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CAMPing Is on the Rise: A Survey of Judicially-Implemented Pre-Argument Conference Programs in the United States Circuit Courts of Appeal

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"CAMP"[1]ING IS ON THE RISE: A SURVEY OF JUDICIALLY-IMPLEMENTED PRE-ARGUMENT CONFERENCE PROGRAMS IN THE UNITED STATES CIRCUIT COURTS OF APPEAL

I. INTRODUCTION

In April of 1974, Chief Judge Irving R. Kaufman initiated a Civil Appeals Management Plan (hereinafter "CAMP") in the Second Circuit. Over the next thirteen years, pre-argument conference programs were implemented in several other circuits. To date, there are currently five circuits with such a program in effect. These programs possess some common characteristics as well as some distinguishing features. The purpose of this article is to present an overview of the use of the pre-argument conference program in federal appellate courts.

The pre-argument conference program is best described by analogy. Essentially it is an appellate procedural device which draws its authority from Federal Rule of Appellate Procedure 33[2] (hereinafter "FRAP 33"). Its analogue at the district court level is the pretrial conference authorized by Rule 16 of the Federal Rules of Civil Procedure.[3] Like the pretrial conference, the

1. CAMP is the acronym given to the Civil Appeals Management Plan of the United States Court of Appeals for the Second Circuit.

2. FED. R. APP. P. 33 states that:

> [t]he court may direct the attorneys for the parties to appear before the court or a judge thereof for a pre-hearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

3. Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094, 1095 (1974).

FED. R. CIV. P. 16 states, in pertinent part:

> (a) Pretrial conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties . . . to appear before it for a conference or conferences before trial for such purposes as
> (1) expediting the disposition of the action;
> (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
> . . . .
> (5) facilitating the settlement of the case.

appellate pre-argument conference is discretionary with the court. Its use, and the objectives it seeks to accomplish, vary from circuit to circuit. Yet, "[t]he whole process, however carried on, is aimed at trying to reduce the forthcoming [appeal] to its simplest terms consistent with the full preservation of the basic positions and rights of the [parties]."[4]

The relatively new concept of appellate pre-argument conference programs, coupled with the varying forms of their implementation nationwide, gives rise to the need for a centralized compendium. This article attempts to fill that need. Its purpose is to objectively relay data received from a survey conducted in December, 1986. Indeed, the format of this article is informational and is not meant to emphasize one circuit's procedure over another. Caution was taken to avoid passing judgment on individual practices of the circuits. Inferences have only been drawn when abstaining from doing so would present an incomplete picture.

In an attempt to serve the needs of the largest number of readers, and to present the most complete picture, the scope of the survey was two-fold. First, it was specific enough to give a detailed picture to the exclusive intra-circuit practitioner and broad enough to produce comparative data between the circuits for the inter-circuit practitioner. Second, specific data on past, present, and future use of the pre-argument conference program was sought from each circuit.

II. Questionnaire Data

A detailed questionnaire was sent to each of the thirteen circuits nationwide, i.e., the 1st through the 11th, the District of Columbia (hereinafter "D.C."), and the Federal Circuit. The participants were asked to indicate their circuit's past, present, and future dealings with pre-argument conference programs. Each question was followed by either a yes/no or a multiple-choice answer. Throughout the questionnaire, the option of "other" was offered, together with space for an explanation. A copy of the actual questionnaire is included in Appendix A.

Participants were asked to answer the questions reflecting their in-house practices exclusively. Hence, the data compiled reflects *only* what the federal *appellate* court in each circuit does. It does not encompass the lower, federal courts nor does it contain any reflection of what the state courts do within a given circuit.

Initially, all participants were asked: "Does your circuit currently have any type of formalized pre-argument conference program?" If a negative re-

4. Professor Wright's synopsis of the underlying purpose of Federal Rule of Civil Procedure 16 applies equally to the appellate pre-argument conference. C. Wright, Law of Federal Courts 604 (4th ed. 1983).

sponse was indicated, then the participants were given a reduced number of follow-up questions, covering: (a) whether a program of this type has *ever* been attempted and, if so, the dates it was in effect; (b) whether a program has been discontinued and the reasons therefore; and (c) whether a program is anticipated in the future.

When a participant responded affirmatively to the initial question (indicating that a program was currently in effect) additional information was requested. The survey was intended to flush-out data such as: the basis of authority for the program, the date of implementation, the primary focus of the program,[5] the stage in the appellate process at which conferences are held, who conducts the conferences, whether conferences are held telephonically or in person, confidentiality of the program, the types of cases which are included or excluded, the voluntariness of the program, and whether the program would be continued.

Since the questions were individualized in nature, it should come as no surprise that the data received varied widely from circuit to circuit. In order to analyze the data received, each circuit was placed in one of four, mutually exclusively, categories. Table 1 illustrates the result of this categorization.

