

U.S. Court of Appeals for the Fourth Circuit

Appellate Practice Webinar



February 2, 2024
Richmond, VA

1.

Agenda



FOURTH CIRCUIT APPELLATE PRACTICE WEBINAR

FEBRUARY 2, 2024, 9:00 A.M. – 12:00 P.M.

Opening remarks: Albert Diaz, Chief Judge, U.S. Court of Appeals for the Fourth Circuit

Introduction: Nicole Grady, Career Clerk to Circuit Judge Paul V. Niemeyer

9:00 **A Conversation with the Solicitor General**

Praised for her brilliant mind, legal acumen, and outstanding advocacy skills, Elizabeth B. Prelogar serves as the 48th Solicitor General of the United States. In this session, join Circuit Judge Toby Heytens for a conversation with the Solicitor General as she shares her insights on her role within the Department of Justice and its impact on the lower federal courts.

*Toby Heytens, Circuit Judge, U.S. Court of Appeals for the Fourth Circuit
Elizabeth B. Prelogar, United States Solicitor General*

Introduction: Nicole Grady, Career Clerk to Circuit Judge Paul V. Niemeyer

10:00 **Effective Advocacy before the Fourth Circuit: Perspectives from the Bench**

Michelle Kallen, a partner at Jenner & Block LLP and the former Solicitor General of Virginia, moderates a panel discussion with Chief Judge Albert Diaz and Circuit Judges Allison Jones Rushing and DeAndrea Gist Benjamin. The panel shares practical tips for effective appellate advocacy, answering questions about Fourth Circuit practice and procedure and offering strategies for both written briefs and oral arguments.

*Michelle Kallen, Partner, Jenner & Block LLP
Albert Diaz, Chief Judge, U.S. Court of Appeals for the Fourth Circuit
Allison Jones Rushing, Circuit Judge, U.S. Court of Appeals for the Fourth Circuit
DeAndrea Gist Benjamin, Circuit Judge, U.S. Court of Appeals for the Fourth Circuit*

Introduction: Nicole Grady, Career Clerk to Circuit Judge Paul V. Niemeyer

11:00 **Agency Appeals in the Fourth Circuit**

Tips and Traps in Litigating Agency Appeals and a Behind-The-Scenes Look at How Your Appeal is Processed

Join William & Mary Law School Professor Allison Orr Larsen as she moderates a discussion on litigating administrative agency appeals in the Fourth Circuit. Although the focus is on agency appeals, the session will include a behind-the-scenes look at how appeals are processed in the Fourth Circuit, including criteria considered in deciding whether to hear oral argument and the role of the Office of Staff Counsel.

*Allison Orr Larsen, Alfred Wilson & Mary I.W. Lee Professor of Law, William & Mary Law School
John R. Grimm, Partner, Goodell, DeVries, Leech & Dann, LLP
Nwamaka Anowi, Clerk of Court, U.S. Court of Appeals for the Fourth Circuit
Christopher D. Dunn, Staff Attorney, Office of Staff Counsel, U.S. Court of Appeals for the Fourth Circuit*

2.

Faculty

FOURTH CIRCUIT APPELLATE PRACTICE WEBINAR

FACULTY

NWAMAKA ANOWI is the Clerk of Court for the United States Court of Appeals for the Fourth Circuit. Ms. Anowi has over 15 years of administrative and management experience in public service, having served as the Deputy Court Administrator and Jury Commissioner for the Circuit Court for Prince George's County, Maryland, and the Chief Deputy for Operations for the United States District and Bankruptcy Courts for the District of Columbia before joining the Fourth Circuit as its Chief Deputy Clerk in August 2020. Ms. Anowi also previously worked as a Senior Manager with the Clerk's Office in Prince George's County, Maryland, and was subsequently promoted to the Circuit Court for Prince George's County as the Deputy Court Administrator/Jury Commissioner.

Ms. Anowi earned her Bachelor's in Law and her Barrister at Law degrees at the University of Benin and the Nigerian Law School and her Master of Laws degree from the Washington College of Law at American University. She is a Certified Court Executive with the Institute for Court Management through the National Center for State Courts.

HONORABLE DEANDREA GIST BENJAMIN serves as a United States Circuit Judge for the United States Court of Appeals for the Fourth Circuit. Confirmed to the court on February 9, 2023, to a seat vacated by the Honorable Henry F. Floyd, Judge Benjamin is the second African-American woman and the first person of color from South Carolina to serve on the Fourth Circuit. A lifelong Columbia native, Judge Benjamin was born in Columbia, South Carolina, in 1972, where she attended public schools in Richland County, graduating from Columbia High School in 1990. She graduated from Winthrop University in 1994 and received her law degree from the University of South Carolina School of Law in 1997.

Following law school, Judge Benjamin served as a law clerk for the Honorable L. Casey Manning, Resident Judge for the Fifth Judicial Circuit, in Columbia, South Carolina. Following her clerkship, she served as an assistant solicitor in the Fifth Circuit Solicitor's Office and as an assistant attorney general and lead VAWA prosecutor for the South Carolina Office of the Attorney General.

In 2001, she joined the Gist Law Firm. While in private practice, Judge Benjamin was a member of the South Carolina Board of Juvenile Parole, from 2001 to 2004, serving as Vice-Chair from 2002 to 2003, and she served as a municipal court judge for the City of Columbia, from 2004 to 2011. In 2011, Judge Benjamin was elected by the South Carolina General Assembly as a Resident Judge for the Fifth Judicial Circuit, covering Richland and Kershaw counties.

