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The Amendment of Rule 3: The Ninth Circuit's New Rule for Screening Oral Argument

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THE AMENDMENT OF RULE 3: THE NINTH CIRCUIT'S NEW RULE FOR SCREENING ORAL ARGUMENT

One knowledgeable critic of American courts has noted that despite years of criticism, our courts are administered in essentially the same way as they were two centuries ago.[1] While this criticism is doubtless somewhat exaggerated, it echoes the widespread view that our courts are "hemmed in by antiquated methods and procedures."[2]

Because of the unprecedented growth in federal litigation in recent years, particular attention has been directed towards the federal judicial machinery.[3] The ever-increasing number and complexity of cases facing the federal courts continues to cause administrative headaches in the form of congested calendars, delay and wasted effort.

The special problems of the United States Courts of Appeals have been carefully documented in a comprehensive report presented to the Administrative Office of the United States Courts in 1966.[4] Some of the data gathered in the 1966 survey has been brought up-to-date in the graph and tables which follow.[5] A brief glance will suffice to show the rapid increase in appeals filed in recent years and the commensurate growth in case backlog.

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1. Address by Senator Joseph D. Tydings at St. Louis University, in 13 ST. LOUIS L. REV. 601 (1969).

2. Address by Chief Justice Earl Warren, Annual Meeting of the American Law Institute, May 16, 1967, in 23 BUS. LAW. 7, 16 (1968). Chief Justice Warren E. Burger recently had this to say concerning the present state of American judicial procedures: "In the supermarket age we are trying to operate the courts with crackerbarrel corner grocer methods and equipment—vintage 1900." Address by Chief Justice Warren E. Burger, *The State of the Judiciary—1970*, American Bar Association, Aug. 1970, in 56 A.B.A.J. 929 (1970). On another occasion Chief Justice Burger had this comment: "[I]f you could get John Adams, Alexander Hamilton and Thomas Jefferson and bring them back—you wouldn't even have to give them a haircut—all they would need would be about a two-day briefing over at the Federal Judicial Center, and they could walk into court in Washington, D.C., or St. Paul or San Francisco and try a case." U.S. NEWS & WORLD REPORT, Dec. 14, 1970, at 43.

3. *See* Address by Chief Justice Warren E. Burger, *The State of the Judiciary—1970*, American Bar Association, Aug. 1970, in 56 A.B.A.J. 929 (1970).

4. WILL SHAFROTH, SURVEY OF THE UNITED STATES COURTS OF APPEALS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, in 42 F.R.D. 243 (1967); WILL SHAFROTH, THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1967) [hereinafter cited as SHAFROTH SURVEY, NINTH CIRCUIT].

5. [1966-67] JUD. CONF., AD. OFF. REP. at 149-52, 180-83; [1968-69] JUD. CONF., AD. OFF. REP. at 174-77, 200-03; DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANNUAL REPORT, 1970.

The dramatic uptrend in the annual total of appeals is illustrated by figure 1. In the 10-year period between 1960 and 1970, the annual total has jumped 173 percent, from 3,899 to 10,585. This contrasts sharply with the 19-year experience from 1941 to 1960. During that period, total annual appeals increased only 21 percent, from 3,213 to 3,899.[6]

Figure 2 evidences the present inability of the United States Courts of Appeals to cope with their burgeoning caseloads. Through added judgeships and other techniques the circuits have, it is true, been able to increase annual terminations significantly. But despite these efforts, at each fiscal year's end the number of cases left pending has also increased.

Prior to 1961 the Ninth Circuit had been successfully reducing the number of cases pending at each year's end.[7] But as figure 3 shows, the Ninth Circuit has waged a losing struggle since that time.

