrors the procedures followed with summary postconviction appeals that proceed past the twice-monthly pre-assigned panels.

#### **6.4 Motions Panels**

Each Tuesday a two-judge motions panel convenes, and central staff attorneys present pending motions on unassigned cases to the panel for its consideration. Routine motions may be decided by one judge. Orders on motions to dismiss, to strike, for sanctions, to relinquish jurisdiction, to stay the appeal or lower tribunal proceedings, to expedite, to review pretrial bond in criminal cases or supersedeas in civil and criminal cases, to review the denial of insolvency, and to consolidate proceedings must have the concurrence of two judges. Orders disposing of a case or on motion to certify the matter to the Supreme Court of Florida under rule 9.125 require the concurrence of three judges.

#### **6.5 Certified Questions from County Court**

The issue of accepting or declining jurisdiction under rule 9.160 must be presented by the director of central staff to the attendees at the court conference following receipt of the notice of appeal, and a majority of judges in attendance voting in favor of accepting jurisdiction is required to maintain the appeal in the court. Submissions from county court that fail because of a procedural or jurisdictional shortfall may be disposed of prior to court conference by a Tuesday motions panel.

#### **6.6 Senior and Associate Judges**

Each judge may be excused annually from service on two panels, either oral argument or oral argument waived, and have their position filled by a senior judge of the court or an associate judge. Utilization of a senior or associate judge who is not a former member of the court requires approval of the chief judge. The staff of a judge exercising this option will remain responsible for all preparatory and follow-up work on the assigned cases that the substituting judge requires. Associate judges are not

assigned to appeals from orders entered in the circuit in which they hold office. County judges are ineligible to sit as associate judges on this court. The judge exercising this option is responsible to assure that the senior or associate judge timely disposes of all matters assigned to that judge.

If a senior or associate judge who is not a former member of the court is selected to serve with this court's associate judges' suite, his or her service is to be approved by the chief judge or his or her designee.

## **6.7 Opinions**

The clerk issues opinions each week on Wednesday and Friday. The clerk circulates all written opinions to court personnel for examination no less than ten days prior to issuance. Opinions requiring expedited release are circulated by e-mail to the judges, staff attorneys, and judicial assistants no less than twenty-four hours prior to the release of the opinion.

Any panel member may direct the clerk not to issue an opinion on the prescribed date, and any judge of the court may do so if he or she is unable to reach a panel member to make a request that an opinion not issue as written. Judges are encouraged to pull opinions in this manner whenever they are concerned that the opinion may contain a legal error or whenever they are convinced that the court should consider the matter en banc prior to its public release.

## **6.8 Facing Sheets**

On all appeals decided on the merits and all original proceedings decided by written opinions, a facing sheet must accompany the opinion. The facing sheet includes the name and address of all entities who are to receive the opinion (excepting the judge of the lower tribunal), the style and number of the case, the panel assigned, the date of

the oral argument or oral argument waived conference, and the name of the document in the directory from whence transmission will occur to subscribers. The signatures or initials of all panel members subscribing to the opinion must be affixed to the facing sheet. In circumstances where more than a majority opinion is to be issued, the facing sheet must reflect the circulation of the final opinion to all panel members and the fact that all members have had an opportunity to review all portions of the opinion. Any time an opinion is withdrawn after circulation to court personnel, a new facing sheet must be prepared and endorsed by panel members.

## **6.9 Proceedings En Banc**

### **(A) Consideration En Banc**

The majority of any three-judge panel who believes that a case under consideration may benefit from, or be required for, en banc consideration may arrange to have the matter placed on the agenda for the next scheduled court conference. If a majority of the attendees at court conference vote to proceed en banc, the matter will be so considered. The principal purpose served by en banc consideration is consistency in the court's decisions. The court may also proceed en banc on its own initiative on matters considered of exceptional importance. En banc consideration is required if a panel intends to recede from a prior holding of the court.

### **(B) Rehearings En Banc**

The clerk forwards to the primary judge a motion for rehearing en banc, along with an en banc facing sheet, upon receipt of the motion. Provided the motion for rehearing appears to be timely and sufficient, the primary judge holds the motion for ten days to afford the opposing side an opportunity to respond. If the motion for rehearing en banc is filed in conjunction with a motion for rehearing, both motions are first

circulated to the assigned panel. Provided full relief is not afforded the movant in response to the motion for rehearing, the motion for rehearing en banc then circulates electronically to the balance of the judges in regular service on the court. The sole question posed to the judges is: "Do you wish to have this rehearing matter considered en banc, yes or no?" At the point that any judge communicates a desire to have the matter considered en banc, the other judges will be advised that further response to the motion is unnecessary at that time. A judge wishing to consider the matter en banc has the responsibility to see that the issue is placed on the agenda for court conference and that the other judges receive the materials necessary to consider the matter at court conference. A majority of attendees at court conference must agree to consider the matter en banc or the materials will be delivered to the clerk for disposition of the motion for rehearing as directed by the panel members and for the entry of an order denying the motion for rehearing en banc. If the court decides to proceed en banc on rehearing, the chief judge designates the judge responsible for drafting an en banc decision.

**(C) Chief Judge's Participation**

The chief judge may vote on all en banc cases, but it is his or her primary responsibility to see that the matter is dispassionately and collegially considered and resolved by the court.