

DELAWARE SUPREME COURT INTERNAL OPERATING PROCEDURES

I. Introduction.

These operating procedures are intended to provide a general understanding to the public, the practicing bar, other courts, and the Supreme Court's own staff of how the Supreme Court typically operates. As should be expected, the operating procedures are subordinate to the Court's duty to comply with the Constitution, statutes, and the Court's Rules, and its overarching commitment to doing justice in the diverse procedural circumstances in which cases arise. When the need to do justice requires, the Court may deviate from these procedures, but they are intended to represent how the Court operates in the ordinary course.

Consistent with their purpose, these operating procedures are not intended to cover the key procedures that litigants in the Supreme Court must follow. Those are primarily incorporated in the Court's Rules and in relevant constitutional and statutory provisions. Rather, these operating procedures are intended to supplement the Court's Rules and governing statutes, so as to give greater insight into the Court's typical operations.

II. Court Administration.

(1) *Supervisory powers.* The Chief Justice is the "administrative head of all the courts in the State" with "general administrative and supervisory powers over all the courts." Del. Const. art. IV, § 13. Approval by a majority of the Justices of the Supreme Court is required for the adoption of rules for the administration of justice and the conduct of the business of all of the courts of the State.

(2) *Administrative meetings.* The Justices shall meet at the call of the Chief Justice on administrative matters. Any Justice may request that an item be placed on the agenda for an administrative meeting or that an administrative meeting be scheduled to discuss an item.

(3) *Liaison Justices*. The Chief Justice has the discretion to appoint Justices to administrative committees, and can designate Justices to act as liaisons to other courts and boards established by the Supreme Court. Some examples of such boards have traditionally included:

- (a) the Board of Bar Examiners;
- (b) the Board on Professional Responsibility;
- (c) the Permanent Advisory Committee on the Supreme Court Rules; and
- (d) the Trustees of the Lawyers' Fund for Client Protection.

(4) *Administration of the Supreme Court*. The administrative head of the Court is the Chief Justice. The Chief Justice administers the Court's operations in consultation with the other Justices and oversees the Court's administrative staff. Subject to the direction of the Chief Justice, the Court Administrator is responsible for all administrative matters for the Court. The Court Administrator also acts as the Chief Public Information Officer for the Court, with assistance from the Administrative Office of the Courts.

(5) *Clerk's Office*. The Clerk's Office is responsible for processing all cases filed in the Court. Its responsibilities include:

- (a) maintaining the automated docket that records each filing in each case;
- (b) conducting a preliminary review of the jurisdictional basis for all appeals;
- (c) reviewing all filings for compliance with Court rules;
- (d) coordinating requests for extensions of time by parties or court reporters;
- (e) acting as custodian of the Court's records;
- (f) circulating filings for action by the Justices;
- (g) under the direction of the Chief Justice and with input from the Chief Staff Attorney,

scheduling cases for oral argument or decision on the briefs; and

(h) acting upon motions as authorized by the Court.

(6) *Chief Staff Attorney.* Under the direction of the Chief Justice, the Chief Staff Attorney supervises a staff of attorneys who assist the Court in carrying out its constitutional responsibilities. The Chief Staff Attorney also serves as Counsel to the Chief Justice and advises and assists the Chief Justice, as requested, on matters of policy arising from the Chief Justice's role as the administrative head of the Supreme Court and of all of the courts in the State.

III. Caseload Management.

(1) *Judicial assignments.* The Clerk's Office traditionally maintains a confidential list of the current caseload of each Justice. This list shows the pending cases that have been decided and assigned to each Justice for preparation of opinions or orders. The list is maintained electronically and is available to Court staff only. The list is taken into consideration in determining the allocation of additional assignments.

(2) *Dispositions.* Each Justice is obligated to decide all assigned matters within 90 days of submission. If any matter is pending before a Justice beyond 90 days, that Justice must file a report with the Chief Justice by the 10th day of the next month with an explanation for the delay. For cases where oral argument is scheduled, a matter is deemed submitted on the later of the date of the oral argument or the completion of supplemental briefing. For cases decided on the briefs without oral argument, a matter shall be deemed submitted on the date the Court schedules the matter for submission.