During the 1960s the number of judgeships in the Ninth Circuit was increased by four, from 9 to 13.[8] In addition, help has been received from visiting district judges and retired (senior) circuit judges; there has been increased use of per curiam opinions; and limited screening has been employed to expedite the handling of prisoners' habeas corpus petitions.[9]

Despite the foregoing remedial measures, case backlogs continue to grow. It is generally conceded that additional doses of types of relief just described offer little prospect for further gains in production.[10]

Faced with the specter of constantly increasing annual caseloads and the waning efficacy of its present tools for increasing production, the Ninth Circuit has been forced to seek "other avenues of relief."[11] It is hoped that the Ninth Circuit has found one such avenue in its new rule for screening oral argument.

The recent amendment of Ninth Circuit rule 3 is a bold and innovative step. It suggests that this court should not be grouped with those courts commonly thought to be reluctant to give up their quill pens and inkwells in favor of typewriters.

Adoption of the amendment to rule 3 has raised some important questions. How is the new rule being implemented? What cases are

6. WILL SHAFROTH, SURVEY OF THE UNITED STATES COURTS OF APPEALS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, in 42 F.R.D. 243, 250 (1967).

7. SHAFROTH SURVEY, NINTH CIRCUIT, *supra* note 4, at 5.

8. 21 HASTINGS L.J. 866-76 (1970); 20 HASTINGS L.J. 854 at 871 (1969).

9. *See* SHAFROTH SURVEY, NINTH CIRCUIT, *supra* note 4.

10. *In re* Amendment of Rule 3, Rules of the Ninth Circuit, at 2 (9th Cir. Aug. 14, 1970) (per curiam).

11. *Id.* at 7.

Figure 1.
UNITED STATES COURTS OF APPEALS
APPEALS COMMENCED, FISCAL YEARS 1950-1970*

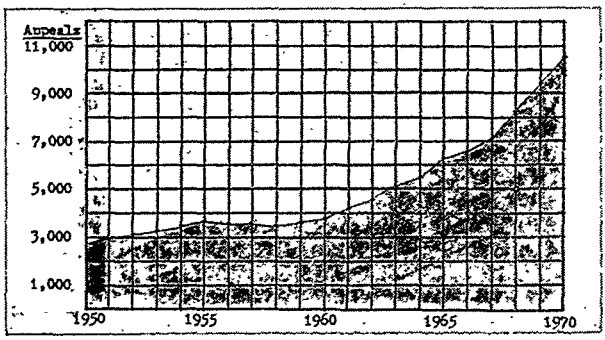


Figure 2.
UNITED STATES COURTS OF APPEALS
APPEALS FILED, TERMINATED AND PENDING
FISCAL YEARS 1960-1970*

Fiscal year	Appeals		
	Filed	Terminated	Pending
1960	3,899	3,713	2,220
1961	4,204	4,049	2,375
1962	4,587	3,931	3,031
1963	5,039	4,613	3,457
1964	5,412	5,089	3,780
1965	6,221	5,226	4,775
1966	6,548	5,936	5,387
1967	7,069	6,693	6,139
1968	8,224	7,372	6,991
1969	9,334	8,100	8,225
1970	10,585	9,662	9,148

Figure 3.
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
APPEALS FILED, TERMINATED AND PENDING
FISCAL YEARS 1960-1970*

Fiscal year	Appeals		
	Filed	Terminated	Pending
1960	455	404	399
1961	443	470	372
1962	560	449	483
1963	687**	555	615
1964	507	670	452
1965	809	532	729
1966	796	718	807
1967	881	864	824
1968	1,077	814	1,087
1969	1,396	1,012	1,471
1970	1,471	1,410	1,532

* Cross appeals and cases disposed of by consolidation have been subtracted from the figures representing appeals filed and appeals terminated.

** Includes 42 S.E.C. cases involving a single issue and 86 tax appeals involving substantially one identical question.

subject to screening? How does the rule compare with screening procedures adopted by other circuits? Will the rule actually expedite the appellate process? These are the questions to be taken up in the ensuing sections of this Note.