TABLE 1

CATEGORIES—BASED ON EXISTENCE OF PRE-ARG. CONF. PROGRAM	CIRCUITS WITHIN THIS CATEGORY
1. "NO" presently/ "NO" in the future	1st, 4th, 10th, 11th, Federal
2. "NO" presently/ "YES" in the future	D.C.
3. "NO" presently/ "YES" in the past	5th, 7th
4. "YES" presently	2nd, 3rd, 6th, 8th, 9th

What follows is an in-depth look at the components of each of the four categories. For the sake of brevity, overlaps in the data have been generalized. This is not meant to lessen a particular circuit's input or standing; it is merely intended to avoid redundancy.

5. Three choices were given to this question: (1) settlement of cases, (2) narrowing of issues raised on appeal, and (3) case management, i.e., extensions of time for briefing, page limitations on briefing, etc. The participants were told that they might choose more than one response, if applicable, but were then asked to number the responses in order of priority if this was done.

A. *CATEGORY 1—"NO" PRESENTLY/"NO" IN THE FUTURE*

Responses received from the 1st, 4th, 10th, 11th, and Federal Circuits indicated that no type of formalized pre-argument conference program was currently in effect. All of the aforementioned circuits also indicated that no program of this type had ever been attempted.

Additionally, the 4th, 10th and 11th Circuits each responded that no pre-argument conference program was anticipated in the future. However, Dana H. Gallup, Circuit Executive for the 1st Circuit, indicated that the court *may* consider the possibility at some time in the future. Likewise, Clerk of Court Francis X. Gindhart, speaking for the Federal Circuit, noted that the court's Advisory Committee is presently studying the question.[6]

Practitioners in Category 1 circuits might conclude that the negative responses given—concerning the existence of past and future programs—provide only limited information. This may be a premature assessment. From the "no" responses, one can infer that practitioners in these circuits will have a higher degree of contact with the Clerk's Office. Initial briefing schedules, extensions of time for briefing, motions to enlarge page limitations, and other general procedural matters will be handled *exclusively* by Clerk's Office personnel, at least to the extent that no liaison has been designated.

By indicating that no pre-argument conference procedures exist in these circuits, counsel, although relieved of the duty of attending a conference, are charged with the affirmative duty of familiarizing themselves with the circuit's internal practices on their own. In the same vein, any overtures toward settlement must come *sua sponte* from the parties in these circuits.

B. *CATEGORY 2—"NO" PRESENTLY/"YES" IN THE FUTURE*

The D.C. Circuit indicated that it did not presently have a pre-argument conference program in effect, nor had one ever been attempted in the past. However, Karen M. Knab, Circuit Executive, indicated that the circuit is in the process of establishing a pre-argument "settlement" program, with testing to begin in the spring of 1987. Although still in its planning stage, Knab indicated that a firm commitment has been made to the program and supplied "probable characteristics" that it will possess.

An initial testing period will be held during which approximately 100 cases will be randomly selected for inclusion. Criminal and *pro se* cases will be excluded. The program will emphasize both settlement and case management

6. Gindhart indicated that no decision had been reached at this time. The authors felt it best to include the Federal Circuit in this category. This classification is for present purposes only and obviously if a plan is prospectively implemented the Federal Circuit should be removed to Category 2 (where firm commitments to a program in the future have been articulated).

functions. Participation will be mandatory in that those cases selected must appear at the conference.

In addition, conferences will be conducted by volunteer attorneys from the local bar association. These volunteers will be subject to approval by the judges of the court and will not exceed ten in number during the test period. Conferences will be held prior to briefing and will be conducted in person. It is anticipated that conferences will be held in the office of the person assigned to conduct same. Finally, absolute confidentiality will be maintained. There will be no court access to conference papers.

C. *CATEGORY 3—"NO" PRESENTLY/"YES" IN THE PAST*

Two of the survey participants fell within this classification, those being the 5th and 7th Circuits. Because their responses were distinct, individual treatment is required.

Steven Felsenthal, Director of the Staff Attorney's Office for the 5th Circuit, indicated that although no formalized pre-argument conference program was currently in effect, Local Rule 15.3.6[7] authorizes prehearing conferences in Federal Energy Regulatory Commission cases. These conferences are held in the 5th Circuit on an *ad hoc* basis and are called by the circuit judges only when deemed necessary.

Over and above this, Felsenthal noted that in the period 1984-85 the circuit experimented with settlement conferences in civil appeals. These conferences were conducted by four senior district judges. The court was of the opinion that the settlement conference program neither advanced the appellate process nor did it significantly increase the number of settlements. Consequently, no program is anticipated in the future in the 5th Circuit.

The 7th Circuit also does not presently have a pre-argument conference program. James C. Schroeder, Senior Staff Attorney, indicated that no present intention exists to implement one in the future. Schroeder noted that the 7th Circuit has considered the possibility of starting a program, but rejected the idea because the circuit does not have room on the payroll at this time to hire a coordinator.