(3) *Docket control.* The Clerk maintains, and makes available electronically to the Justices, lists helpful to ensuring the timely disposition of the Court's docket. Such lists have traditionally included categories such as:

- (a) all pending motions;
- (b) cases that have been presented orally or submitted on the briefs that are awaiting decision;
- (c) cases at issue but not yet scheduled for oral arguments or assigned to a panel for decision on the briefs;
- (d) cases that are stayed;
- (e) cases that were remanded with jurisdiction retained;
- (f) pending Board on Professional Responsibility cases;
- (g) pending death penalty cases; and
- (h) pending termination of parental rights cases.

IV. Communications With And By The Court.

Although the Court Administrator acts as the Chief Public Information Officer of the Court, contact outside the courtroom with counsel or the public may be conducted by the Court Clerk, a Deputy Clerk, the Chief Staff Attorney, or the Court Administrator. Speaking for the Court in this capacity does not authorize any of these individuals to waive the requirements of any statute or rule.

V. Communication Within The Court Regarding The Resolution of Cases.

(1) *Internal communications.* Because the Supreme Court is a collegial body, the Justices typically endeavor to confer with each other simultaneously about cases, either in writing, by joint telephone conference, or in person.

(2) *Typical pre-submission communications.* Before scheduled sittings, each Justice independently reviews the briefs and appendices unless specifically agreed otherwise in a given case. Neither the Justices nor their law clerks discuss the merits of a matter between chambers

before oral argument or the date of submission for cases submitted on briefs.

In particular situations, however, the Justices assigned to decide a case may determine it would be useful to confer in advance of oral argument or the date of submission of a case to be decided without argument on the briefs. For example, in an expedited case where a decision is required at or shortly after oral argument, the Justices may determine that it is advisable to circulate preliminary thoughts and key questions based on their reading of the briefs and record on appeal, so that the Justices can best prepare for oral argument, oral argument can be the most helpful to reaching a sound decision, and the Justices can issue their decision with the requisite speed. In these circumstances, all of the Justices assigned to decide a case should discuss the approach to communication and endeavor to reach consensus.

(3) *Typical post-submission practices.* After the primary responsibility to propose a resolution of a case has been assigned to a Justice, the Justices assigned to decide the case typically will consider any change in the agreed resolution of the case by communicating simultaneously with each other in writing or by an in-person or telephonic conference. In any situation where there is going to be a discussion that involves consideration of whether a Justice assigned to the matter will change her view as to the ultimate resolution of the appeal, the Court's tradition as a collegial, deliberative body counsels for the inclusion of all Justices assigned to the matter. Thus, if there is going to be a discussion of changing the resolution agreed upon at the decisional conference, all Justices assigned to the case should be included.

(4) *Post-submission conferences.* The Court's general policy supporting discussions among all Justices assigned to hear a case does not mean, however, that the Justice assigned to draft a decision may not confer with a colleague to get that colleague's help during the drafting process, when that consultation only involves how to implement the decision reached by all of

the Justices assigned to the case at conference. It is common in any business or law firm that everyone involved in a matter may not be able to confer at all times. Consistent with the Court's collegial tradition, collaboration to improve the quality of the Court's decisions is appropriate and an important part of its effectiveness as an appellate court.

VI. Timing Of Issuance Of Opinions To Be Courteous To Counsel And Clients.

The Supreme Court realizes that its decisions are important to the parties involved and that when attorneys receive decisions, they then have a duty to forward them to their clients and to confer with their clients about the effect of the Court's resolution of the matter. Accordingly, the Supreme Court endeavors to issue its decisions at a time of day that does not impose an undue burden on counsel to have to consult with clients after normal business hours, or the hours leading to the weekend.

Thus, on Monday to Thursday, the Court will endeavor not to issue decisions in non-expedited cases after 4:30 p.m., and on Friday, after 2:00 p.m.

VII. Briefs And Preparation.

The Clerk's Office distributes briefs and appendices sufficiently far in advance of a scheduled submission or argument date to afford several weeks of study in chambers before the panel is scheduled to sit or convene. In special circumstances, such as expedited cases, the panel may agree to a shorter reading period. Two sets of briefs and appendices are furnished to each chambers.