Rule 3(a) and Its Implementation

The full text of the new section (a) of rule 3 is as follows:

> (a) *Classes of cases to be submitted without oral argument, or with limited argument.* Pursuant to Rule 34 (b), Federal Rules of Appellate Procedure, there is hereby established a class of cases to be submitted without oral argument except as provided below. There may be placed in this class any appeal, petition for original writ, or petition for review or enforcement of an administrative order in which (a) one party is appearing in forma pauperis and in propria persona and will not be present to participate personally in the argument, or (b) the questions raised on appeal are, in the unanimous opinion of a panel of the court, of such a nature that oral argument would not be of assistance to the court.
>
> When a case has been classified for submission without oral argument the Clerk shall give the parties notice in writing of such action, provided that as to cases classified in category (b), the Clerk shall give notice that if counsel for either side believe oral argument is needed and so notifies the Clerk within ten days, the cause shall be placed on the argument calendar, argument to be limited to fifteen minutes on a side. Oral argument will be had in all other cases, as provided in the following paragraphs of this rule, except where the parties stipulate to submission without argument or where the court otherwise orders.[12]

The most obvious and significant purpose for adoption of this new section is to expedite appeals.[13] There are, however, other less apparent advantages intended to inure from the rule as amended.

For example, procedures for implementing section (a) require law clerks to prepare a memorandum of law for all in propria persona cases before those cases are scheduled for submission. It is anticipated that the memoranda will greatly assist the court in deciding these cases where one party is not represented by counsel.[14] Moreover, if section (a) successfully reduces some of the pressure created by large case backlogs, extended consideration may be given to more difficult cases.[15]

It is also worthy of note that, apparently for the first time, all cases will be examined prior to calendaring. This preliminary review will make it possible for different cases involving similar or related

12. *Id.* at 11.
13. *Id.* at 1.
14. *Id.*
15. *Id.* at 7.

questions of law to be grouped, subject to priority considerations, for submission to the same hearing panel. Such grouping, even on a limited basis, has considerable potential for enhancing the court's productivity.

The court's per curiam opinion adopting the amendment to rule 3 carefully noted that the new section (a) and the procedures promulgated thereunder are tentative and experimental in nature.[16] The following discussion of the procedures currently utilized in implementing section (a) must be considered subject to that *caveat.*

Mechanics of the Screening Process[17]

Court personnel participating in the screening process are a panel of three judges, four staff law clerks and the Clerk of the court (hereinafter referred to as: screening panel, staff clerks and Clerk). All active judges serve on the screening panel for a period of 1 week on a rotating basis. Three law clerks are assigned to serve as staff clerks for 1 month per year by the judges for whom they ordinarily work. A fourth staff clerk is permanently assigned to this function.

When the Clerk has determined the order of priority for cases ready for calendaring, he will forward the records and briefs to the staff clerks. The screening process then proceeds as follows: (Refer to the simplified diagram *infra.*)

