

## Pre-argument Review, Calendaring & Oral Argument

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### Pre-argument Review

- **Requesting Oral Argument**

Because any case may be decided without oral argument, all major arguments should be fully developed in the briefs. The parties may include in their briefs at the conclusion of the argument a statement setting forth the reasons why, in their opinion, oral argument should be heard. Local Rule 34(a).

- **Pre-argument Review Panel**

Under Fed. R. App. P. 34(a)(2), oral argument is allowed in all cases unless a panel of three judges, after examination of the briefs and appendix, is of the opinion that oral argument is not needed. Oral argument will be allowed unless: (i) the appeal is frivolous; or (ii) the dispositive issue or set of issues has been recently authoritatively decided; or (iii) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Local Rule 34(a) sets out the court's pre-argument review procedure. Under Local Rule 34(a), cases are referred to randomly selected three-judge panels for review of the briefs and appendix in light of the oral argument criteria in Fed. R. App. P. 34(a)(2). If all of the judges of the panel conclude that oral argument is unnecessary, they may make any appropriate disposition, without oral argument, including but not limited to, affirmance or reversal. Local Rule 34(a). A decision against oral argument must be unanimous, and if a case is decided without oral argument the decision on the merits must be unanimous also. Internal Operating Procedure 34.2. Whenever at least one member of the review panel determines that oral argument would be of assistance, the panel notifies the clerk who places the case on the oral argument calendar. Id.

- **Motions to Submit on the Briefs**

As soon as possible upon completion of the briefing schedule, or within 10 days of tentative notification of oral argument, whichever is earlier, any party may file a motion to submit the case on the briefs without the necessity of oral argument. Local Rule 34(e). The motion must state the position of opposing counsel.

- **Motions to Expedite**

The court on its own motion or on motion of the parties may expedite an appeal for briefing and oral argument. Any motion to expedite should state clearly the reasons supporting expedition, the ability of the parties to present the appeal on the existing record, and the need for oral argument. Counsel may request argument at the next regularly scheduled session, move for argument at a specially scheduled session, request argument via video conference or teleconference, or move to submit the case on the briefs.

A motion to expedite must state the position of opposing counsel. If opposing counsel agrees to expedited briefing, the motion should set forth the schedule agreed to by counsel. In general, all briefs should be filed at least two weeks prior to the argument session to afford the panel a full opportunity to study the briefs in advance of argument. More expedited argument may, however, be ordered in the discretion of the court.

The granting of a motion to expedite affects the briefing and argument of the case; the timing of the ultimate disposition rests within the discretion of the panel. Local Rule 12(c).

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## Calendaring

- **Tentative Calendaring of Cases for Argument**

Counsel are notified about 10 weeks in advance that their case has been tentatively assigned to a particular argument session. The notice advises counsel that any motions which affect the calendaring of the case (such as motions to continue or motions to submit on the briefs) must be filed within 10 days of the date of the notice. Local Rule 34(c). During the 10-day tentative calendar period, counsel notifies the clerk's office regarding any dates they are unavailable for argument during the scheduled week and files any motions which may affect the calendaring of the case.

The clerk's office will attempt to accommodate any conflict of which it receives written notice during the tentative calendar period. Any motion filed by counsel during this tentative calendar period, as at any time, must reflect whether opposing counsel consents to or will oppose the motion. Local Rule 27(a). If, during the tentative calendar period, counsel files an unopposed motion to submit the case on the briefs, the case will be removed from the tentative calendar and submitted to a randomly assigned panel. If counsel files a motion to submit on the briefs which is opposed by the other side, disposition of the motion will be deferred pending assignment to an argument panel.

- **Calendaring of Cases for Argument**

After removing cases affected by conflicts or pending motions, the clerk's office calendars the remaining cases from the tentative calendar list for oral argument or assigns them to standby status.

The clerk's office uses a computer program designed to achieve total random selection of three-judge panels, and merges those panels with the cases remaining on the tentative calendar list. Internal Operating Procedure 34.1. The composition of each panel changes each day during court week except on those occasions where only one panel is sitting in a given geographical location. The varied assignment of judges to panels and the independent assignment of varied

cases to panels is designed, insofar as practicable, to assure the opportunity for each judge to sit with all other judges an equal number of times, and to assure that both the appearance and the fact of presentation of particular types of cases to particular judges is avoided. Internal Operating Procedure 34.1.