VIII. Oral Argument.

(1) *Selection of cases.*

(a) Scheduling generally. The Clerk and Chief Staff Attorney schedule arguments under the direct supervision of the Chief Justice. The Clerk, in consultation with the Chief Staff

Attorney, prepares a draft oral argument list and schedule of decisions to be made on the briefs. After the Chief Justice has approved the oral argument list, it is circulated by the Clerk to all of the Justices. The list is updated periodically throughout the month and redistributed as needed.

(b) Counsel requests. Consideration is given to written requests by counsel for oral argument, but such requests are not binding on the Court.

(c) Justice requests. Upon the request of any Justice, a case not already recommended for oral argument may be added to the oral argument list.

(2) *Suggested criteria for oral argument.*

(a) Argument unnecessary. The Justices usually will dispense with oral argument when:

- (i) The issue is not novel and the briefs adequately cover the arguments; or
- (ii) The outcome of the appeal is clearly controlled by a decision of the United States Supreme Court or this Court; or
- (iii) The factual state of the record will determine the outcome and the sole issue is either sufficiency of the evidence, the adequacy of jury instructions, or discretionary rulings, and the briefs refer to the record adequately.

(b) Argument desirable. The Justices usually request oral argument when:

- (i) The appeal presents a substantial or novel legal issue;
- (ii) The resolution of an issue presented by the appeal will be of institutional or precedential value;
- (iii) The Justices have questions to ask counsel to clarify legal, factual, or procedural points;
- (iv) A decision, legislative act, or another event that occurred after the filing of the last brief filed may significantly bear on the case; or

(v) An important public policy issue is implicated.

The foregoing criteria are illustrations and not limitations on any Justice's discretion in voting for oral argument.

(3) *Notice to counsel.* The Clerk provides timely advance notice to counsel in each case whether the case is to be argued orally or submitted on the briefs. The composition of the panel is not disclosed to counsel before oral argument. If the case is submitted for consideration on the briefs, counsel are notified in writing of the submission date but not the panel composition. The panel composition is available, however, upon request after the submission date. Unless otherwise specified, oral arguments are held in Dover on Wednesdays, as scheduled by the Court.

IX. Panel Hearings.

(1) *Panels.* Except in death penalty appeals or other cases where the Court has determined that *en banc* consideration is desirable, cases are typically assigned for consideration to a panel of three Justices.

(2) *Composition of panel.* The composition of a panel is typically random. Unless there are disqualifications, vacancies, or other scheduling conflicts by three or more Justices, each panel includes only active Justices of the Court. Other than hearings by the Court *en banc*, a rotating schedule automatically designates the three-Justice panels to hear each case, taking into consideration any notices of disqualification which have been filed. The Court also seeks an even distribution of the judicial caseload between all panels and Justices. Panels are not composed with a view to the matter in dispute. There is thus no consideration of developing subject matter specialists among the Justices when making case assignments.

(3) *Identity of panel.* The composition of a panel for a given case is not announced

before oral argument. When cases are considered on the briefs without oral argument, counsel are informed that such submission on the briefs has taken place. The names of the panel members are not disclosed unless requested by counsel for any party after a submission on the briefs. The Clerk's office does add the panel's identity to the docket sheet after the date of submission on the briefs.

(4) *Presiding Justice.* The Chief Justice is the presiding Justice. In the absence of the Chief Justice, the presiding Justice is that Justice of the Court in active service next in seniority.

(5) *Seating in Court.* The panel assembles in the robing room before the opening of Court. The next-ranking Justice sits to the right of the presiding Justice facing the courtroom from the bench. Seating of the Justices continues from left to right in order of the seniority of their commissions, followed by visiting active or retired jurists.

(6) *Conflict of precedent.* The holding of the Court *en banc* or a panel in an opinion or order is binding on the entire court and on subsequent panels. Thus, no subsequent panel can overrule a prior holding of the Court without consideration by the Court *en banc*.

X. *En Banc* Hearing.

The Chief Justice may order any matter to be determined by the Court *en banc* upon the briefs or upon oral argument. In addition, there shall be a determination by the Court *en banc* upon the briefs or upon oral argument in the following circumstances:

- (1) upon direct appeal in death penalty cases;
- (2) upon a motion for postconviction relief in death penalty cases;
- (3) when a panel of this Court indicates possible disagreement;
- (4) when there is a reasonable likelihood that a prior decision of this Court may be modified or overruled;

(5) upon the affirmative vote of two or more Justices; and

(6) in such other cases as the Court by rule or the General Assembly by two-thirds vote shall determine. *See* Del. Const. art. IV, § 12.