Judge Benjamin has been active in local and national bar associations and other professional organizations, including serving as the District Representative for South Carolina and the U.S. Virgin Islands for the American Bar Association Young Lawyers Division and chairing multiple committees in the South Carolina Bar, including the Young Lawyers Division and the Children's Law Committee. Judge Benjamin was a member of the South Carolina Bar Board of Governors and the House of Delegates. Judge Benjamin is a member of the American Bar Association, South

Carolina Bar, Richland County Bar Association, South Carolina Black Lawyers Association, and South Carolina Women Lawyers Association. Judge Benjamin is also a member of the John Belton O’Neill Inn of Court, Federal Judges Association, and the Fellows of the American Bar Foundation.

Throughout her tenure on the bench, Judge Benjamin has received several awards, including The State newspaper/Columbia Business Journal “20 under 40,” Phenomenal Women’s Award from the Capital City Club, the National Judicial College Making the World a More Just Place Award, the Capital City Classic Award, Richland County School District 2 Black History Month Honoree Award, and American Board of Trial Advocates of South Carolina Jurist of the Year Award.

While on the bench and throughout her career, Judge Benjamin has been engaged in community service, including serving as president of the Columbia Chapter of the Links, Incorporated; parliamentarian for the Columbia Chapter of Jack & Jill of America, Inc.; board member for Congaree Girl Scouts; and board member of Pathways to Healing.

HONORABLE ALBERT DIAZ is the Chief Circuit Judge of the U.S. Court of Appeals for the Fourth Circuit. A native of Brooklyn, New York, Chief Judge Diaz joined the Marines after high school. He attended the University of Pennsylvania on an NROTC scholarship, earning a B.S. in Economics. Following graduation, he was commissioned a Second Lieutenant of Marines. While in service, Chief Judge Diaz attended law school on a full scholarship. He received his J.D. from the New York University School of Law and later earned a Master of Science in Business Administration from Boston University, where he was later honored as a Distinguished Alumni.

In the Marines, Chief Judge Diaz served as a prosecutor, defense counsel, and appellate government counsel. Chief Judge Diaz left active duty in 1995 for private practice. Twice, he earned his law firm’s award for exemplary pro bono service. He remained in the Marine Reserves while in private practice, serving as an appellate defense counsel, military trial judge, and appellate military judge. He retired from the Marines in 2006 at the rank of Lieutenant Colonel. His service decorations include the Meritorious Service Medal (twice) and the Navy Marine-Corps Commendation Medal.

From 2001 to 2009, Chief Judge Diaz served on the North Carolina Superior Court bench, to include service on North Carolina’s Business Court. President Obama nominated him to the U.S. Court of Appeals for the Fourth Circuit in 2009. The American Bar Association rated him unanimously well-qualified, and he was confirmed by the Senate by voice vote.

Chief Judge Diaz has been involved with the Mecklenburg County Bar’s Diversity & Inclusion Committee since shortly after its founding and helped create “Lunch with a Lawyer,” a mentorship program for rising ninth graders. He was also instrumental in establishing the Mecklenburg County Hispanic Latino Lawyers Bar. He has spoken at graduation, commencement, convocation, and award ceremonies for law schools, a graduate school, a prison, and several high schools, but he is especially proud to have delivered the graduation address at Merry Oaks Elementary School in Charlotte.

Chief Judge Diaz is past Chair of the ABA Judicial Division's Appellate Judges Conference and the Appellate Judges Education Institute. He is a member of the Judicial Conference of the United States and previously served the conference as a member of the Committee on Codes of Conduct. Chief Judge Diaz is also a member of the American Law Institute and a fellow of the American Bar Foundation.

In 2011, Chief Judge Diaz received Campbell Law School's James Iredell Award. In 2020, he was honored by the Elon University Law School with its Leadership in the Law Award. He has twice received the Hispanic National Bar Association's Latino Judge of the Year Award, has been recognized as a Legal Legend of Color by the North Carolina Bar Association, and has received the Mecklenburg County Bar's Diversity Champion award.

CHRISTOPHER D. DUNN is a staff attorney in the Office of Staff Counsel at the United States Court of Appeals for the Fourth Circuit where he specializes in petitions for review of agency immigration decisions. Prior to joining the Office of Staff Counsel in 1998, Mr. Dunn spent two years as a pro se law clerk with the United States Court of Appeals for the Second Circuit. He received his Bachelor of Fine Arts from Virginia Commonwealth University in 1977 and his Juris Doctor from the City University of New York School of Law in 1995.

NICOLE GRADY is the career law clerk for the Honorable Paul V. Niemeyer, Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit. Ms. Grady graduated from the University of Virginia School of Law in 2008, receiving the Robert E. Goldsten Award for Distinction in the Classroom and the Daniel Rosenbloom Award. Following law school, she served as a law clerk for the Honorable T. S. Ellis, III, of the U.S. District Court for the Eastern District of Virginia before clerking for Judge Niemeyer in Baltimore, Maryland. From 2010 until 2012, Ms. Grady was a trial attorney in the Department of Justice's Federal Programs Branch, where she worked on a variety of civil matters. She returned to Judge Niemeyer's chambers in 2012 to serve as his career clerk, and she lives in Silver Spring, Maryland, with her husband and two sons.

