

## **PRE-ARGUMENT REVIEW & CALENDARING**

### **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. Loc. R. 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. Loc. R. 34(a). A decision against oral argument must be unanimous, and if a case is decided without oral argument the decision on the merits generally will be unanimous also. IOP 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. IOP 34.2.

### **Tentative Calendaring of Cases for Argument**

Counsel are notified about ten 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 the time period provided by the notice. Loc. R. 34(c). During the 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. Loc. R. 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.

The tentative calendar notification also directs counsel to file additional paper copies of briefs and appendices required for distribution to the argument panel.

A notice is issued to the parties requesting a response to whether similar cases are pending in this court or the United States Supreme Court.

### **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. IOP 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. IOP 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. IOP 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 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, unless the defendant signs a waiver of counsel's appearance and co-defendant's counsel certifies in advance of argument that he or she is prepared to argue on behalf of the defendant whose attorney is not present. 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. Loc. R. 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. Loc. R. 34(c) & 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).

## Related Links

- [Oral Argument](#)
- [Rule 34, Oral Argument \(with Local Rules\)](#)
- [Court Forms & Fees – Oral Argument](#)