XI. Opinion Of The Justices Sought Under 10 Del. C. § 141.

(1) *Hearing.* By custom, the Chief Justice has convened the Justices to sit *en banc* when the “opinion of the Justices” is sought by the Governor or the General Assembly under 10 Del. C. § 141. *See* Supr. Ct. R. 44.

(2) *Counsel.* The Court will appoint *pro bono* counsel to brief and argue each side of the questions presented to the Justices.

(3) *Opinion format.* Although each Justice is asked for an “opinion,” the Justices may join in signing one opinion, as has frequently been the custom.

XII. Decisional Conference Procedure.

(1) *Post-argument.* As previously discussed in Section V, in cases where oral argument is held, the first time the Justices exchange opinions concerning the merits of a case is ordinarily at a post-argument conference held immediately after, or closely following, the oral argument. The Justice who presided at the argument initiates the discussion. That senior Justice invites comments on the case and a tentative vote by each of the other Justices. The Justices ordinarily comment and cast tentative votes in reverse order of seniority.

(2) *Submission on briefs.* A corresponding decisional conference, in person, by telephone, or in writing, is held in cases heard on the briefs, generally on the same day those cases are submitted or closely following the submission date.

(3) *Assignment of disposition.* If the Justices are in agreement, the panel then decides how the decision of the Court should be announced: *i.e.*, through a signed opinion, *per curiam*

opinion, or order. The presiding Justice then assigns the case to a member of the panel for preparation of a proposed order or opinion. If there is a dissent or potential dissent in a case heard by a three-Justice panel, the Chief Justice is notified by the presiding Justice, the case is put down for rehearing *en banc*, and no assignment is made.

(4) *Tentative views.* Any of the Justices, including the Justice assigned to write the order or the opinion, may change her mind while the opinion or order is being prepared or after a draft has been circulated. Continuing written or oral communications among the panel about the opinion or order while it is being drafted are common. If at any time before the release of the opinion or order, the three Justices cease to be unanimous in their view of the resolution of the case or it becomes apparent that a prior precedent may be modified or overruled, an *en banc* rehearing is ordered.

(5) *Issuance of decision.*

(a) Notifying counsel. The opinions and orders containing final decisions issued under Supreme Court Rule 17 are electronically filed, and counsel receive the decisions through File and Serve Xpress. *Pro se* litigants who do not have a File and Serve Xpress account receive copies of court decisions by first class mail. Telephone notification may also be made by the Clerk's office, the Chief Staff Attorney, or a Justice's chambers staff.

(b) Notifying trial court. The named author of the decision provides a copy of the final decision through File and Serve Xpress to the trial judge.

(c) Notifying public. Copies of all final decisions are provided to the Court Administrator's assistant for posting on the Court's website.

(6) *Issuance of mandate.*

(a) Unless a motion for reargument or a motion for rehearing *en banc* is filed, a mandate

shall issue upon the expiration of the 15-day period allowed for such motions.

(b) Immediately. The Court sitting as a panel or *en banc* routinely issues the mandate “forthwith,” immediately following the announcement of an oral decision in an expedited proceeding. See, e.g., *Paramount Commc’ns, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1990); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1265 n.2 (Del. 1988).

(c) Expedited. The Court has the authority to reduce the time in which the mandate will issue for other reasons, such as the retirement of a Justice.

XIII. Opinions.

(1) Form of opinions.

(a) Identified author. The primary author is identified on the first page of the opinion.

(b) *Per curiam* opinions. A *per curiam* opinion may be used for affirming, reversing, remanding, or dismissing an appeal. *Per curiam* opinions are generally used when the Court wishes to speak with one voice, especially in disciplinary matters.

(c) Special contents. Each written opinion of the Court shall include immediately under the caption of the case:

(i) the date of submission of the matter for decision;

(ii) the date the opinion is filed; and

(iii) the name of the attorneys appearing on the briefs for each party and, if the case was argued, who presented the oral argument by a parenthetical to that effect after their names.