JOHN R. GRIMM is a partner at Goodell, DeVries, Leech & Dann, LLP, in Baltimore, Maryland, where he practices in the firm's commercial litigation and appellate practice groups. Mr. Grimm represents organizations from a wide range of industries, including entertainment, telecommunications, and pharmaceuticals, in commercial disputes and related appeals. He has also represented individuals in civil rights suits and criminal appeals. Mr. Grimm previously served as an Assistant Attorney General in the Maryland Attorney General's Office Civil Litigation Division and was a partner at a prominent litigation and telecom boutique in Washington, D.C.

Mr. Grimm has extensive experience representing clients in federal and state courts at all stages of litigation. He has served as lead counsel in civil cases in both federal and state trial courts and has tried numerous criminal cases in Maryland state courts. An experienced appellate lawyer, Mr. Grimm has argued in the U.S. Courts of Appeals for the D.C. Circuit and Fourth Circuit and the Appellate Court of Maryland, and he has authored briefs in appeals before the U.S. Supreme Court, U.S. Courts of Appeals around the country, and the Appellate Court of Maryland.

Mr. Grimm serves on the section council of the Maryland State Bar Association's administrative law and litigation sections; is the chair of the Maryland Criminal Defense Attorneys' Association's Appellate Committee; and is a founding member of the Cole-Davidson Appellate Inn of Court. He has served as an adjunct professor of evidence at the University of Maryland Francis King Carey School of Law.

HONORABLE TOBY HEYTENS is a Circuit Judge on the U.S. Court of Appeals for the Fourth Circuit, appointed in 2021 by President Biden. Originally from Superior, Wisconsin, and a first-generation lawyer, Judge Heytens attended Macalester College in St. Paul, Minnesota, and the University of Virginia School of Law.

Judge Heytens began his career as a law clerk to Chief Judge Edward Becker of the U.S. Court of Appeals for the Third Circuit and Justice Ruth Bader Ginsburg of the U.S. Supreme Court. He next spent several years working in Washington, D.C., first in private practice and then at the Department of Justice's Office of the Solicitor General. From 2010 until 2018, Judge Heytens was a law professor at the University of Virginia, where he taught civil procedure, civil rights litigation, and the Supreme Court Litigation Clinic and helped coach UVA's three-time national champion trial advocacy team. From 2018 until 2021, Judge Heytens served as Solicitor General of Virginia, where he argued three times before the U.S. Supreme Court and served as lead counsel successfully defending the governor's decision to remove the Robert E. Lee monument from Richmond's Monument Avenue.

MICHELLE KALLEN, the former Solicitor General of Virginia, is a partner at Jenner & Block LLP, who helps clients navigate complex matters before federal and state appellate courts. Her oral argument experience includes ten cases before the Fourth Circuit and ten cases before the Virginia Supreme Court. After her time in the Virginia Office of the Attorney General, Ms. Kallen served as Special Litigation Counsel in the U.S. House of Representatives, representing the Select Committee to Investigate the January 6th Attack on the United States Capitol in litigation.

Ms. Kallen maintains an active pro bono practice and is committed to serving her community. She serves as a mentor for The Appellate Project and is a founding member of the Ad Idem Corporate Counsel Network, the Washington Area Women Trial Attorneys, and the Women Lawyers on Guard. Ms. Kallen clerked for the Honorable Jane B. Stranch on the U.S. Court of Appeals for the Sixth Circuit. She holds a bachelor's degree from Stanford University and a J.D. from Vanderbilt Law School.

ALLISON ORR LARSEN is the Alfred Wilson & Mary I.W. Lee Professor of Law at William & Mary Law School where she also directs the Institute for the Bill of Rights Law. Professor Larsen teaches courses in constitutional law, administrative law, and statutory interpretation. Since joining the William & Mary law faculty in 2010, Professor Larsen has received many awards honoring her teaching and scholarship including: the university's Alumni Fellowship Award, the Walter L. Williams Jr. Memorial Teaching Award, the 1L Professor of the Year Award, two university-wide Plumeri Awards, the inaugural McGlothlin Teaching Award and the state-wide Outstanding Faculty Award in the "Rising Star" category (the latter is Virginia's highest faculty honor, awarded by the State Council of Higher Education for Virginia).

Professor Larsen is a scholar of constitutional law and legal institutions, with a focus on how information dynamics affect both. Her work on fact-finding at the Supreme Court has been featured multiple times in the New York Times, the Washington Post, and the Wall Street Journal, and was also the subject of her testimony before the Senate Judiciary Committee in April 2021. Professor Larsen has published in the nation's top law reviews, and her work has been cited by four different U.S. Courts of Appeals. She appeared with Stephen Colbert as a guest on The Colbert Report (Comedy Central) to discuss her scholarship on Supreme Court amicus briefs, a subject on which she also testified before the Presidential Commission on Supreme Court Reform.

Professor Larsen received her B.A. from William & Mary in 1999 and her law degree in 2004 from the University of Virginia where she graduated first in her class. After law school, Professor Larsen clerked for Judge J. Harvie Wilkinson on the U.S. Court of Appeals for the Fourth Circuit and for Justice David Souter on the U.S. Supreme Court. Prior to joining the William & Mary faculty, Professor Larsen was an associate in the appellate practice group at O'Melveny and Myers in Washington D.C.

