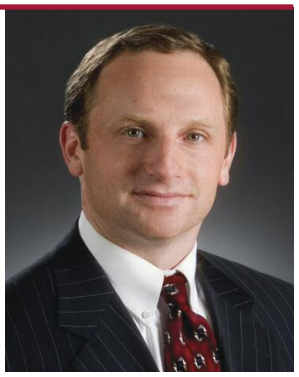

New rules on en banc review: Strategic implications for Supreme Court and appellate practice

by Dennis D. Hirsch

Of the recent changes to the Rules of Appellate Procedure and to the Supreme Court's Rules of Practice, the most significant may be the new rules on en banc review in the district courts of appeals.

Until a few years ago, it was unclear whether the Ohio Constitution even allowed en banc proceedings. The Ohio Constitution states that "three judges shall participate in the hearing and disposition of each case" in the courts of appeals.[1] Some courts read this to prohibit en banc review, which requires that all of a district's judges convene to resolve conflicting decisions in that district.[2]

The Supreme Court of Ohio settled the issue in *McFadden v. Cleveland State University*.[3] The plaintiff 's case turned on whether a two-year or a six-year statute of limitations applied. The 10th District had previously issued conflicting decisions on this question. On appeal, it elected to apply the two-year statute and barred plaintiff's claim.[4] In his motion for reconsideration, the plaintiff argued that the court should have used an en banc proceeding to resolve the intra-district conflict. The panel denied the motion on the grounds that such proceedings were unconstitutional.[5] The Supreme Court reversed the panel's decision, holding that the Constitution's reference to three judges created a "quorum requirement" not a "cap."[6] The Court made it clear that courts of appeals can identify intra-district conflicts and, where they do, "must convene en banc" to resolve them.[7] This will ensure "uniformity and continuity" in decisions, maintain the "integrity" of the court and promote "finality and predictability" in the law.[8] Justice Judith Ann Lanzinger, dissenting, argued that the majority's ruling would add an additional layer of review and so create "[d]elay, cost and uncertainty."[9]

At the time of the *McFadden* decision, the Ohio Rules of Appellate Procedure and the Supreme Court of Ohio's Rules of Practice did not establish a process for en banc review. The recent rule amendments fill this gap. As amended, the Rules of Appellate Procedure provide that an en banc proceeding can arise in two ways. First, the judges of a given district court of appeals may themselves determine that a case creates an intra-district conflict and sua sponte order en banc review to resolve it.[10] Second, a party can apply for rehearing en banc within 10 days of the clerk's service of the judgment or order.[11] A response is due 10 days thereafter, and a reply seven days after that.[12] The Rules provide that, as a general matter, "[c]onsideration en banc is not favored."[13] To obtain it, the applicant must identify a conflict on a "dispositive issue" and explain why en banc review "is necessary to secure and maintain uniformity of the court's decisions."[14] The entire court of appeals (other than disqualified or recused judges) will hear the application, and, if it agrees that an intra-district conflict exists, meet en banc to resolve it.[15] If, on the other hand, the en banc court rejects an application, then a party may appeal to the Supreme Court of Ohio for discretionary review of this determination.[16]

The amendments to the Supreme Court's Rules of Practice spell out how en banc proceedings affect the time for filing a notice of appeal to the Court. The Rules provide that the filing of an application for rehearing en banc, or a court of appeals' sua sponte determination that such a hearing is needed, tolls the standard 45-day period for filing a notice of appeal.[17] This means that, where a party files an application for rehearing en banc and the district court of appeals rejects the application, then the party's notice of appeal is due 45 days after the court of appeals' decision denying the application.[18] If, on the other hand, the court of appeals *grants* the party's application and hears the case en banc, or if it sua sponte decides to hear the case en banc, then a party's notice of appeal to the Supreme Court is due 45 days after the en banc court enters judgment on the matter.[19]