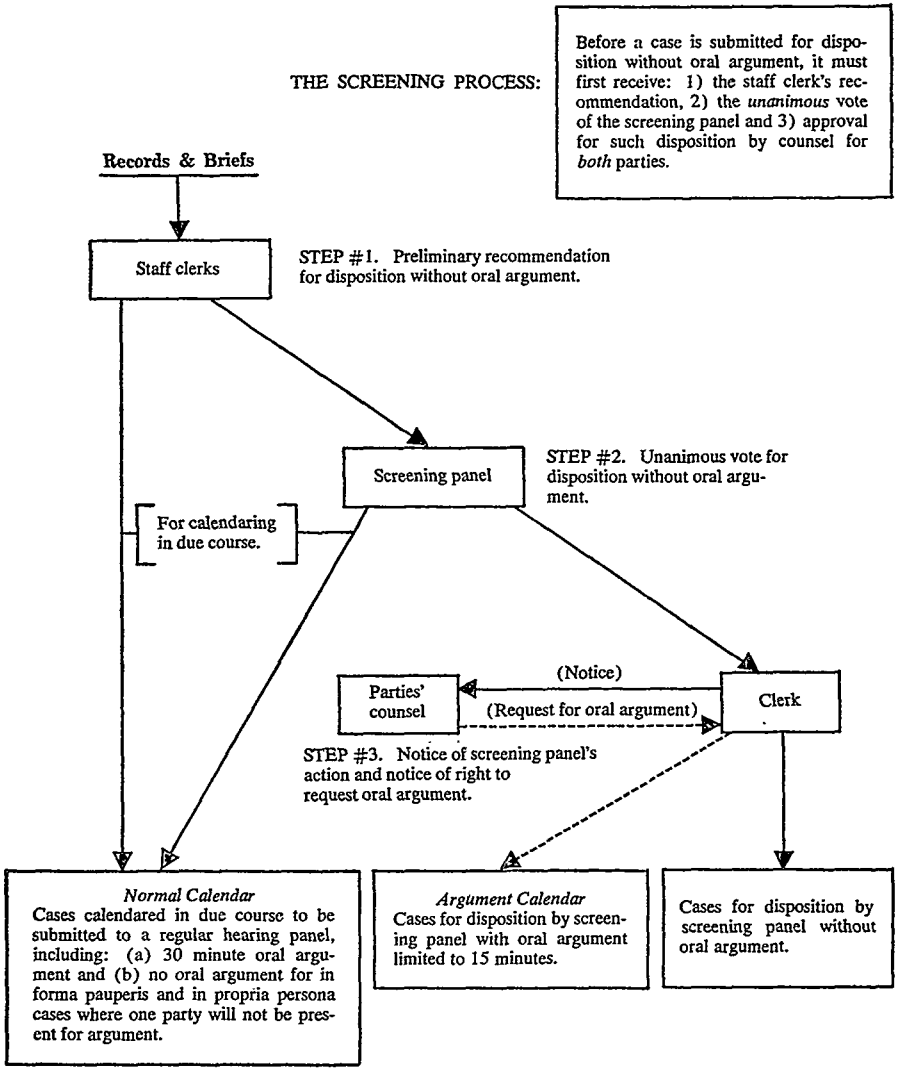
Step #1. The staff clerks initially study the briefs and tentatively place each case in one of two classifications: (a) "for screening panel," or (b) "for calendaring in due course."

Only after a case has been tentatively segregated for screening will the staff clerk review the record. Based upon this examination he will either confirm or reverse his initial recommendation for disposition without oral argument.

Although no oral argument will be heard in any case where one party is appearing in forma pauperis and in propria persona and will be unable to be present for argument, such cases may be referred for calendaring in due course. Because of the nature of the question presented, some in propria persona cases are considered inappropriate for summary disposition by the screening panel.

Once the staff clerks have finalized their recommendations, memoranda are prepared for all cases to be submitted to the screening panel. Memoranda are also prepared for all in propria persona cases regardless of the ultimate mode of disposition.

16. *Id.* at 1, 7.
17. *Id.* app. A, at 9-10.



Finally, all cases for calendaring in due course are forwarded to the Clerk to be placed on the normal calendar. The records, briefs and accompanying memoranda belonging to cases selected for screening are sent to the Clerk, who, in order of priority, forwards copies to the judges currently sitting on the screening panel.

Step #2. The judges on the screening panel independently examine the cases recommended by the staff clerks. Since not more than ten cases may be submitted to the panel within a 1-week period, there is adequate time for each case to receive the careful attention of all three judges.

Before a case will be approved for screening by the panel the three judges must agree, based upon their independent deliberations, (1) that the case is suitable for summary disposition and (2) that it cannot be aided by oral argument. A dissenting vote by any member of the panel is conclusive against screening.

Those cases failing to win unanimous approval for summary disposition without oral argument are returned to the Clerk to be placed on the normal calendar. If the screening panel approves the staff clerk's recommendations for screening, the Clerk is immediately so informed.

Step #3. When the Clerk learns that a particular case has been selected for submission without oral argument, he promptly sends written notice informing the parties: 1) of the screening panel's action and 2) of their right to request oral argument.

