

## AUTHOR INTRODUCTION

Welcome to the 2025 Edition of *Federal Appellate Practice: Ninth Circuit*, which represents the continued evolution of the treatise in its format, schedule, content, and author. The First Edition appeared in 1994 as a single volume from Lawyers Cooperative Publishing. The Second Edition came out five years later from West Group as a two-volume hardcover set; over the years, it bore two sizeable annual paperback supplement volumes prepared by the authors and later the publisher. No lawyer—or author, for that matter—enjoys page-by-page and footnote-by-footnote supplements, particularly when the book’s print and electronic versions diverge. The 2014-2015 Edition marked the beginning of a new approach, taking the shape of a single paperback volume that will be updated and reissued each year. This new format makes it easier for our readers to use the book, and for us to update, improve, and enhance it. To that end, I again extend this invitation to those who use this book: if there are issues that you believe should be addressed, or errors that should be corrected, please let me know by emailing me at [bcooper@dickinsonwright.com](mailto:bcooper@dickinsonwright.com).

### What’s New in the 2025 Edition

As I noted in the 2014–2015 Edition, we chose to implement the reformation of the book through a multiyear process, in order to keep up the beat of annual updates but also move beyond the existing four-volume format. Each year will see a new and better book, and this edition is no exception. We have focused on four goals: (1) updating the material to reflect new procedures and developments; (2) filling in gaps in coverage; (3) ensuring accuracy; and (4) thinning out the underbrush of accreted footnotes and information of diminishing historical significance.

Among the topics addressed in the 2025 Edition are the following:

- Updates on the status of active and senior judgeships
- Updated information for the fiscal year ended September 30, 2023, on the Ninth Circuit’s caseload in various categories, published opinions and unpublished memorandum dispositions, affirmance and reversal rates, median time from filing of the notice of appeal and submission to final disposition, and the frequency of calls for, votes on, and grants of rehearing en banc

- Amendments to the Federal Rules of Appellate Procedure effective December 1, 2024, including the consolidation of Rule 35 and Rule 40 into a single Rule 40 that covers both panel rehearing and rehearing en banc
- Amendments to the Ninth Circuit Rules effective December 1, 2024, including the adoption of new Circuit Rule 26.1-1 and Form 34 as to disclosure statements; clarification of the Circuit Rules on citation to excerpts of record and formatting and technical requirements for submitting digital exhibits; and modifications of Circuit Rules regarding tables of contents and authorities in counseled briefs, as well as shortening the time for ordering transcripts and filing mediation questionnaires
- Amendments to the Ninth Circuit's General Orders through December 21, 2024, including changes to procedures regarding panel rehearing and rehearing en banc
- The Ninth Circuit's administrative order establishing rules for filing, service, and management of a new category of documents called "Highly Sensitive Documents"
- A rewritten chapter on panel rehearing and rehearing en banc
- New sections on Circuit Rule 26-1.1 Disclosure Statements, "Highly Sensitive Documents," and receiving Notices of Docket Activity from the Ninth Circuit in cases in which the attorney is not counsel
- Enhanced discussions of the role of the Ninth Circuit's Office of Staff Attorneys in case review and processing; the treatment of ACMS filing types, including those that do not require a separate document; and the preparation of the record in criminal and civil appeals, including prejudgment preparation of the transcript in criminal cases.

## Guiding Principles

Our plan is that the increased coverage will be offset, in terms of the book's overall length, by the continued reduction of undue footnoting. My editor and I remain committed to offering a handbook in every sense of that word: a concise work that can fit easily into a briefcase or litigation bag and thereby provide a ready answer on the spot without undue physical or intellectual labor. If the book were to grow too bulky to carry or too cumbersome to use, then, in our minds, more would likely be less.