The new en banc procedure presents strategic opportunities. Attorneys who lose an appeal should assess whether the decision creates or resolves an intra-district conflict on a dispositive point of law and, if so, apply for rehearing en banc. They should not abuse the process, though, since some districts will meet frivolous applications with sanctions.[20] In their applications, attorneys should refer to the policy reasons the Court articulated in *McFadden*: "uniformity and continuity" in judicial decisions, the "integrity" of the court and "finality and predictability" in the law.[21] They should track emerging local rules and standards on what constitutes an intra-district conflict and which issues are "dispositive." For example, the 8th District Court of Appeals recently issued both a local rule and a practitioner's guide on en banc review, and the 9th District adopted a standing order.[22]

Finally, lawyers should begin to think through some key questions.[23] Can a standard of review ever be "dispositive"? Dictum cannot create an intra-district conflict. So where precisely is the line to be drawn between holding and dictum? When is a new

decision truly in conflict with an earlier one, and when does it merely create an exception to a more general rule?

What of Justice Lanzinger's concerns about "[d]elay, cost and uncertainty"? In 2010, the first year under the new rules, the 8th District received approximately 50 applications for rehearing en banc—a marked increase over prior years—and has designated a staff attorney to handle these applications.[24] By contrast, applications for en banc review appear rare in the smaller districts.[25] The reason for this difference may be that courts with fewer judges are more able to work out conflicts informally. Or, it may be that attorneys in the 8th District, which allowed limited en banc review even before the recent rule changes, have been able to grasp more quickly the opportunities that the new rules present. Over time, as more Ohio attorneys become familiar with these rules, en banc proceedings should assume even greater strategic importance. ■

Author bio

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Endnotes

1 Section 3(A), Article IV, Ohio Constitution.
2 See, e.g., *Schwan v. Riverside Methodist Hosp.* (1982), 1982 Ohio App. LEXIS 15078.
3 *McFadden v. Cleveland State University* (2008), 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672.
4 Id., at ¶4-6.
5 Id., at ¶7-8.
6 Id., at ¶13-14.
7 Id., at ¶19.
8 Id., at ¶16.
9 Id., at ¶39, quoting *W. Pacific RR. Corp.*, 345 U.S. 247, 273 (1953) (Jackson, J., dissenting).
10 App. R. 26(A)(2)(b).
11 App. R. 26(A)(2)(b). App. R. 26(A)(2)(c); App. R. 26(A)(1)(a).
12 App. R. 26(A)(2)(c); App. R. 26(A)(1)(b).
13 App. R. 26(A)(2)(a).
14 App. R. 26(A)(2)(a).
15 Id.
16 S. Ct. Prac. R. 2.2(A)(6)(b); *McFadden*, supra note 3, at ¶19.
17 S. Ct. Prac. R. 2.2(A)(6)(a), (d).
18 S. Ct. Prac. R. 2.2(A)(6)(b).
19 S. Ct. Prac. R. 2.2(A)(6)(b), (d).
20 Loc.R. 26(c)(1) of the 8th District Court of Appeals.
21 *McFadden*, supra note 3, at ¶16.
22 Loc.R. 26 of the 8th District Court of Appeals. Practitioner's Guide, available at http://appeals.cuyahogacounty.us/PDF/EnBanc PractitionersGuide.pdf. Standing Order, available at www.ninth.courts.state.oh.us/En%20Banc%20Standing%20Order.pdf.
23 I thank Tina Wallace, staff attorney for the 8th District Court of Appeals, for helping me to identify these questions.
21 Telephone interviews with Ute Vilfroy, court administrator (Oct. 24, 2011), and with Tina Wallace, staff attorney (Oct. 25, 2011), 8th District Court of Appeals.
24 Telephone interviews with Erin Scanlon, deputy court administrator, 2nd District Court of Appeals (Oct. 19, 2011); Mark Combs, court administrator, 1st District Court of Appeals (Oct. 19, 2011); C. Michael Walsh, court administrator, 9th District Court of Appeals (Oct. 25, 2011); and Jack Kullman Jr., court administrator, 10th District Court of Appeals (Oct. 25, 2011).