If counsel for either party believes oral argument is necessary, he must so notify the Clerk within 10 days. Upon receipt of a request for oral argument, the Clerk will place the case on an argument calendar for argument not to exceed fifteen minutes. In the absence of a timely request for oral argument, the screening panel will proceed to dispose of the case.

Screening Criteria

Due process requires that each case be examined separately in determining whether oral argument is necessary for a fair hearing.[18] It is not surprising, therefore, that neither the new section (a) nor the procedures drawn for its implementation set forth any definite criteria for determining which cases do not require oral argument.

As suggested in the above discussion of the screening process, however, there are two general conditions that must be satisfied before a case will be considered for screening: First, the questions raised on appeal must be of such nature that oral argument will not assist the court in deciding the case,[19] and second, the issues presented by the case should be few in number and should not raise questions of great complexity.[20] Generally, the case which does not require oral argu-

18. FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265, 274-77 (1949); *cf.* Morgan v. United States, 298 U.S. 468 (1936); Londoner v. City of Denver, 210 U.S. 373, 386 (1908).

19. *In re* Amendment of Rule 3, Rules of the Ninth Circuit, at 1 (9th Cir. Aug. 14, 1970) (per curiam).

20. This second condition is not expressly stated in the text of the amendment of rule 3. Nevertheless, it is safe to assume that oral argument is least likely to "assist the court" in cases presenting few issues, none of which are complex. That the court did not explicitly say this is perhaps due to its fear that such an explicit statement might encourage counsel to raise a number of unnecessary and frivolous issues in an effort to avoid screening.

ment is also the case presenting a small number of clearly defined issues suitable for summary disposition.[21] There are, however, cases which may not require argument, yet present issues that require extended consideration inconsistent with summary procedures. For example, Ninth Circuit screening procedures expressly suggest that some in propria persona cases to be disposed of without argument must nevertheless be submitted to a regular hearing panel if unsuitable for submission to the screening panel.[22]

Because a case is recommended for screening does not necessarily mean that the case lacks merit or that it will be affirmed, dismissed or reversed as a matter of course, or that it will not require an authored opinion. Substantiality of the issues is not by itself determinative.[23]

Screening Procedures Adopted by Other Courts of Appeals

At present it appears that the Fourth, Fifth, Sixth and Tenth circuits are the only other courts of appeals that utilize case-screening as a means of coping with increased caseloads. The fundamental scheme of the screening rules and procedures implemented by three of these circuits[24] may be outlined as follows:

Tenth Circuit. In the Tenth Circuit an appellant must file a docketing statement containing a concise statement of the case, including facts material to the issues raised on appeal.[25] Based on the docketing statement, the Chief Judge assigns the case to one of three classifications.[26]

Cases in the first classification are recommended for disposition without oral argument.[27] A case may be placed in this category on one of two grounds: 1) the appeal is not within the jurisdiction of the court,[28] or 2) because of the unsubstantialness of the issues presented.[29] The parties are given notice of the recommendation for disposition without oral argument[30] and an opportunity to oppose such disposition by filing a memorandum of law addressed to the merits of

21. *See* Huth v. Southern Pac. Co. 417 F.2d 526, 530 (5th Cir. 1969); Murphy v. Houma Well Serv., 409 F.2d 804, 806 n.6 (5th Cir. 1969); *cf.* 1970 TOL. L. REV. 63, 71.

22. *In re* Amendment of Rule 3, Rules of the Ninth Circuit, at 9 (9th Cir. Aug. 14, 1970) (per curiam).

23. FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265, 276 (1949).

24. Insufficient reference material at the date of publication prevents any discussion of screening procedures adopted by the Fourth Circuit.

25. 10TH CIR. R. 7.

26. *Id.* 9(a).

27. *Id.* 9(b).

28. *Id.* 8(a)(1).

29. *Id.* 8(a)(2).