(2) Circulation of opinions for approval.

(a) Review of a draft is given priority. After the draft opinion or order has been prepared, the Justice who was the named author circulates it to the other members of the panel only, with a

request for approval or suggestions. Answering this request is given the highest priority by the other Justices, who shall communicate in writing their approval, disapproval, or suggestions within a few days of receipt of the draft opinion or order.

(b) *Suggestions for modification.* Because it is the decision of the Court, other members of the panel are free to make any suggestions relating to the modification of, addition to, or subtraction from the proposed text. A Justice proposing a textual revision or addition typically submits modifications in specific language capable of being inserted into the opinion or order. When the other Justices approve the suggestions, the draft becomes the opinion or order of the Court.

(3) *90-day period and draft decision-writing.* The Justice who will be the named author is expected to transmit to the panel a draft opinion or order sufficiently far in advance to permit the final opinion or order to issue within ninety days after submission or after any supplemental briefing has been filed or other factors that suspend the drafting process.

(4) *Procedure for approval.* The Justice assigned to prepare the opinion furnishes each member of the panel with a copy of the proposed opinion. The panel members indicate their approval, disapproval, or comments in writing.

(5) *Concurring and dissenting opinions.* If a member of a three-Justice panel desires to concur separately, the Justice not joining in the opinion or order notifies the writing Justice promptly and transmits those separate views to the panel. Panel opinions shall not be issued until each member has had an opportunity to respond to the other panel members in writing. The same procedure is followed for concurring and dissenting opinions in an *en banc* proceeding.

(6) *Filing of opinions and orders.* Opinions and orders of the panel that unanimously affirm or reverse the trial court or dismiss the appeal are filed with the Clerk by the Justice who

is the named author.

(7) *Publication of opinions and orders.* The Clerk's office promptly forwards to any publisher designated by the Court all opinions and case-dispositive orders designated for publication and also ensures that a copy of the decision is available on the Court's website.

XIV. Judgment Orders.

(1) *Panel unanimity.* A case may be terminated in this Court by a judgment order upon the unanimous decision of the panel.

(2) *Criteria for disposition by order.* A case may be finally determined or terminated by written order, among other reasons, if:

(a) the issue on appeal is controlled by settled Delaware law;

(b) the issue on appeal is factual and there is sufficient evidence to support the jury verdict or findings of fact below;

(c) the issue on appeal is one of judicial discretion and there was no abuse of discretion;

or

(d) the trial judge's determinations of fact and law are correct and there is no reason for the Supreme Court to repeat the reasoning articulated in support of them.

(3) *Form of order.*

(a) An order affirming the trial court usually includes a brief statement of the facts, the issues raised by appellant, and the reasons for the panel's decision.

(b) Alternatively, an order may state that the case is affirmed by reference to the opinion of the trial court or the decision of the administrative agency and may contain one or more references to cases or other authorities.

(c) Each dispositive order of the Court shall include the date of submission of the matter

and the date the order is issued.

(4) *Procedure for approval.* The procedure for approving orders by written acknowledgement is the same procedure which is used to approve opinions.

XV. Remand Orders.

(1) *Assignment following remand.* When a report is filed in a case that has been remanded with jurisdiction retained under Rule 19(c), the Clerk will assign the appeal to the same panel unless directed otherwise by the Chief Justice.

(2) *Reversal and remand.* In those instances when a panel reverses and remands a case, jurisdiction is generally not retained, and a mandate issues for further proceedings in accordance with this Court's decision.

XVI. Reargument by Panel.

(1) *Distinguished from rehearing en banc.* A motion for rehearing before the Court *en banc* is to be distinguished from a motion for reargument by a panel. The former is a request for *de novo* consideration, whereas the latter seeks reconsideration by the same panel which has already made a ruling.

(2) *Request for answer.* If any member of the panel timely notifies the other members of the panel that an answer is desired, the named author of the original decision instructs the Clerk to direct that an answer be filed and the time period for its filing. The Clerk forwards the answer to the panel members.

(3) *Internal process of motion.*

(a) *Consideration.* If a motion for reargument before the panel is filed simultaneously with a motion for a rehearing *en banc*, the motion for reargument is processed first.

(b) *Circulation.* The motion is circulated to the entire panel by the Clerk's office.