Indeed, to a certain degree, brevity will best serve the intended purpose of this book, which is to answer questions on how the appellate process operates in the Ninth Circuit from a functional perspective. Much of the information lawyers need is not readily apparent from the Federal Rules of Appellate Procedure and the Ninth Circuit rules, which is true of any court and its formal rules. But none of this information is secret knowledge:

the Ninth Circuit judges, clerk, and staff very much want those who appear before the court to understand how the nation's largest circuit conducts its business. We aim to provide that information and help advocates represent their clients more effectively. This requires focusing on this court at *this time*. As a result, we anticipate that the book increasingly will drill down deeper into Ninth Circuit practice while actually becoming shorter. It is tempting to explore collateral subjects of great worth, such as the history of the Ninth Circuit, underlying procedures before district courts and agencies, the development and public-policy implications of legal doctrines, and general instruction on how to write a better brief, present a more-effective oral argument, or manage an appellate practice. Those are subjects, however, for other treatises, books, and articles, of which there are many fine examples. Attempting to address those subjects in a cursory fashion in this book would not do them justice and would undermine our intended purpose. Moreover, while it would be easy to "update" the book by documenting every new Ninth Circuit opinion that stands for a particular proposition, doing so may add little to the user experience except for a lot of page turning. Our goal is to provide succinct answers supported by selected citations to leading or illustrative cases, which means that future editions will continue to lose some of the book's footnote undergrowth.

Our initial step was to reorganize the text in two fundamental ways. First, there is now a single, linear narrative corresponding to the life of an appeal. The book begins, as did the prior editions, with an introduction to the Ninth Circuit, and then works its way from jurisdiction and commencement of the appeal through issuance of the mandate and petitions for certiorari to the United States Supreme Court. This single narrative replaces separate chapters devoted to prosecuting civil, criminal, bankruptcy, immigration, tax, agency, and other appeals. These different types of appeals share many, if not most, procedural requirements, and their differences or unique requirements are now addressed as variations that follow immediately after the general theme. This is now possible for two reasons: I have the benefit of hindsight and input from users of the book over the last twenty-five years; and I have the luxury of being a single author who inherited the work of a very fine team of authors (more about them later) who prepared their chapters independently.

Second, the chapters have been split up and arranged differently in six parts. The rearranged chapters are designed to correspond more closely to what appellate lawyers tend to view as the key segments of appellate practice, which makes it easier for readers to find what they are looking for.

- Part I addresses the Ninth Circuit and general rules of practice before it, including the court, its judicial officers

and staff, admission of attorneys, registration for e-filing, filing and service requirements, and the representation of clients before the court.

- Part II covers threshold questions about the Ninth Circuit's reach, including appellate jurisdiction and such barriers to appeal as waiver, standing, ripeness, and mootness.
- Part III then turns to the appellate process before ordinary briefing on the merits, including initiation of the appeal, stays and supersedeas pending appeal, designation of the record on appeal, extraordinary writs, motions, and appellate mediation.
- Part IV focuses on what most lawyers view as the core of appellate advocacy—briefs and oral argument—and it now features separate chapters on briefs, excerpts of record, amici curiae, and oral argument.
- Part V views the decision-making process from the court's perspective, although it should inform how parties present their cases in the briefs and oral arguments. It covers the standards of review, grounds of decision and waiver of arguments, the precedential or persuasive effect of various legal authorities, the procedures for various types of panels, and the disposition of cases.
- Part VI completes the life of the appeal with postdecision issues, including the entry of judgment; the awarding of costs, fees, and sanctions; petitions for panel rehearing and rehearing en banc; and the issuance of the court's mandate and its relationship to a petition for certiorari to the Supreme Court and postmandate proceedings.