30. *Id.* 8(d).

the case.[31] Before a case will finally be submitted for disposition without argument, a panel of three judges, after full consideration of the record, docketing statement and any opposing memorandum, must unanimously confirm the Chief Judge's recommendation.[32]

A second class of cases are allowed a shorter period for briefing, and oral argument will be limited to 15 minutes.[33] The basic criterion for assigning cases to this category is narrowness or complexity of the issues presented.[34] And it appears that the Chief Judge's decision to place a case in this class is conclusive. The third class of cases are those to be calendared in due course for a full 30 minutes of argument.[35]

Sixth Circuit. All appeals to the Sixth Circuit will be permitted oral argument unless the case is to be dismissed as clearly frivolous, or clearly not within the jurisdiction of the court.[36]

Cases are, however, screened in advance of oral argument by a panel of three judges. If the judges unanimously agree that a case will require only limited argument, the case is placed on a Summary Calendar for argument limited to 15 minutes.[37] The number and complexity of the issues presented are the general criteria applied in selecting cases for limited argument.[38] All cases not so limited are calendared for full argument.

Fifth Circuit. The Fifth Circuit employs a relatively comprehensive screening scheme. Its operation is outlined as follows in a recent opinion:

> Empowered by Fifth Circuit Rule 17, the Court has established four main classifications. The *first* covers cases so lacking in merit as to be frivolous and subject to dismissal or affirmance without more. The *second* comprises cases in which oral argument is not required and which then go on the Summary Calendar for disposition on briefs and record without oral argument. This leaves

31. *Id.* 9(b)(1); *see* Green v. Turner, 409 F.2d 215 (10th Cir. 1969).

32. Letter and enclosed memorandum from Chief Judge David T. Lewis, United States Court of Appeals for the Tenth Circuit, to *The Hastings Law Journal*, Dec. 9, 1970, on file in the Hastings Law Library.

33. 10TH CIR. R. 9(c)(6).

34. Letter from Chief Judge David T. Lewis, *supra* note 32.

35. 10TH CIR. R. 9(d).

36. 6TH CIR. R. 8(a), 9.

37. *Id.* 3(e), 7(e); *see* Goodpasture v. TVA, 434 F.2d 760, 766 (6th Cir. 1970).

38. *See* Goodpasture v. TVA, 434 F.2d 760, 766 (6th Cir. 1970); 1970 TOL. L. REV. 63, 71. Chief Judge Harry Phillips reports that the court is reluctant to dismiss appeals as frivolous; nevertheless, excellent gains in production have been achieved since December 1967, when the summary procedures described in the text were adopted: "In fiscal year 1970 filings totaled 911, an all-time high. During the same period 1,004 cases were terminated, also an all-time high. The backlog of pending cases has been reduced from 686 as of June 30, 1967, to 489 as of June 30, 1970." Letter from Chief Judge Harry Phillips, United States Court of Appeals for the Sixth Circuit, to *The Hastings Law Journal*, Dec. 3, 1970, on file in the Hastings Law Library.

> those cases in which oral argument is deemed required or helpful, the *third* group covering those in which limited (15 min.) argument is thought adequate, and the *fourth*, those meriting up to the full time (30 min.). . . .[39]

In the same opinion the court stressed that no case will be placed on the Summary Calendar described above without the unanimous approval of such action by a panel of three judges.[40] All parties to cases so calendared will receive written notice of the panel's action, but the panel's unanimous decision to dispose of a case without oral argument may be challenged only by Supreme Court review.[41]

As in the Ninth Circuit, no definite criteria have been incorporated in Fifth Circuit Rules or procedures to be applied in determining whether a case will or will not require oral argument. The screening panel may consider a variety of factors in determining whether oral argument would assist the court in deciding the case, including the nature, complexity and public significance of the issues.[42] Ultimately, however, all judges on the panel must be satisfied that denying oral argument in a particular case will not deprive the parties of a fair hearing.

By way of comparison, it is interesting to note that in the Tenth and Sixth circuits only frivolous appeals or appeals not within the jurisdiction of the court are actually screened out for disposition without oral argument.[43] The Fifth and Ninth circuits have adopted much more ambitious schemes permitting a greater number of cases to be submitted without argument.