(c) Lead Justice. The lead Justice (the named author of the opinion or order) circulates a memorandum setting forth the author's position to the other two panel members only. The other panel members respond to the suggested disposition in writing.

(4) *Disposition*. Two members of a panel must vote in favor of reargument for it to be granted.

XVII. Rehearing *En Banc*.

(1) *Circulation of motion for rehearing en banc*.

(a) Reargument granted. If a motion for reargument is granted, a simultaneous motion for rehearing *en banc* is implicitly denied.

(b) Reargument denied. If the motion for reargument is denied and a simultaneous motion for rehearing *en banc* has been filed, the latter motion is circulated.

(c) Recommended disposition. A memorandum is then circulated to the other qualified members of the Court by the author of the opinion or order, stating that the panel has denied the motion for reargument, and attaching a copy of the motion for rehearing *en banc* with the panel's recommended disposition of the motion for rehearing *en banc*.

(d) *En banc* motion only. If only a motion for rehearing *en banc* is filed, the Justice who was the named author of the opinion or order typically takes the lead by circulating the motion with a suggested disposition to the other qualified Justices, in the same manner that a motion for reargument is processed. The other Justices respond to the suggested disposition in writing.

(2) *Qualified Justices only*. Only those Justices who are qualified and available to hear a case will vote on the motion for rehearing *en banc*. Except in capital cases, if only three Justices are qualified and available, other state Judges or former Justices are not called to complete the Court *en banc* in disposition of the motion. Therefore, if only three Justices are available and

qualified, the original panel is, in effect, the Court *en banc* for purposes of the motion. If only one Justice is disqualified, only the four remaining qualified and available Justices will constitute the Court *en banc* and consider the Motion for Rehearing.

(3) *Rehearing denied.* If the motion for rehearing is denied, a written disposition is prepared by the Justice who was the named author and then circulated for approval. If there is a dissent from the denial of rehearing, a notation will be added to the dispositive order, at the affirmative request of the dissenting Justice, that “Justice ____ would grant rehearing by the Court *en banc*.”

(4) *Rehearing granted.* If a majority of the active justices of the Court vote for rehearing *en banc*, the named author or ranking active Justice of the majority enters an order which grants rehearing, vacates the panel’s opinion and the judgment entered thereon, and assigns the case to the calendar for rehearing *en banc* on a priority basis.

(5) *Supplemental authorities.* Rehearing *en banc* addresses all issues presented in the original briefs. The Chief Justice or the next senior available Justice if the Chief Justice is not sitting on the matter, upon the request by a majority of the *en banc* Court, may direct the Clerk to advise counsel to submit supplemental briefs on specific issues or to be prepared to discuss at oral argument any other relevant issues designated by the majority of Justices.

XVIII. Motion Practice.

(1) Motion Justice.

(a) Monthly rotation. For each month of the year, the Chief Justice designates a “motion Justice.” The motion Justice assignment is typically rotated among all five Justices in order of seniority. All applications by motion, however, must be made to the Court.

(b) Circulation by Clerk. The Clerk will refer the matter to the current motion Justice

unless the motion Justice has entered a disqualification or the Clerk receives other instructions from the Court, *e.g.*, the motion relates to a matter with which one Justice has already been substantially involved.

(2) *Motion panels.* A panel of three Justices is available to receive motions at all times. The motion panel is composed of the current motion Justice and the motion Justices from the preceding and succeeding months. If a member of the motion panel is disqualified, the next qualified Justice in rotation is added to the panel. The motion panels act in cases that have not already been assigned to a panel for disposition on the merits.

(3) *Routine motions.* During a given month, all newly filed routine motions are handled by, or under the supervision of, the motion Justice unless the motion Justice is disqualified in a particular case, or the case is being handled by another Justice.

(4) *Extraordinary writs.* The motion Justice also processes (to the extent judicial attention is required) those proceedings which may be filed in the first instance in the Supreme Court. The motion Justice also determines whether briefing or a hearing is required. *See* Supr. Ct. R. 43. Usually the State is directed to file a response to these motions. The Clerk's office is directed to ascertain whether the judicial officer wishes to be heard or represented.