In the past, however, the 7th Circuit has experimented with a program of prehearing conferences for federal appeals.[8] In 1978, the court developed a pre-appeal program based on FRAP 33.[9] All civil appeal notices filed between February 1978 and March 1979 (excluding *pro se* and *habeas corpus* applications) were reviewed by the court's senior staff attorney for possible inclusion

7. 5TH CIR. R. 15.3.6.

8. *See* J. GOLDMAN, THE SEVENTH CIRCUIT PREAPPEAL PROGRAM: AN EVALUATION (Federal Judicial Center 1982). (Goldman undertook an exhaustive study of the 7th Circuit program and recommended that it be continued).

9. *See supra* note 2.

in the program.[10] The purpose of the evaluation was to "determine whether and to what extent prehearing conferences conducted by a senior staff attorney, or by a senior staff attorney in collaboration with a circuit judge, are effective in reducing the workloads of 7th Circuit judges."[11]

This "reduction in workloads" was expected to result from a reduction in the length and frequency of submission of materials (for example, motions or briefs) to the court.[12] With regard to the reduction of non-routine motions, "the experimental program's evidence seemed to satisfy the court's minimum expectations."[13] However,

> [t]he court was unconvinced that staff intervention through prehearing conferences could encourage informal dispute resolution on appeal, an oft-repeated claim of proponents of the preappeal conference. Although the court recognized that such dispute resolution might be encouraged by its program, the court's main objective for the program was to achieve substantial reductions in the workloads of the circuit judges independent of the settlement or withdrawal of appeals.[14]

As in Category 1 circuits—where no future program is anticipated—practitioners are on notice in the 5th and 7th Circuits that overtures toward settlement or reduction of issues on appeal must come *sua sponte* from the parties themselves.

D. *CATEGORY 4—"YES" PRESENTLY*

The 2nd, 3rd, 6th, 8th and 9th Circuits have each implemented some form of pre-argument conference program which is currently in effect. Some common threads can be seen throughout them. Generally speaking:

(1) All of these circuits use FRAP 33[15] as authority for their programs. In addition, some utilize a local rule.[16]

(2) Confidentiality cloaks the entire program. Files of the pre-argument conferences are kept separate from the court's files. They are not incorporated into either the clerk's office or the staff attorney's office files. This is mandated by the guidelines of each circuit. It has also been reinforced by case law. In *Lake Utopia Paper Ltd. v. Connelly Containers*,[17] counsel for appellee incorporated in his brief some of the comments made by Staff Counsel during

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10. GOLDMAN, *supra* note 8, at 2.
11. *Id.*
12. *Id.*
13. *Id.* at 43.
14. *Id.* at 2.
15. *See supra* note 2.
16. Individualized local rules are discussed *infra* in the in-depth examination of the 6th, 8th and 9th Circuits. (Both the 6th and the 8th Circuits' rules are attached as Appendices B and C, respectively.)
17. 608 F.2d 928 (2d Cir. 1979).

the pre-argument conference. In a stiff admonition, the 2nd Circuit noted, "[counsel] committ[ed] a serious breach of the confidentiality essential to the purpose of pre-argument conferences . . . and we deplore any compromising of the confidentiality of [Staff Counsel's] comments by counsel for a party to [an] appeal."[18]

(3) As to what stage in the appellate proceedings contact is made and/or conferences are held, the overwhelming response selected was—"in the interim period between docketing from the clerk's office and filing of the briefs." The 2nd Circuit was the exception, and it indicated that conferences are held immediately upon notification of docketing from the clerk's office.

(4) In all programs criminal cases are excluded.

(5) In most programs *pro se* cases are excluded, the exception being the 9th Circuit.

(6) Overall it is felt that appeals arising from monetary awards, as opposed to those which sought injunctive relief, are the most amenable to the program. In fact, Chief Judge Kaufman[19] summarized the prevailing view concerning types of cases excluded when he noted, "[i]t was also suspected that appeals raising substantial questions of constitutional law or public policy, because of the number of parties or the significance of the outcome, would be difficult, and often undesirable, to submit to settlement procedures."[20]

In addition to these generalities, a closer look is needed at the individual flavor of each circuit's program. With an eye toward objectivity, assessments as to effectiveness of the individual circuits' programs have been avoided. In order that the reader may have access to additional reflections on each circuit, when available, a footnote reference has been provided immediately adjacent to the sub-category identification of the circuit.

1. 2nd Circuit[21]

As noted in the Introduction, CAMP was inaugurated by the United States Court of Appeals for the 2nd Circuit on April 15, 1974. In the intervening

18. *Id.* at 930.