The differing tacks taken by the four courts might easily be explained as nothing more than measuring the dosage to suit the patient. All four circuits have experienced considerable increase in the number of appeals filed annually, but the Fifth and Ninth circuits are currently grappling with caseloads far larger than those of the Tenth and Sixth circuits.[44]

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39. Murphy v. Houma Well Serv., 409 F.2d 804, 806 (5th Cir. 1969) (emphasis added).

40. *Id.*

41. Huth v. Southern Pac. Co., 417 F.2d 526, 530 (5th Cir. 1969).

42. *Id.*

43. *Compare* 6TH CIR. R. 3(e), 8, 9, *with* 10TH CIR. R. 8(a).

44. Compare:*

	Appeals Filed			
Fiscal Year	5th Cir.	9th Cir.	6th Cir.	10th Cir.
1965	1,073	809	638	415
1966	1,099	796	603	543
1967	1,132	881	717	489
1968	1,348	1,077	793	641
1969	1,648	1,396	868	551
1970	1,924	1,471	911	635

*See sources cited notes 4-5 *supra*.

Conclusion

Unfortunately, there is no crystal ball available permitting a view of what the Ninth Circuit's amended rule 3 (a) portends for the future. And there are too many variables incapable of isolation which preclude meaningful statistical prognostications.[45]

However, because the Ninth and Fifth circuits are experiencing commensurate increases in the annual volume of appeals, and because both circuits are currently employing similar remedial measures, (including screening procedures similar in effect),[46] some cautious extrapolations based on the Fifth Circuit's recent experience should provide a few useful observations on what may be expected from the amended rule 3 (a).

Will the implementation of rule 3 (a) mean some cases are to receive "second class" treatment? Despite assurances by the court to the contrary, many members of the bar will undoubtedly be concerned that summary disposition will prevent some cases from receiving proper consideration. Perhaps these figures from the Fifth Circuit will allay such suspicions: During fiscal year 1970, although cases screened for disposition without oral argument accounted for only 38 percent of all cases terminated that year, the same cases accounted for 34 percent of *all* Fifth Circuit written opinions. Further analysis of Fifth Circuit annual statistics reveals that in 1970, cases submitted without oral argument were responsible for 52 percent of *all* per curiam opinions and 16 percent of *all* authored opinions.[47] These figures do not seem to indicate that a recommendation for summary disposition relegates a case to "second class" status.

Will Ninth Circuit rule 3 (a) actually expedite the appellate process? Over the 18 months since the Fifth Circuit's summary procedure went into effect, approximately 35 to 40 percent of the annual terminations were cases submitted without oral argument. Conversely, 60 to 65 percent of the yearly terminations were cases which received 15 or 30 minute oral argument.[48] Since the Fifth Circuit screening panels are apparently guided in their deliberations by many of the same

45. Statisticians have yet to accurately project the United States Courts of Appeals' growth rate: *Compare* WILL SHAFROTH, *supra* note 4, in 42 F.R.D. 243, 263 (1967), *with* NLRB v. Local 990, AFL-CIO, Civil No. 28680, at 4 (5th Cir., Aug. 12, 1970), *and* Isbell Enterprises, Inc. v. Citizens Cas. Co., 431 F.2d 409, 413 nn.16-17 (5th Cir. 1970).

46. Compare the Fifth Circuit's broad criteria for disposition without oral argument, in text accompanying note 42 *supra*, with the Ninth Circuit's broad conditions discussed in text accompanying notes 19-20 *supra*.

47. *See* Isbell Enterprises, Inc. v. Citizens Cas. Co., 431 F.2d 409, 413 n.13 (5th Cir. 1970).

48. *Id.* at 411.

factors which are considered determinative in the Ninth Circuit, it will be interesting to note in the future whether the Ninth Circuit employs its screening procedures with the same aggressiveness demonstrated by the Fifth Circuit.