(5) *Procedure.*

(a) *Written requirement.* All motions must be made in writing with the required notice provided to the opposing party. Any other contact with the Court regarding motions is confined to the Clerk's office or Chief Staff Attorney.

(b) *No conference.* Motions are routinely handled by the motion Justice without a conference or hearing.

(c) *Special problems.* When emergencies or other special problems arise, however, it is

not inappropriate for an attorney to seek to set up a conference so that the attorney and opposing counsel may meet with the motion Justice. The request for such a conference should be made through the Clerk's office.

(6) *Clerk of the Court.* The Clerk is authorized, on behalf of the Court, to approve several types of motions, including unopposed motions to proceed *in forma pauperis* in criminal matters.

(7) *Single Justice motions.* The motion Justice is authorized to approve the following types of motions:

(a) automatic stay of execution required by statute or consistent with a prior *en banc* order in capital cases;

(b) certificate of reasonable doubt;

(c) changing the caption of an appeal, *e.g.*, assigning pseudonyms;

(d) consolidating appeals;

(e) denying motion to affirm. Denial of such a motion simply puts the case back into the routine briefing schedule. Per Supreme Court Rule 25(a)(iii), the appellee's brief is then due within 20 days of the denial;

(f) expedite appeal upon consultation of others for availability;

(g) motion to proceed *in forma pauperis*;

(h) motion to proceed *pro se*. These motions are remanded for initial consideration by the trial court under *Watson v. State*, 564 A.2d 1107 (Del. 1989);

(i) motion for stay or supersedeas in a civil case;

(j) page limit extension of no more than 15 pages for an opening or answering brief and 7 pages for a reply in a non-capital case; or no more than 25 pages for an opening or answering

brief and 12 pages for a reply in a capital case. Motions for page limit extensions are disfavored and will usually not be granted by the Court *en banc* beyond these limits in total;

- (k) *pro hac vice* admission;
- (l) seal records;
- (m) substitution of parties;
- (n) extension of time;
- (o) unopposed rule to show cause; and
- (p) motion to withdraw other than with a Rule 26(c) brief.

(8) *Three-Justice motions*. A single Justice may act on any motion that is not case-dispositive, including the motions specified above. But certain non-dispositive motions will also only be acted upon by a panel. Whenever a matter requires the affirmative vote of three Justices, the motion Justice circulates a proposed disposition in writing. Three-Justice matters include the following:

- (a) *amicus curiae* status—granting or denying;
- (b) certified questions—accepting or refusing;
- (c) extraordinary writs—granting or denying;
- (d) granting motions to affirm. Motions to affirm under Rule 25 are made after the opening brief is filed. Since such motions may result in a final ruling on the merits before full briefing is completed, they are screened by the motion Justice. Acting alone, the motion Justice may deny the motion. But a motion to affirm the trial court under Rule 25 may be granted only if three Justices vote to grant it. *See* Supr. Ct. R. 3(a);
- (e) interlocutory appeals. If the trial court has not acted upon the request for an interlocutory appeal, the Clerk is directed to notify the parties that no action will be taken until

the trial court acts and a supplemental notice of appeal is filed. Whether such a motion is granted or denied, it is acted upon by three Justices. Either order is electronically filed and provided to counsel and the trial court through File and Serve Xpress.

(f) motion to intervene—granting or denying.

(g) motion for reargument—granting or denying (same panel);

(h) stay of execution, other than automatic (only *en banc*); and

(i) motion to withdraw. When filed with a Rule 26(c) brief, such a motion is held in abeyance and is dismissed as moot if the State’s motion to affirm is granted.

(9) *Summary action.*

(a) *Sua sponte* initiation. The Court, *sua sponte* or upon a motion by a party, may take summary action affirming, enforcing, or reversing the judgment or order appealed from if it clearly appears that no substantial question is presented or that subsequent precedent or a change in circumstances warrants such action.

(b) Parties’ positions. Before taking summary action, the Court will afford the parties an opportunity to submit argument in support of or in opposition to such disposition if briefs on the merits have not already been filed.

(c) Panel unanimity. Summary action may be taken only by a unanimous vote of the panel. If a motion panel determines that summary action is not appropriate at that time, it may, in lieu of denial, refer the matter to the merits panel without decision and without prejudice.