19. Hon. Irving R. Kaufman, Chief Judge, United States Court of Appeals for the Second Circuit.

20. Kaufman, *supra* note 3, at 1100.

21. *See generally* A. PARTRIDGE & A. LIND, A REEVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN (Federal Judical Center 1983) (Partridge and Lind evaluated CAMP under the auspices of the Federal Judicial Center); Kaufman, *supra* note 3 (Judge Kaufman gives personal insight into the use of pre-argument conference programs in federal appellate courts, with emphasis on the Second Circuit); Benjamin & Morris, *The Appellate Settlement Conference: A Procedure Whose Time Has Come*, 62 A.B.A. J. 1433 (Nov. 1976) (an evaluation of the success of CAMP and its application in state appellate courts).

years the program has both evolved in a number of ways and has grown through the addition of a second staff counsel member.[22] Despite this growth and evolution,

> [n]evertheless, the two features that were central to the plan in 1974 remain central today: first, the use of conferences conducted under the auspices of staff counsel in which participation by the lawyers for appellants and appellees is mandatory and, second, the use of scheduling orders, issued by staff counsel, to impose briefing schedules that differ from case to case depending on the needs of the particular appeal and the argument schedule of the court.[23]

Under CAMP, conferences are conducted exclusively by staff attorneys and are held primarily in person. It should be noted that this ability to hold face-to-face conferences rests, in part, on geography. Many of the other circuits are less compact than the 2nd circuit, and the lawyers who practice before them are more widely dispersed.[24] In fact, even within the 2nd circuit, conferences are occasionally held telephonically. This is especially true when counsel of record are inter-circuit practitioners.

The primary objectives of the 2nd Circuit program, in order of priority, are: (1) settlement of cases, (2) narrowing of issues raised on appeal, and (3) case management, i.e., extensions of time for briefing, page limitations on briefing, and so forth. The 2nd Circuit program is mandated by the court. Being involuntary, counsel may not "opt out" of participation. However, *pro se* and criminal cases are automatically excluded.

There are no current plans to discontinue CAMP. On the contrary, it is anticipated that CAMP will continue to be an integral part of the 2nd Circuit's appellate procedure in the future. Consequently, present and future practitioners involved in appeals lodged in the 2nd Circuit will undoubtedly be exposed to CAMP early on in the perfection of their appeals. In summarizing CAMP, it has been noted that:

> although the encouragement of nonjudicial resolution of appeals is a very important goal of [CAMP], it is important to keep in mind that it is not the only goal. [CAMP] is viewed by staff counsel and court personnel as an effort to bring a variety of tools to bear upon improving the management of the court's civil docket.[25]

2. 3rd Circuit

The 3rd Circuit currently has in effect what it refers to as an "experimental" version of a formalized pre-argument conference program. The pro-

22. A. PARTRIDGE & A. LIND, *supra* note 21, at 13.
23. *Id.*
24. *Id.* at 10.
25. *Id.* at 20.

gram was implemented in November, 1984. One distinguishing feature of the program is that conferences are conducted exclusively by senior district judges of the circuit. These conferences are conducted both by telephone and in person. About half of the conferences are face-to-face and in these instances counsel always come to the office of the senior district judge. No conferences are held outside the realm of the courthouse. Like its counterparts in other circuits, authority for the program is derived from FRAP 33.[26]

The 3rd Circuit program is entirely voluntary. Counsel may elect not to participate and no sanctions will follow. However, the option to participate is only offered to those civil cases involving money damages, such as contract, torts, real property, or anti-trust. *Pro se*, agency, and criminal cases, as well as those involving court-appointed counsel, are automatically excluded from the program.

The 3rd Circuit indicated that the primary focus of its program is settlement of cases. When asked to assess whether the program would continue, the 3rd Circuit responded that it was "uncertain."

Due to the newness of the 3rd Circuit program, as well as its "experimental" format, no outside references are available to which to direct the reader. Therefore, the practitioner in the 3rd Circuit will want to inquire early on as to whether the pre-argument conference is available as an alternative to the traditional appellate procedural process.

3. 6th Circuit[27]

In the latter part of 1981, the 6th Circuit implemented a formal pre-argument conference program. The program draws its authority from FRAP 33[28] and 6th Circuit Local Rule 18.[29] Unlike some of the other circuits, 6th Circuit Local Rule 18 contains non-compliance sanctions. For example, upon failure of a party or attorney to comply with the provisions of Rule 18 or the provisions of the pre-argument conference order, the court may impose sanctions. These may include assessing reasonable expenses caused by the failure to comply (including attorney's fees), assessment of all or a portion of the appellate costs, or dismissal of the appeal.[30]

Conferences in the 6th Circuit are conducted by an independent director other than a staff attorney. Three conference attorneys are authorized to hold conferences and they are administratively separate from other court personnel.

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26. *See supra* note 2.

27. *See generally* Rack, *Pre-Argument Conferences in the Sixth Circuit Court of Appeals*, 15 U. TOL. L. REV. 921 (1984) (The author, himself a conference attorney, gives an in-depth view of the procedures used in the 6th Circuit program).