Recent statistics of the Fifth and Ninth circuits are set out in the following table:

UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND NINTH CIRCUITS[49]

APPEALS FILED, TERMINATED AND PENDING FISCAL YEARS 1966-1970

Fiscal year	FIFTH CIRCUIT			NINTH CIRCUIT		
	Filed	Terminated	Pending	Filed	Terminated	Pending
1966	1,099	1,028	1,004	796	718	807
1967	1,132	1,112	1,024	881	864	824
1968	1,348	1,245	1,127	1,077	814	1,087
1969	1,648	1,491	1,284*	1,396	1,012	1,471
1970	1,924	1,901	1,307	1,471	1,410	1,532**

* The Fifth Circuit's oral argument screening procedures described at page — *supra* were implemented December 1968, approximately 6 months into fiscal year 1969.[50]

** The Ninth Circuit's oral argument screening procedures were implemented September 1970, approximately 2 months into fiscal year 1971.[51] Halfway into fiscal year 1971, the Ninth Circuit reports that 913 new appeals have been docketed and 807 appeals terminated.[52]

Notice that the jump in annual fillings for the Fifth Circuit during fiscal year 1970 was sufficient to prevent a reduction in the number of cases pending despite a significant increase in terminations. Since the growth rate of the Ninth Circuit's caseload has closely paralleled that of the Fifth Circuit's caseload, it would seem unrealistic to expect rule 3 (a) alone to solve the Ninth Circuit's backlog problems.

Furthermore, there is also reason to doubt whether the Ninth Circuit's screening procedures will prove as efficient as those adopted by the Fifth Circuit. The Ninth Circuit's procedure is unique in allowing counsel for either side to request, and ultimately to have, oral argument even though the case receives the court's final approval for screening. Counsel may thus override the considered judgment of one or more law clerks and three experienced judges. This is manifest "over-safeguarding." Surely Supreme Court review could adequately protect against possible deprivation of due process resulting from excessive

49. See note 5 *supra.*

50. Isbell Enterprises, Inc. v. Citizens Cas. Co., 431 F.2d 409, 410 (5th Cir. 1970).

51. *In re* Amendment of Rule 3, Rules of the Ninth Circuit, at 8 (9th Cir. Aug. 14, 1970) (per curiam).

52. Letter from William B. Luck, Clerk of the Court, United States Court of Appeals for the Ninth Circuit, to *The Hastings Law Journal*, Jan. 14, 1971, on file in the Hastings Law Library.

screening.[53] Without this additional safeguard the screening panel could, upon unanimous agreement that a case will not be aided by oral argument, proceed immediately to dispose of the case while facts and issues are still fresh in mind.[54]

Under the current rule 3(a) the lapse of time between initial consideration and final disposition may be anywhere from 12 to 25 days. The screening panel must notify the Clerk of their recommendation for screening. The Clerk must send notice to counsel for both parties. Counsel for either side may then request oral argument or remain silent for 10 days. In the absence of a request for oral argument the members of the screening panel are notified, possibly in distant cities, that the case is now ready for disposition. And finally, the facts and issues must be called back to mind before ultimate disposition. Regretfully, such a procedural encumberance could prevent rule 3(a) from realizing its full potential for increased production.

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53. The Fifth Circuit has adopted this policy. Huth v. Southern Pac. Co., 417 F.2d 526, 530 (5th Cir. 1969). The Supreme Court has on two occasions declined to hear cases directly attacking disposition without oral argument pursuant to Fifth Circuit summary procedures. United States v. Ambers, 416 F.2d 942 (5th Cir. 1969), *cert. denied*, 396 U.S. 1038 (1970); Louisiana Loan & Thrift Shop v. Reynolds, 416 F.2d 898 (5th Cir.), *petition for cert. filed*, 38 U.S.L.W. 3289 (U.S. Dec. 3, 1969).

54. This would mean eliminating step 3 described in text accompanying note 17 *supra*; however, some provision for notifying the parties that their case is to be submitted without oral argument would be retained.

* Member, Second Year Class