If a prior panel or judge has had previous involvement with the case by way of a pre-argument motion or a prior appeal, the clerk's office will make every effort to assign the case for oral argument to that judge or panel, but there is no guarantee that any of the judges who have previously been involved with an appeal will be assigned to a hearing panel. Internal Operating Procedure 34.1.

The clerk's office sends counsel a "calendaring notice" approximately six weeks prior to the argument date, advising counsel of the date of oral argument and the time by which counsel must register for argument. The notice directs counsel to acknowledge within five days who will appear and argue the case and state how much argument time will be used. In consolidated criminal cases, the court requires that counsel appear on behalf of each defendant separately represented, to be available if questions arise as to any defendant, even though only one attorney is presenting argument for all defendants. Counsel uses the entry oral argument acknowledgment to acknowledge that they are arguing or appearing for oral argument.

Once a case has been calendared for a date certain, it will be removed from the argument calendar only for good cause shown for the requested relief and that the relief could not have been requested within the tentative calendar period. Local Rule 34(c). Continuance of an established oral argument date is not granted because of a prior professional commitment. Although the case will not be removed from the calendar because of a scheduling conflict by counsel after the notification of oral argument has been issued, the court may direct another lawyer from the same firm to argue the appeal if counsel of record cannot be present. Id.; see also Local Rule 28(c) (court will interpret listing of an attorney on a brief as a representation that he or she is capable of arguing the appeal if lead counsel is unavailable).

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## Oral Argument

- **Richmond Sessions**

The court sits in Richmond, Virginia from Tuesday-Friday during six separate "court weeks" scheduled between September and June. The court initially hears and decides cases in panels consisting of three judges. Each panel hears oral argument in four cases each day during court week. Additional days and sessions are added to the schedule as needed.

- **Law School Sessions**

Special sessions are scheduled at law schools and other locations within the Circuit. The court generally hears three cases at a law school, followed by a question and answer session. If argument is scheduled for a law school session but counsel prefers to present argument in Richmond, counsel should notify the clerk and request that the case be scheduled for the next available Richmond argument session.

- **Pre-argument Registration**

Attorneys appearing for oral argument must register at least 30 minutes in advance in Room 222 on the morning of argument to learn of panel assignment, courtroom assignment, order of appearance, and allocation of oral argument time. All counsel to a side must check in together to agree on the allocation of time. Attorneys check in between 8:45 a.m. and 9:00 a.m. for oral arguments commencing at 9:30 a.m. En banc oral arguments start at 9:00 a.m., and counsel check in for en banc arguments between 8:15 and 8:30 a.m. Arguments on the last day of the session commence at 8:30 a.m., and counsel checks in between 7:45 a.m. and 8:00 a.m.

- **Electronic Device Policy**

During court week only, the court authorizes attorneys and their staff to possess electronic devices in the courthouse and annex, subject to security inspection. Electronic devices are prohibited in the courthouse and annex at all other times, unless expressly authorized by the court. Devices include cell phones, smart phones, tablets, Blackberrys, pagers, laptops, notebooks, netbooks, or similar functioning devices. All devices must be turned off when in a courtroom or judicial chambers and must not be used to take photographs or for audio or video recording. Devices intended for use only as cameras or audio or video recorders are prohibited without express authorization of the court. The court may also prohibit or further restrict electronic devices in the interest of security, safety, or the integrity of judicial proceedings. Failure to adhere to this policy may result in removal from the courtroom, courthouse, or annex, or in the imposition of a fine or other sanction.

- **Argument Panel**

The identity of the argument panel is kept confidential until the morning of oral argument.

The chief judge presides over en banc sessions of the court and over all three-judge panels on which the chief sits. The active circuit judge most senior in service on a panel is the presiding judge for all other oral argument panels. The presiding judge sits in the center of the panel; the next most senior judge sits to the right of the presiding judge; and the least senior judge on the panel sits to the left of the presiding judge.

An appeal may be heard and decided by two of the three judges assigned to a panel, when one judge becomes unavailable. If a panel is reduced to two and the two cannot agree, however, the case will be reargued before a new three-judge panel which may or may not include prior panel members. Internal Operating Procedure 36.2.