28. *See supra* note 2.

29. 6TH CIR. R. 18. (A copy of this rule is included in Appendix B.)

30. 6TH CIR. R. 18(e)(2).

These conferences are conducted primarily by telephone although occasionally conferences do occur in person. If a conference is held face-to-face, it is usually conducted at the courthouse. On occasion, however, another neutral location has been used.

The average appeal in 1985 involved one conference with five follow-up communications with counsel individually. Of the conferences held in 1985, one-fourth were conducted using two conferences attorneys.[31] In about 25% of all appeals, program involvement ends the day of the conference. For those in which discussions continue, the median length of time a case remains active in the conference attorney's office is about five weeks.[32]

The 6th Circuit indicated that the primary objectives of its program, in order of priority, are: (1) settlement of cases, (2) narrowing of issues raised on appeal *and* case management—these two tied in order of priority, and (3) preventing motions. This third objective, preventing motions, was unique to the 6th Circuit.

Regarding the voluntariness of its program, the 6th Circuit is best described as "semi-voluntary." Mandatory conferences are scheduled in some cases per 6th Circuit Local Rule 18.[33] Parties may, however, request inclusion in the program. This "self-selection"[34] for the program is currently encouraged in the 6th Circuit.[35] The option to be voluntarily included, however, is withheld from *pro se*, criminal, *habeas corpus*, prisoner and most agency cases.

The 6th Circuit intends to continue its program of pre-argument conferences in the future. The present and prospective practitioner in the 6th Circuit should secure a copy of Local Rule 18 concurrent with the filing of the notice of appeal in order to avoid the risk of non-compliance and/or sanctions.

4. 8th Circuit[36]

Following in the footsteps of its colleagues in the 2nd Circuit, the 8th Circuit implemented a pre-argument conference program in 1981 headed by

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31. This data was supplied by Robert W. Rack, Jr., Conference Attorney for the 9th Circuit, in his cover letter dated Dec. 10, 1986, transmitted with his completed questionnaire.

32. *Id.*

33. 6TH CIR. R. 18.

34. Rack, *supra* note 27, at 928.

35. *Id.*

36. *See generally* Lay, *A Blueprint for Judicial Management,* 17 CREIGHTON L. REV. 1047 (1984) (Chief Judge Lay describes the 8th Circuit's use of the pre-argument conference program in its overall plan for judicial management); Martin, *Eighth Circuit Court of Appeals Pre-Argument Conference Program,* 40 MO. BAR J. 251 (June, 1984) (Martin gives a personal look at how conferences are held in the 8th Circuit from a Conference Director's viewpoint).

then Prof. Charles B. Blackmar.[37] Authority for the program is found in FRAP 33[38] as well as in 8th Circuit Local Rule 2.[39] The Committee Comment to Local Rule 2 notes:

> [t]he clerks of the district courts distribute to parties in civil appeals an informational packet explaining the prehearing conference program and containing the forms referred to in 8th Cir. R. 1. The parties are required to complete the Appeal Information Form as required by 8th Cir. R. 1. Further participation in the settlement portion of the Prehearing Conference Program is voluntary with the parties.[40]

To date, conferences have been conducted exclusively by the Conference Director who occupies a staff attorney position. A provision in Local Rule 2 does exist, however, for conferences to be held by a senior district judge, upon special assignment of the chief judge.[41] These conferences are held primarily by telephone. The 8th Circuit's geographics mandate this as it is "spread over a large region includ[ing] seven states from the Canadian border down to the border of Louisiana."[42] When feasible, conferences are held in person within the courthouse. Other neutral locations, outside the court's facilities, are not utilized.

The 8th Circuit indicated that its current program is completely voluntary, and that its primary objective is settlement of cases. *Pro se*, agency, and criminal cases are automatically excluded. Counsel in all other civil appeals have the option to participate in the program.

The current Conference Director, John H. Martin, indicated that the program would be continued in the future. Eighth Circuit practitioners should be aware that the pre-argument conference program exists should they elect to make use of this alternative to the traditional appellate procedure. Yet, it is not mandated by the court and no sanctions for non-compliance currently exist.

5. 9th Circuit[43]

The 9th Circuit pre-argument conference program has grown in scale over the last six years. The program was established in November, 1981, on a small

37. Subsequent to serving as Conference Director in the United States Court of Appeals for the Eighth Circuit, Hon. Charles B. Blackmar was appointed as a Justice on the Missouri Supreme Court.

38. *See supra* note 2.

39. 8TH CIR. R. 2. (A copy of this rule is included in Appendix C.)

40. 8TH CIR. R. 2, Committee Comment.

41. 8TH CIR. R. 2(b).