Professor Larsen spent the fall of 2016 as a visiting scholar at Oxford University, and the fall of 2018 as the Daniel P.S. Paul Visiting Professor of Constitutional Law at Harvard Law School.

ELIZABETH BARCHAS PRELOGAR is the 48th Solicitor General of the United States and serves as the fourth-ranking individual at the Department of Justice. As Solicitor General, she is responsible for conducting and supervising all Supreme Court litigation on behalf of the United States. The Solicitor General also determines whether appeals will be taken by the federal government to all appellate courts and whether the federal government will file an amicus curiae brief or intervene in any appellate court.

Solicitor General Prelogar previously served in multiple roles at the Department of Justice. Before her confirmation as Solicitor General, she served as Acting Solicitor General and Principal Deputy Solicitor General. She also served as an Assistant to the Solicitor General from 2014 to 2019. During her prior tenure as a career attorney at the Department, she was detailed to Robert S. Mueller III's investigation into Russian interference in the 2016 presidential election and obstruction-of-justice issues, where she served as an Assistant Special Counsel.

Solicitor General Prelogar was born and raised in Boise, Idaho. She received her bachelor's degree from Emory University and a master's degree in creative writing from the University of St. Andrews. She subsequently spent a year living and studying in St. Petersburg, Russia, as a Fulbright Fellow. She graduated from Harvard Law School where she was an Articles Editor of the Harvard Law Review.

After graduating from law school, Solicitor General Prelogar clerked for Judge Merrick B. Garland of the U.S. Court of Appeals for the D.C. Circuit. She then completed consecutive Supreme Court clerkships for Justice Ruth Bader Ginsburg and Justice Elena Kagan. After her clerkships, she worked as an associate in the appellate group at Hogan Lovells LLP. She later became a partner at Cooley LLP focused on Supreme Court and appellate litigation, and she also served as a Lecturer on Law at Harvard Law School, where she co-taught a course on Supreme Court and appellate advocacy.

HONORABLE ALLISON JONES RUSHING is a United States Circuit Judge for the Court of Appeals for the Fourth Circuit. Before joining the bench, Judge Rushing practiced law at Williams & Connolly LLP, where her appellate advocacy skills were recognized by national publications including Legal 500, Super Lawyers, and The National Law Journal. Before entering private practice, Judge Rushing clerked for judges of the United States Court of Appeals for the Tenth Circuit, the United States Court of Appeals for the D.C. Circuit, and the United States Supreme Court.

3.

A Conversation with the Solicitor General
The Solicitor General and the Lower Courts

A Conversation with

Hon. Toby Heytens, Circuit Judge, U.S. Court of Appeals for the Fourth Circuit

and

Elizabeth B. Prelogar, Solicitor General of the United States

A Conversation with the Solicitor General

The Solicitor General and the Lower Courts

Introduction

The position of United States Solicitor General is one of the most coveted legal jobs in America. In a 2012 talk at Harvard Law School, then-Solicitor General Donald B. Verrilli, Jr., maintained that “every solicitor general has described this as the greatest legal job one could have, and it certainly has been for me.”¹

As the fourth highest-ranking official within the U.S. Department of Justice, the Solicitor General’s most prominent role is to represent the federal government in cases before the Supreme Court. The Solicitor General also performs a “gatekeeping” function for the Court by putting forth only the most important cases that she deems essential for development of the law.² Because the position serves a dual role as an advocate for the government and counselor to the Court, it is often referred to as the “Tenth Justice.”

An equally important and lesser known role, however, is the Solicitor General’s duty to “[d]etermin[e] whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing en banc and petitions to such courts for the issuance of extraordinary writs)”³ The Solicitor General is also charged with determining whether the government

will file an amicus curiae brief or intervene in any appellate court action.⁴ For a full understanding of the extraordinary responsibility accorded to the position and the critical role that the Solicitor General plays within the judiciary, it is necessary to delve into our country's history—going all the way back to the First Congress.

History of the Office of Attorney General

The Office of Attorney General was created by the First Congress in the Judicial Act of 1789.⁵ Under the Act, the Attorney General was charged with two duties: “to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President . . . or when requested by the heads of any of the departments”⁶ Far from being a coveted job, the position of Attorney General at that time was part-time with low pay and no support staff.⁷ Edmund Randolph, the first to occupy the position, provided his own office and reportedly even bought his own paper and pencils.⁸

Randolph quickly became frustrated with the limited authority accorded to him under the Act.⁹ Although he could represent the United States in actions before the Supreme Court, he lacked the authority to represent the country's interests in the lower federal courts. District attorneys (later known as United States attorneys) were given that authority.¹⁰ In December 1791, Randolph wrote

President Washington requesting authorization to represent the United States in the lower courts, supervision and control over the district attorneys, and at least one clerk to assist him in transcribing his opinions.¹¹ As noted by Randolph:

[I]t may frequently arise that the United States may be deeply affected by various proceedings in the inferior courts, which no appeal can rectify. The peculiar duty of the Attorney General calls upon him to watch over these cases; and being, in the eye of the world, responsible for the final issue, to offer his advice at the earliest stage of any business; and indeed, until repeated adjudications shall have settled a clear line of partition between the federal and State courts, his best exertions cannot be too often repeated, to oppose the danger of a schism. For this purpose the attorneys of the districts ought, I conceive, to be under an obligation to transmit to him a state of every case in which the harmony of the two judiciaries may be hazarded, and to communicate to him those topics on which the subjects of foreign nations may complain in the administration of justice.¹²