## Acknowledgments

With the 2014-2015 Edition, it was my honor, privilege, and duty to take over fully the reins of *Federal Appellate Practice: Ninth Circuit* from Paul G. Ulrich. Until his retirement from the practice of law, Paul had long been a dean of Arizona appellate lawyers and the driving force behind numerous projects designed to improve the quality of appellate advocacy in Arizona, throughout the Ninth Circuit, and nationwide. Among other roles, Paul served as national co-chair for the American Bar Association's state and federal appellate handbook projects. This book was his brainchild, as was the *Arizona Appellate Handbook*, now a multi-volume State Bar of Arizona treatise for which Paul served as general co-editor for nearly a quarter of a century. *Federal Appellate Practice: Ninth Circuit* would not have come to life and been sustained to this day without the excellent work and dedication of Paul's Phoenix firm, Ulrich, Kessler & Anger, P.C., and the Los Angeles office of Sidley & Austin LLP. Indeed, those two firms were the authors listed on the spine of the Second Edition. I am indebted to Paul, his partners Donn G. Kessler (now retired from

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the Arizona Court of Appeals) and William H. Anger, and their colleague Pamela B. Petersen, as well as to Sidley & Austin partners James M. Harris and Joel G. Samuels and their colleagues Catherine Valerio Barrad, Stephen H. Geary, Robert A. Holland, Christopher L. Pitet, Neil B. Shouse, Craig A. Wolfe, Paul J. Means, and Robert M. Stone. I am also indebted to their editorial consultant, Cole Benson, then the Procedural Motions Coordinator/Supervisor for the Ninth Circuit and later its Supervising Deputy Clerk.

I have taken on new editions of this book not only as a matter of honor and privilege, but also to repay an incalculable debt to now-retired Judge Alex Kozinski and the Ninth Circuit. I was a third-year law student preparing to leave Cambridge, Massachusetts, for a career in far-off Phoenix, Arizona, when I was afforded the opportunity to interview for a clerkship with Judge Kozinski. While he later served from 2007 to 2014 as Chief Judge of the Ninth Circuit, Judge Kozinski was at that time so newly confirmed to the Ninth Circuit that his chambers were still in the Washington, D.C., building where he had been Chief Judge of the United States Claims Court. The year I spent as his law clerk doing the work of the Ninth Circuit, and also the D.C. Circuit and the Central District of California when he sat by designation made me the lawyer and writer I am today. It also made me a lifetime member of the Ninth Circuit family, and I have cherished my continuing friendship with Judge Kozinski, his longtime assistant Donna Salter, and other Ninth Circuit judges and staff.

After practicing before the Ninth Circuit for many years, I was honored in 2009 to be asked to serve it in a formal capacity as the Chair of the first group of Appellate Lawyer Representatives to the Ninth Circuit Judicial Conference. Unlike the traditional Lawyer Representatives selected at the district level, the eighteen Appellate Lawyer Representatives are chosen by the Ninth Circuit judges themselves to pursue a dialogue focused on the appellate system. I served for three years with seventeen outstanding lawyers who reflected the diversity of the Ninth Circuit bar in every respect, and we worked together with the court staff and the Ninth Circuit judges to improve both the quality of appellate advocacy and the effectiveness of the court's internal operations. Preparing the new editions of this book allows me to carry on the work of the Appellate Lawyer Representatives by other means, and I will be calling on several of them to serve as editorial consultants in the coming years. In 2023, I was appointed to the Ninth Circuit's Advisory Committee on Rules of Practice and Internal Operating Procedures, which allows me to continue my service to the court.

I wish to express my gratitude to Thomson Reuters and, in particular, my editor, Stephen P. Tarolli, for his vision, encourage-

ment, and enduring patience. I also wish to gratefully acknowledge the invaluable support of my law firm, Dickinson Wright PLLC, which six years ago enthusiastically invited me to join a wonderful group of colleagues and continue my avocation as an appellate lawyer. I am also thankful for the extraordinary labors of my former colleagues Douglas D. Janicik, Stephen I. Richer, and Shannon Trebbe at Steptoe & Johnson LLP in updating and correcting the book's treatment of the Federal Rules of Appellate Procedure and Ninth Circuit Rules, among other topics. Of course, none of this would have been possible without my wife Leslie, who is also a lawyer, and our three children, Jared, Nathaniel, and Hannah.

Bennett Evan Cooper  
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