42. Lay, *supra* note 36, at 1063.

43. *See generally* J. CECIL, ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT (Federal Judicial Center 1985) (A thorough study of the 9th Circuit's Innovations Project, a section of which is devoted exclusively to the court's pre-argument conference program).

scale to deal with civil appeals originating in the Northern District of California. By March of 1982, the program had been broadened to include civil appeals from the districts of Oregon, Western Washington, and Central California. Three years later it was implemented circuitwide.

Since March, 1985, it has been mandated that all 9th Circuit practitioners participate in the program. Should counsel take issue with this involuntary inclusion, they are given the opportunity to file a formal objection within ten days. It should be noted that all criminal cases and some agency matters are automatically excluded from the scope of the program.

The basis of authority for the 9th Circuit program is FRAP 33[44] and 9th Circuit Local Rule 32.[45] Norman Vance, Senior Conference Attorney, indicated that Local Rule 32 is currently in the process of revision. As the program is mandatory, practitioners should secure a copy of amended Local Rule 32 when it becomes available.

As to the format utilized in holding pre-argument conferences, 99% are conducted by three to four senior staff attorneys. Occasionally, district or circuit judges are employed in settlement efforts. These conferences are primarily conducted by telephone, again due to geographics. If a conference occurs in person, it is held inside the courthouse, be it in San Francisco, Los Angeles or Seattle.

The 9th Circuit indicated that any notion of "priority" was inapplicable in assessing its program's objectives. Rather, the 9th Circuit named four areas, each on an equal footing, as objectives of the program. These are—settlement of cases, narrowing of issues raised on appeal, case management, and resolving questions of jurisdiction. It should be noted that the 9th Circuit was the only participant to mention the resolution of jurisdictional problems as an objective of the pre-argument conference. Yet silence on behalf of the other survey participants does not, necessarily, give rise to an inference of exclusion.

One feature of the 9th Circuit program which is novel from its counterparts concerns recovery of compensation for time spent preparing for and attending a conference. In the initial packet of materials sent to appellate counsel they are notified that,

> [t]he costs of preparing and filing a docketing statement are not taxable, but time spent preparing for and attending a pre-briefing conference *may* be recovered as part of attorneys' fees when such fees are awarded by the court and compensation for such work is not prohibited by statute.[46]

Like other Category 4 members, the 9th Circuit intends to continue its program in the future. This means that 9th Circuit appellate counsel will want

44. *See supra* note 2.
45. 9TH CIR. R. 32.
46. *See supra* note 43, at 160 (emphasis added).

to stay abreast of the forthcoming revisions in local rules governing conference procedures.

III. CONCLUSION

The purpose of this survey was to flush out the past, present, and future state of affairs in the thirteen circuit courts of appeal concerning internal procedures relating to pre-argument conference programs. Since CAMP's inception in April of 1974, at least eight circuits have had some contact with this procedural device as a part of the appellate process. The degree of that contact has varied. Indeed, it ranges from exclusive, past exposure—to present use—to prospective implementation.

By presenting a centralized source of this information, it is hoped that members of the bar who engage in federal appellate practice will be able to deduce, at a glance, what the particular practice is within a given circuit. As such, the survey is intended to serve as a "starting point" from which further inquiry may[47] or may not be needed, depending on whether the particular circuit in question has implemented a mandatory or voluntary program or has no program in effect.

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47. Included in Appendix D is a directory of "contact persons" for each circuit to whom further inquiry on this subject should be directed.

APPENDIX A
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Directions: Where applicable, please mark your selection with an "X" and explain it if necessary.

_____ (indicate your Circuit's designation)

1. To whom should any follow-up correspondence, if necessary, be directed:

   _____

   _____

2. Does your circuit currently have any type of formalized pre-argument conference program?
   _____ Yes
   _____ No. (If answer is NO, please skip to Question 19)
3. When was the program implemented?_____
4. What is used as a basis for authority for your program:
   _____ Federal Rule of Appellate Procedure 33
   _____ Federal Rule of Appellate Procedure 33 *and* Local Rule*
   _____ Local Rule*
   *(Please attach a copy of the Local Rule if applicable).
5. Are conferences conducted by:
   _____ staff attorneys
   _____ independent director other than a staff attorney
   _____ both of the above
   _____ circuit judges
   _____ Other: (including any combination of above).
   Please explain:_____

   _____
6. At what stage in the appellate proceedings is contact made, and/or conferences held, with counsel:
   _____ immediately upon notification of docketing from Clerk's Office
   _____ interim period between docketing and filing of briefs
   _____ after briefing completed
   _____ Other:_____
7. What is the primary focus of your program: (choose more than one, if applicable, and number in order of priority)
   _____ settlement of cases
   _____ narrowing of issues raised on appeal
   _____ case management (i.e. extensions of time for briefing, page limitions on briefing, etc.)