Although President Washington forwarded the letter to Congress where a bill was drafted to enact Randolph's suggestions, it would take another eight decades for Congress to resolve the structural deficiencies in the position.¹³

In fact, in the ensuing years, Congress fragmented the Attorney General's authority even further. In 1830, Congress created the role of Solicitor of the Treasury.¹⁴ The newly created position was given the authority over all court actions involving the Treasury and the power to establish necessary rules and regulations for the district attorneys to follow.¹⁵ Other federal executive department heads clamored for their own legal staff and, by the start of the Civil War, every major department had its own legal officer.¹⁶

Representative Thomas Jenckes of Rhode Island explained the shortcomings of this system during an 1870 session of Congress:

[W]e have found that there has been a most unfortunate result from this separation of law powers. We find one interpretation of the laws of the United States in one Department and another interpretation in another Department. In fact, we had brought to our notice here early in the session an instance of different opinions upon the same subject, where the Paymaster General of the Army obtained one opinion from one law officer and another officer of the Government obtained from another law officer a different opinion upon the same subject, neither obtaining the opinion of the Attorney General, who ought to have been consulted. The consequence is a difference of opinion and a difference of advice in each case upon the same statute.¹⁷

Additionally, due to an increase in Civil War-related litigation, the federal government began to hire outside counsel to represent its interests. Representative Jenckes reported that, by 1861, “the law business of the Government greatly outgrew the capacity of the persons authorized to transact it, and the number of outside counsel . . . was greater than all the commissioned law officers of the Government in every part of the country.”¹⁸ Between the years of 1864 and 1869, the United States spent more than \$733,000 on outside counsel.¹⁹ Representative William Lawrence of Ohio, in advocating for a prohibition on outside counsel, expressed concern that the “system . . . might be perverted to purposes of favoritism.”²⁰ He further argued that “very large fees ha[d] been paid for services which could have been performed by proper law officers at much less expense.”²¹

Creation of the Department of Justice and the Position of Solicitor General

In 1870, Representative Jenckes introduced a bill to create the Department of Justice and the position of Solicitor General.²² He incorporated many of the ideas set forth in a previous bill that had been introduced in 1868 by Representative Lawrence.²³ In proposing the position of Solicitor General, Representative Jenckes explained:

We propose to create . . . a new officer, to be called the solicitor general of the United States, part of whose duty it shall be to try these cases in whatever courts they may arise. We propose to have a man of sufficient learning, ability, and experience that he can be sent to New Orleans or to New York, or into any court wherever the Government has any interest in litigation, and there present the case of the United States as it should be presented.²⁴

The bill passed both houses and was signed into law by President Grant in June 1870.²⁵ Among other things, the newly enacted legislation (1) established the Department of Justice with the Attorney General as its head; (2) established the positions of the Solicitor General and two “assistants of the Attorney General”; (3) transferred the solicitors and law officers from the other executive departments to the Department of Justice and placed them under its supervision and control; (4) gave the Department the authority to represent the United States “in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States”; and (5) gave the

Attorney General the power to make all necessary rules and regulations to govern the Department of Justice.²⁶

The Solicitor General in the Lower Courts Today

Assisted by a staff of approximately twenty attorneys, the Solicitor General continues to ensure that the United States speaks with one voice as opposed to through 94 separate U.S. Attorney's offices.²⁷ In order to fulfill this function, the Solicitor General determines whether appeals will be taken by the government to the appellate courts by reviewing adverse decision recommendations submitted by the U.S. Attorney's offices.²⁸

Drew S. Days, III, who served as U.S. Solicitor General from 1993 to 1996, described this gatekeeping function as follows:

[T]he Solicitor General's job is to weed out those adverse decisions worthy of further review from those that are not. Where decisions unfavorable to the Government lack precedential significance (for example, because they are unpublished or involve unique factual characteristics), or turn on factual determinations by trial judges that are unlikely to be reversed on appeal, or have deficient records, the Solicitor General will normally deny authorization to appeal. Solicitors General may come away from reviewing such recommendations with the gut sense that error was committed in some of these cases. But, given the thousands of criminal prosecutions and civil suits brought by the Government, as well as the number of claims filed *against* federal agencies and officials, the absence of a screening process for Government appeals would put further stress on the already overly-burdened appellate court dockets. It would also result in the waste of precious human and financial resources on a number of ultimately lost causes.²⁹

The Solicitor General also determines, following a government loss in the federal court of appeals, whether to file a petition for rehearing en banc.³⁰ Under the Federal Rules, petitions for en banc review should be reserved for situations in which there is an intra-circuit conflict or the case presents a question of exceptional importance.³¹ Former Solicitor General Days noted that “[t]here is an understandable tendency of government lawyers who have lost on appeal to view [an] adverse ruling as necessarily generating questions of ‘exceptional importance.’”³² The Solicitor General, however, must “resist that notion and . . . take seriously the concern of federal appellate courts that en banc review not be sought routinely.”³³