- **Argument Time**

A running clock with timer lights is used to track argument time. The timer light shows green until only five minutes of argument time remain, at which point a yellow light appears. A red light appears when argument time has expired.

All parties to a side must share the time allotted for oral argument. The party filing the first notice of appeal or, in the event the parties noted an appeal on the same day, the plaintiff in the proceedings below will be deemed the appellant for purposes of both briefing and oral argument. Fed. R. App. P. 34(d); 28.1(b). Each side is normally allowed 20 minutes, except in en banc cases, in which counsel is allowed 30 minutes per side. In social security disability cases, black lung cases, and labor cases where the primary issue is whether the agency's decision is supported by substantial evidence, and in criminal cases where the primary issue involves the application of the sentencing guidelines, each side is limited to 15 minutes. Id.

Since the appellant is allowed to open and close the argument, counsel for appellant is asked to allocate their time between opening and rebuttal. Local Rule 34(d). In a cross-appeal, both appellant and appellee may reserve rebuttal time. No more than 1/3 of the time may be reserved for rebuttal. In a 30-minute argument, counsel may reserve up to 10 minutes for rebuttal. In a 20-minute argument, counsel may reserve up to 7 minutes for rebuttal. In a 15-minute argument, counsel may reserve up to 5 minutes for rebuttal.

It is recommended that no more than two attorneys argue per side. Id. Care should be taken to avoid duplication of argument. Fed. R. App. P. 34(d).

Counsel may request additional time by written motion stating reasons, filed after notification that the case has been calendared for oral argument. Local Rule 34(d). At argument, the panel may reduce or increase the amount of time allotted for oral argument. Local Rule 34(d).

Briefs for cases assigned to an argument panel are distributed to the panel at the time the assignments are made, and the judges hearing argument will have read the briefs and be familiar with the case. Therefore, in oral argument, counsel should emphasize the dispositive issues. Local Rule 34(d). Counsel should not read at length from briefs, records, or authorities. Fed. R. App. P. 34(c).

- **Internet Availability of Argument Audio Files**

Effective May 2011, audio links to the court's digitally recorded oral arguments are made available on the court's internet site two days after argument. Counsel should not include in their arguments any sensitive personal information (juvenile names, dates of birth, social security numbers, financial account numbers, home addresses in criminal cases) or sealed criminal information (presentence reports, statement of reasons for judgment, juror names, victim statements, sealed plea agreements, or sealed motions for downward departure for substantial assistance).

For cases argued before May 2011, CDs of oral argument recordings may be requested from the clerk's office using the Oral Argument CD Request form. A fee of \$26 applies (except to the United States and to individuals providing services under the Criminal Justice Act). Official transcripts of oral arguments are not prepared.

- **Intervenors**

Intervenors are treated as parties for purposes of both briefing and argument, and share argument time with whichever side they support.

- **Amicus**

Amicus do not participate in argument except upon permission of the court. Fed. R. App. P. 29. If such a motion is granted, amicus is typically permitted to argue on time ceded by the party whose position they support.

- **Exhibits**

Counsel desiring to use an exhibit at argument that is not part of the record must file a prior motion for leave and indicate whether opposing counsel has any objection.

Advance arrangements must be made with the clerk's office if counsel wishes to place any physical exhibits in the courtroom. Such arrangements are best made after receipt of notice of oral argument. Local Rule 11(c). Counsel should make arrangements to have exhibits placed in the courtroom before court convenes on the date of argument. After argument, counsel shall cause the exhibits to be removed from the courtroom unless the court otherwise directs. Fed. R. App. P. 34(g).

- **Seating**

Only counsel and law students practicing under Local Rule 46(a) may sit at the attorney tables. Parties must use general seating outside the well of the courtroom. Counsel for the first case should be seated at counsel table when court convenes. The presiding judge will call upon appellant's counsel to approach the podium and begin argument.

- **Recess**  
The court may choose to hear the day's cases without a break or may take a brief recess between cases.
  
- **Greeting**  
Traditionally, Fourth Circuit judges come down from the bench following argument to shake hands with counsel and thank them for their advocacy.