_____ Other:_____

_____

8. Are conferences held:
   _____ primarily telephonically but occasionally in person
   _____ primarily in person but occasionally by telephone
   _____ equally in percentage by phone and in person
9. If conferences are held in person, do:
   _____ counsel come to your office exclusively
   _____ counsel usually come to your office but on occasion meetings are held other places such as one party's office or another neutral location
   _____ conferences held exclusively outside the court-house, i.e., at one party's office or another neutral location
10. In regard to confidentiality, are your files kept separate from those of the Clerk's Office or are they integrated therein? In other words, does the Court have access to your conference correspondence?_____

_____

11. Is your program:
    _____ voluntary
    _____ semi-voluntary (Explain:_____

    _____)
    _____ mandated by the Court/involuntary
12. Please attach a copy of any "form" correspondence sent to counsel, i.e., initial solicitation letters, any follow-up letters, etc.
13. Please attach any data you have compiled on the program, i.e., number of cases involved, number of settlements, number of case management orders entered, etc.
14. In your program:
    _____ all cases are included
    _____ pro se cases are excluded
    _____ agency cases are excluded
    _____ criminal cases are excluded
    _____ cases with court-appointed counsel are excluded
    _____ a combination of the above (Explain:_____)
15. Have you written any articles for publication or studies on your, or another circuit's, program?
    _____ Yes. (If yes, please provide a citation to your work. If not yet published, please include a copy with your response).
    _____ No.
16. How would you assess the effectiveness of your program?

_____

_____

_____

_____

17. How is your program viewed by attorneys/parties who have participated?

_____

_____

_____

_____

18. To the best of your knowledge, will the program be continued?

_____ Yes.

_____ No. (Please explain:_____

_____)

NOTE: ONLY COMPLETE THE FOLLOWING QUESTIONS IF YOU ANSWERED "NO" TO QUESTION NUMBER 2.

19. Has a program of this type *ever* been attempted in your circuit in the past?

_____ Yes. (If yes, what were the dates it was in effect:_____

_____)

_____ No.

20. If you answered "YES" to No. 19, what were the reasons for the discontinuance of the program?

_____

_____

_____

_____

_____

_____

21. If no program is currently in effect, do you anticipate one in the future?

_____ Yes. (Explain:_____

_____

_____ No.

APPENDIX B
6th Cir. R. 18
PRE-ARGUMENT CONFERENCE PROCEDURE
(Amended October 3, 1984)

(a) TRANSMISSION OF DOCUMENTS. Upon the filing of a notice of appeal in a civil case, the clerk of the district court shall forthwith transmit a copy of the notice of appeal to the clerk of the court of appeals, who shall promptly enter the appeal upon the appropriate records of the court of appeals. Each notice of appeal so transmitted shall have appended thereto a copy of:

(1) the docket sheet of the court or agency from which the appeal is taken;
(2) the judgement or order sought to be reviewed;
(3) any opinion or findings;
(4) any report and recommendation prepared by the United States Magistrate.

(b) FILING PRE-ARGUMENT STATEMENT.

(1) Civil appeals from United States District Courts. Within fourteen days after filing the notice of appeal in the district court, the appellant shall cause to be filed with the clerk of the court of appeals, with service on all other parties, an original and two (2) copies of a pre-argument statement setting forth information necessary for an understanding of the nature of the appeal (see form 6CA-53).
(2) Review of Administrative Agency Orders; Applications for Enforcement. Within fourteen days after the filing of a petition for review of an order of an administrative agency, board, commission or officer, or an application for enforcement of an order of anagency, the petitioner or applicant shall cause to be filed with the clerk of the court of appeals, with service on all other parties, an original and two (2) copies of a pre-argument statement setting forth information necessary for an understanding of the nature of the petition or application (see form 6CA-54).

(c) PRE-ARGUMENT CONFERENCE.

(1) All civil cases shall be reviewed to determine if a pre-argument conference, pursuant to Rule 33, Federal Rules of Appellate Procedure, would be of assistance to the court or the parties. Such a conference may be conducted by a circuit judge or a staff attorney of the court known as the conference attorney. An attorney may request a pre-argument conference in a case if he or she thinks it would be helpful.
(2) A circuit judge or conference attorney may direct the attorneys for all parties to attend a pre-argument conference, in person or by telephone. Such conference shall be conducted by the conference attorney or a circuit judge designated by the chief judge, to consider the possibility of settlement, the

simplification of the issues, and any other matters which the circuit judge or conference attorney determines may aid in the handling of the disposition of the proceedings.

(3) A judge who participates in a pre-argument conference or becomes involved in settlement discussions pursuant to this rule will not sit on a judicial panel that deals with that case, except that participation in a pre-argument conference shall not preclude a judge from participating in any en banc consideration of the case.

(4) The statements and comments made during the pre-argument conference are confidential, except to the extent disclosed by the pre-argument conference order entered pursuant to Rule 18(d), and shall not be disclosed by the conference judge or conference attorney nor by counsel in briefs or argument.