Another way that the Solicitor General shapes review of government cases in the lower courts, which is described by Days as “the most important function the Solicitor General performs,” is by “orchestrating the movement of government litigation up through the lower courts toward ultimate Supreme Court review.”³⁴ It is the Solicitor General’s job “to try to spot [conflicting rulings] early on in the adverse decision process and to try to guide [these] issues . . . to the Supreme Court for definitive resolution.”³⁵ Sometimes this is accomplished by authorizing appeals in various circuit in an attempt to create a “circuit split” and increase the chance of Supreme Court review.³⁶

Conclusion

When viewed with a historical lens, the need for this extraordinary position is clear. Praised for her brilliant mind, legal acumen, and outstanding advocacy skills, Solicitor General Elizabeth B. Prelogar is the 48th Solicitor General of the United States and the second woman to hold the position after Supreme Court Justice Elena Kagan. We are honored to have Solicitor General Prelogar join us for our 2024 Appellate Practice Webinar and look forward to hearing her insights on her position as Solicitor General and her role in the lower federal courts.

¹ Divya Subahmanyam, *At HLS, Solicitor General Verrilli describes “the greatest legal job one could ever have,”* Harvard Law Today, <https://hls.harvard.edu/today/at-hls-solicitor-general-verrilli-describes-the-greatest-legal-job-one-could-ever-have-video/> (Nov. 6, 2012).

² See, e.g., *United States v. Providence Journal Co.*, 485 U.S. 693, 706 (1988).

³ 28 C.F.R. § 0.20(b).

⁴ 28 C.F.R. § 0.20(c).

⁵ The Judiciary Act of 1789, ch. 20, 1 Stat. 73, 92-93.

⁶ *Id.* at 93.

⁷ Seth P. Waxman, Speech, *Presenting the Case of the United States as It Should Be: The Solicitor General in Historical Context* (address to the Supreme Court Historical Society, June 1, 1998) at 5 (available at <https://www.justice.gov/osg/solicitor-general-historical-context>).

⁸ Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, Duke Law Journal, 1989 Duke L.J. 561, 567 (June 1989).

⁹ Bloch, *supra* note 8 at 585; Waxman, *supra* note 7 at 5.

¹⁰ Bloch, *supra* note 8 at 567.

¹¹ Letter from Edmund Randolph to George Washington, Dec. 26, 1791, Am. State Papers: Misc.: 1:45-46 (available at <https://memory.loc.gov/ammem/amlaw/lwsplink.html>).

¹² *Id.* at 46.

¹³ Waxman, *supra* note 7 at 6.

¹⁴ Act of May 29, 1830, ch. 153, 4 Stat. 414, 414-16.

¹⁵ *Id.* at 415; see Waxman, *supra* note 7 at 7.

¹⁶ Waxman, *supra* note 7 at 8 & n.38; see *Cong. Globe*, 41st Cong., 2d Sess., 3036 (1870) (available at <https://memory.loc.gov/ammem/amlaw/lwcglink.html>).

¹⁷ *Cong. Globe*, 41st Cong., 2d Sess., 3036.

¹⁸ *Id.* at 3035.

¹⁹ *Id.*; see Waxman, *supra* note 7 at 8.

²⁰ *Cong. Globe*, 41st Cong., 2d Sess., 3038.

²¹ *Id.*

²² *Id.* at 3034-39.

²³ Waxman, *supra* note 7 at 9-10.

²⁴ *Cong. Globe*, 41st Cong., 2d Sess., 3035.

²⁵ Act of June 22, 1870, ch.150, 16 Stat. 162; see Waxman, *supra* note 7 at 11.

²⁶ Act of June 22, 1870, ch.150, 16 Stat. 162-165.

²⁷ There are 93 United States Attorneys, but 94 federal districts as Guam and the Northern Mariana Islands share a U.S. Attorney.

²⁸ Justice Manual, 2-2.110 (available at <https://www.justice.gov/jm/justice-manual>).

²⁹ Drew S. Days, III, *No Striped Pants and Morning Coat: The Solicitor General in the State and Lower Federal Courts*, 11 Ga. State Univ. L. Rev. 645, 648-49 (June 1995).

³⁰ 28 U.S.C. § 0.20(b).

³¹ Fed. R. App. P. 35.

³² Days, *supra* note 29 at 649.

³³ *Id.*

³⁴ *Id.* at 649-50.

³⁵ *Id.* at 650.

³⁶ *Id.* at 650-51.

4.

Effective Advocacy before the Fourth Circuit

Moderator: Michelle Kallen, Partner, Jenner & Block LLP

Panel:

Hon. Albert Diaz, Chief Judge, U.S. Court of Appeals for the Fourth Circuit
Hon. Allison Jones Rushing, Circuit Judge, U.S. Court of Appeals for the Fourth Circuit
Hon. DeAndrea Gist Benjamin, Circuit Judge, U.S. Court of Appeals for the Fourth Circuit

Effective Advocacy before the Fourth Circuit
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14. **Admit your Mistakes**
15. **Don't Argue with or Interrupt the Panel**
16. **Know When to Concede and When to Plant the Flag**
17. **Know When to Hold Them and When to Fold Them**
18. **Pay Attention to All Members of the Panel**
19. **Don't Attack Your Opponent**
20. **Treasure your Credibility**
21. **Enjoy the Moment**

Effective Advocacy before the Fourth Circuit
Honorable Albert Diaz, Chief Circuit Judge

1. In most cases, a well-prepared judge has some sense of what the result should be. But my own experience has been that in a fair number of the close difficult cases (and our court tends to limit argument to those cases), I remain uncertain before the argument. And in those cases, a well-prepared, thoughtful advocate can make all the difference.