(10) *Motions related to cases assigned to merits panels.* Motions related to cases assigned to merits panels are generally granted or denied by the presiding Justice of the panel if they are merely administrative and unrelated to the disposition of the case, unless the presiding Justice believes a discussion by the entire panel is appropriate.

(11) *Post-decision motions.*

(a) A motion for extension of time for filing a petition for rehearing or for leave to file out of time is referred to the named author of the opinion or order, who has authority to grant the extension. If the author votes to deny, the motion is referred to the entire panel for disposition.

(b) A motion for stay of mandate or for the recall of the mandate, or certified judgment in lieu thereof, is processed by the presiding Justice.

(c) A motion to amend the judgment of the Court is referred to the panel.

XIX. Recusal Or Disqualification Of Justices.

(1) *Procedure.*

(a) Generally. Each Justice may submit to the Clerk in writing those circumstances which would generally require recusal, including the names of businesses in which the Justice or family members have a financial interest, the names of relatives whose names may appear as counsel in appeals, and the names of law firms on whose cases the Justice does not sit.

(b) Before submission. When cases are electronically filed, an alert is sent to each Justice's File and Serve Xpress mailbox informing them when disclosure statements are filed in a case. After reviewing the disclosure statements, the Justice will promptly inform the Clerk if the Justice is disqualified from sitting in the case.

(c) After submission. A Justice who finds it necessary to recuse herself after distribution of the briefs or a motion immediately notifies the other members of the panel and the Chief Justice or the active Justice next in seniority if the Chief Justice is recused. The Chief Justice, or the Justice next in seniority if the Chief Justice is recused or otherwise unavailable, names a substitute to reconstitute the panel. A written order is not necessary for the reconstitution of any panel before submission for disposition.

(d) Disclosure. The reasons for disqualification are not disclosed to the parties.

(2) *Rule of necessity.* The rule of necessity is an exception to the principle that every litigant is entitled to be heard by a judge who is not subject to any disqualifications which might reasonably cause the judge's impartiality to be questioned. *See* Delaware Judges' Code of Judicial Conduct R. 2.11. The rule of necessity has been invoked where disqualifications exist as to all members of the state judiciary who would normally hear a matter. Rather than deny a party access to court, judicial disqualification yields to the demands of necessity.

XX. Visiting Jurists.

(1) *Selection.* When it is necessary to provide a quorum because of the disqualification or unavailability of a Justice in *en banc* hearings or in panels normally consisting of three Justices, a retired Justice or active trial court judge is called upon to sit. *See* Del. Const. art. IV, §§ 12 and 38; Supr. Ct. R. 2(a) and 4(a). The Chief Justice or next senior available Justice selects and ascertains a jurist's availability to sit.

(2) *Assignment.* A visiting jurist is not assigned to sit on an appeal from the visiting jurist's own Court.

XXI. Law Clerks.

Delaware Supreme Court law clerks hold major, non-tenured advisory positions for the Justices of the Court. All judicial law clerks are bound by the Delaware Code of Conduct for Law Clerks.

XXII. Death Penalty Cases.

(1) *Docketing.* An automatic appeal is docketed by the Clerk's office after a death sentence is imposed. If the defendant files a separate notice of appeal, the cases are consolidated.

(2) *Stay of execution.*

(a) Automatic. In all automatic appeals, the motion Justice enters a stay of execution *sua sponte*, which remains in effect for the duration of this Court's consideration.

(b) Other requests. Any other request to stay a death sentence is considered *en banc*.

(3) *Procedures.* The following standards govern proceedings in the Supreme Court unless otherwise directed by the Court:

(a) Compliance with briefing schedules in the Supreme Court will be strictly enforced and only in extraordinary circumstances will this Court grant extensions totaling more than sixty days.

(b) Oral arguments shall be scheduled within forty-five days after the prosecution's answering brief and appendix have been served and filed.

(c) This Court will issue its decision within ninety days after the case has been submitted for decision. The Court will determine motions for reargument within thirty days after their filing.

(4) *Hearings en banc.* All substantive matters relating to a capital case are considered *en banc*.

(5) *Notices to other courts.* The Clerk's office receives from and distributes filings to the Superior Court, District Court, Third Circuit Court of Appeals, and the United States Supreme Court when an execution is imminent.