(d) PRE-ARGUMENT CONFERENCE ORDER. To effectuate the purposes and results of the pre-argument conference, the circuit judge or the clerk of the court at the behest of the conference attorney shall enter a pre-argument conference order controlling the subsequent course of the proceedings.

(e) NON-COMPLIANCE SANCTIONS.

(1) If the appellant, petitioner or applicant has not taken the action specified in paragraph (b) of this procedure within the time specified, the appeal, petition or application may be dismissed by the clerk without further notice.

(2) Upon failure of a party or attorney to comply with the provisions of this rule or the provisions of the pre-argument conference order, the Court of Appeals may assess reasonable expenses caused by the failure, including attorney's fees; assess all or a portion of the appellate costs; or dismiss the appeal.

APPENDIX C
8th Cir. R. 2

RULE 2: PREHEARING CONFERENCE PROGRAM

(a) In any civil appeal designated as appropriate for inclusion in this court's prehearing conference program, a conference shall be held as soon as practicable to review, limit, or clarify the issues on appeal, to discuss settlement of the appeal, if agreeable to the parties, or to consider any other matter relating to the appeal. Petitions for post-conviction relief, social security cases, dismissals for lack of jurisdiction, interlocutory appeals certified under 28 U.S.C. § 1292(b), injunction cases appealed under 28 U.S.C. § 1292(a)(1), federal or state agency cases, and federal income tax cases are not subject to this rule. In addition, cases arising under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1983, labor arbitrations, and suits brought under ERISA will also be excluded unless there is a specific money judgment involved.

(b) The conference shall be conducted by the director of the prehearing conference program or, upon special assignment of the chief judge, by a senior district judge, at a site convenient to the parties. Conferences will be held initially in St. Louis, Missouri; St. Paul, Minnesota; and Little Rock, Arkansas.

(c) Settlement-related material and settlement negotiations shall be maintained in confidence by the director of the prehearing conference program or senior district judge who conducts the conference and, under no circumstances, may that material be available to any judge who considers the appeal on its merits, except as agreed by the parties.

Source: New.
Cross-References: FRAP 33.

COMMITTEE COMMENT:

The clerks of the district courts distribute to parties in civil appeals an informational packet explaining the prehearing conference program and containing the forms referred to in 8th Cir. R. 1. The parties are required to complete the Appeal Information Form as required by 8th Cir. R. 1. Further participation in the settlement portion of the Prehearing Conference Program is voluntary with the parties.

APPENDIX D

First Circuit:	Dana H. Gallup, Circuit Executive, U.S. Court of Appeals for the First Circuit, 1302 John W. McCormack Post Office & Courthouse, Boston, MA 02109
Second Circuit:	Virginia Loughran, U.S. Court of Appeals for the Second Circuit, U.S. Courthouse, Room 2803, 40 Foley Square, New York, NY 10007
Third Circuit:	Michael LaFontaine, Assistant Circuit Executive, U.S. Court of Appeals for the Third Circuit, 21613 U.S. Courthouse, 601 Market Street, Philadelphia, PA 19106
Fourth Circuit:	Samuel W. Phillips, Circuit Executive, U.S. Court of Appeals for the Fourth Circuit, P. O. Box 6-G, Richmond, VA 23214-1850
Fifth Circuit:	Steven A. Felsenthal, Director, Staff Attorneys Office, U.S. Court of Appeals for the Fifth Circuit, Room 116, 600 Camp Street, New Orleans, LA 70130
Sixth Circuit:	Robert W. Rack, Jr., Senior Conference Attorney, U.S. Court of Appeals for the Sixth Circuit, 527 U.S. Post Office & Courthouse Building, Cincinnati, OH 45202
Seventh Circuit:	James C. Schroeder, Senior Staff Attorney, U.S. Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, IL 60604
Eighth Circuit:	John H. Martin, Conference Director, U.S. Court of Appeals for the Eighth Circuit, U.S. Court & Custom House, 1114 Market Street, St. Louis, MO 63101
Ninth Circuit:	Norman P. Vance, Senior Conference Attorney, U.S. Court of Appeals for the Ninth Circuit, P. O. Box 547, San Francisco, CA 94101-0547
Tenth Circuit:	Robert L. Hoecker, Clerk of Court, U.S. Court of Appeals for the Tenth Circuit, Room C-404, U.S. Courthouse, 1929 Stout Street, Denver, CO 80294
Eleventh Circuit:	Norman E. Zoller, Circuit Executive, U.S. Court of Appeals for the Eleventh Circuit, 50 Spring Street, S.W., Atlanta, GA 30303
Federal Circuit:	Francis X. Gindhart, Clerk of Court, U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439

D. C. Circuit: Karen M. Knab, Circuit Executive, U.S. Court of Appeals for the District of Columbia Circuit, Room 4826, 333 Constitution Avenue, N.W., Washington, D.C. 20001