You must be the best prepared lawyer in the courtroom. This is your one case before our court. I will be prepared, but there is no way that I should know the record, the briefs, and the cases better than you.

2. Think long and hard about the case, its strengths and weaknesses. Be prepared to explain why your proposed disposition of the case is fair and right not just for your facts but for others that may follow.
3. Anticipate the questions (including the dreaded hypotheticals) and be ready with thoughtful responses that are in fact responsive, but nonetheless move the ball in your favor.
4. Participate in at least one moot court argument. Get lawyers to moot you who know nothing about the case, but who are willing to prepare as a judge would. They will open your eyes to points (some

obvious, others not so much) that you've either overlooked or not emphasized enough.

5. Be clear about what you want the court to do when the smoke clears. Affirm, reverse, vacate in full or in part, etc. Your brief should spell it out in detail but be prepared to explain it at argument.
6. Accept the standard of review. If you're the appellant, you can't run from an abuse of discretion or clear error standard. Nor can the appellee ignore de novo review. You have to own the standard (good or bad) and explain why you win either because or in spite of the standard of review.
7. Speak slowly and clearly, but don't scream at us. I've seen the extremes, the Machine Gun Kellys, the shouters, and the mimes in the courtroom. None is effective, even when they have something important to say. Come up for air occasionally, and let your voice be heard. For you trial lawyers--get someone actually versed in appellate arguments to make the case. But if you insist on doing it yourself, remember that a three-judge panel (or a 15-judge en banc one) is not a jury. It's not a closing, but rather a conversation. Treat it as such.

8. Don't bring a library with you to the podium. Former SG Paul Clement, who has argued in our court on a number of occasions, brings himself to the podium, that's it. You don't need to go that far, but neither should you back a truck up to the podium full of your materials. They are likely to stray from the podium, crash to the floor, and annoy both you and the judges. A notebook with an outline and the principal record excerpts and cases should do.
9. Avoid reading your argument. It's Ok to glance at your notes from time to time, but the reality is you're not going to get very far in your prepared remarks before the questions come—or at least you hope that's how it will go. You should memorize your introduction and conclusion, but that's it.
10. Zero in on the points that matter. Identify in advance where the heart or theme of your argument lies and hammer those points home in the argument.
11. Don't split an argument. Sometimes it's unavoidable, it's almost never effective and detracts from the conversation.
12. Expect a hot bench prepared with questions. You must answer them!!! Rather than wince, you should **stop** and rejoice when the court asks questions. As Supreme Court Justice Robert Jackson once observed, if a judge is asking a question, it means he's not asleep!! And when you're done rejoicing, answer the court's questions--I repeat answer the panel's questions!!!! Don't restate

it, evade it, or worse yet, ignore it. Don't say you'll get to it later. And never answer a question with one of your own (Believe me, I've seen it happen). If you're unsure of what's being asked, say so. But once the fog clears, answer the question!!!!

The answer to the question should always begin with "yes" or "no". Only then, should you deign to explain or qualify.

Oral argument isn't a boxing match where you get points for ducking and weaving. When done right, an argument is a conversation between the advocate and the panel. And that conversation is at its most effective when the advocate eagerly anticipates and yes, forthrightly answers the judges' questions and in doing so, explains why she should prevail. This gets back to preparation, for a lawyer who has prepared well for argument will have largely anticipated where the weaknesses are in his case (and believe me, there almost always is a weakness in a case that our court has set for argument) and is ready to address them head on.

13. Even the best prepared lawyer will occasionally be stumped by a question. What then? Honesty is the best medicine. That is, say so, rather than give an uninformed or idiotic answer. In the words of Abraham Lincoln, it's generally better in such an instance to remain silent and be thought a fool than to speak out and remove all doubt.

14. Similarly, if you make a mistake during the argument (i.e. you misstate something in the record, or the holding of case), admit it, preferably right away, but certainly in writing if you can't clear it up during the argument. We all make mistakes, judges included. I've been on panels where we've gone back and granted panel rehearing to fix a mistake. If we can do it, surely you can too.
15. Don't argue with the panel or interrupt a judge. There will come a time where you have exhausted your powers of persuasion and a judge (or worse the entire panel) is not buying what you're selling. Time to take it on the chin, move on (respectfully) and stop the bleeding. Be patient. Stop, listen to what the judge is saying (whether asking a question or waxing poetic), be sure he/she has stopped, and then respond. It's such a simple courtesy, but one often overlooked, to the advocate's detriment.
16. A good advocate knows when to concede a point that doesn't matter, and when the flag must be planted without surrender. Here again, preparation is the key, for if you know your case backwards and forwards, you will know on which hills you must fight, and which can be retreated from gracefully.
17. Know when to hold them, and when to fold them. If a panel is with you, don't snatch defeat from the jaws of victory!!! I've seen a few lawyers get up to the podium, and having taken the temperature of the room, make a very brief statement, and then ask the panel if

they have questions. They answer them, and then sit down!!! How refreshing!!

18. Pay attention to all members of the panel during your argument and when answering questions. Remember the math--you need two votes to win, so focusing your attention on one judge will not do. In the same way, be respectful of the panel no matter how silly you may think the questions to be.

Look the judges in the eye--don't engage in a staring contest but let them know that you see them and wish to engage (respectfully) in a conversation with them.

Know your panel. Their names, titles, etc. It's Judge, not Justice, Diaz, not Dieazzz. It's embarrassing when you butcher a judge's name or title.

19. Don't attack your opponent—attack his arguments. Make your point without making it personal. As tempting as it may be, don't roll your eyes, shake your head vigorously (I've seen all of these, or my clerks have), or make any other public display of disdain for your opponent's argument. Don't mistake civility for weakness.
20. Treasure your credibility. We will presume good faith on your part as a lawyer and officer of the court. But the quickest way to rebut

that presumption is to misrepresent something or make a ridiculous argument.

21. Finally, enjoy the moment! At our last judicial conference, I had a young lawyer come up to me and gush over her first argument before our court. It was the highlight of her career. That she found it to be such a positive experience (even though, as she admitted, she lost) is what I hope all lawyers will be able to say when they argue a case.

5.

Agency Appeals in the Fourth Circuit

*Tips and Traps in Litigating Agency Appeals
and a Behind-The-Scenes Look at How Your Appeal is Processed*

**Moderator: Allison Orr Larsen, Alford Wilson & Mary I.W. Lee Professor of Law and
Director, Institute of the Bill of Rights Law, William & Mary Law School**

Panel:

**John R. Grimm, Partner, Goodell, DeVries, Leech & Dann, LLP
Nwamaka Anowi, Clerk of Court, U.S. Court of Appeals for the Fourth Circuit
Christopher D. Dunn, Staff Attorney, Office of Staff Counsel, U.S. Court of Appeals for the
Fourth Circuit**

Agency Appeals in the Fourth Circuit

Tips and Traps in Litigating Agency Appeals and a Behind-The-Scenes Look at How Your Appeal is Processed

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AGENCY APPEALS IN THE FOURTH CIRCUIT
Tips and Traps in Litigating Agency Appeals
and a Behind-The-Scenes Look at How Your Appeal is Processed

I. APPEALING YOUR AGENCY DECISION

A. Filing your petition for review

Review of agency decisions by the court of appeals is initiated by filing a petition for review as provided by the Federal Rules of Appellate Procedure and the Local Rules of the Fourth Circuit:

Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. . . . In this rule “agency” includes an agency, board, commission, or officer; “petition for review” includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

Fed. R. App. P. 15(a). Upon filing, the petitioner must pay a docketing fee of \$600, payable to the Clerk, U.S. Court of Appeals, or submit a properly executed application for leave to proceed in forma pauperis. 4th Cir. R. 15(a). A copy of the agency order for which review is sought must be attached to the petition. 4th Cir. R. 15(b). The petition must also be accompanied by a list of the respondents’ names and the addresses where respondents may be served with copies of the petition. *Id.*

To find the relevant time period in which to petition for review, refer to the particular statute(s) authorizing review.

PRACTICE TIP: Verify that the Fourth Circuit has jurisdiction over your petition by referring to the particular statute authorizing review.

Although jurisdiction is often vested in the court of appeals, some statutes establish jurisdiction in the district court, establish exclusive jurisdiction in a particular court of appeals such as the D.C. Circuit, or provide for concurrent jurisdiction.

B. Venue considerations in immigration cases

- Venue is located “with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.” 8 U.S.C. § 1252(b)(2).
- If the proceedings are conducted via videoconference such that the noncitizen and immigration judge appear from different locations, this Court has held that proper venue is the circuit in which the immigration judge is physically located. *See Herrera-Alcala v. Garland*, 39 F.4th 233, 243 (4th Cir. 2022).
- There is a circuit split on the issue of where venue lies when immigration proceedings are conducted remotely. Other circuits have held that venue lies at the place of hearing identified on the charging document or hearing notice, unless the immigration judge has granted a change in venue. *See, e.g., Bazile v. Garland*, 76 F.4th 5, 13 (1st Cir. 2023) (holding that “an IJ necessarily completes the proceedings for the purposes of § 1252(b)(2) at the court where the proceedings are commenced, absent a formal change in administrative venue”); *Sarr v. Garland*, 50 F.4th 326, 332 (2d Cir. 2022); *Plancarte Saucedo v. Garland*, 23 F.4th 824, 831-32 (9th Cir. 2022).

II. YOUR AGENCY APPEAL—BEHIND-THE-SCENES

A. Calendaring considerations

1. Initial screening

After a case is docketed and processed by the Clerk’s Office, an initial determination is made regarding the need for oral argument. The case either remains with the Clerk’s Office for placement on the oral argument or is routed to the Office of Staff Counsel (OSC).¹ This determination is typically made following the filing of the petitioner’s brief and the record.

2. Determining whether there is a need for oral argument

- All pro se cases are routed to OSC. *See* 4th Cir. R. 46(f) (“Cases involving pro litigants are ordinarily not scheduled for oral argument.”).

¹ Cases not granted oral argument are occasionally sent directly to the judges for consideration, bypassing OSC.

- If the Clerk or her counsel concludes that oral argument is unlikely to aid the decisional process, or if the need for argument is unclear, the case is referred to OSC. The following considerations may be taken into account in determining whether there is a need for oral argument:
 - Does the case present an issue of public significance?
 - Does the case present an issue that is likely to come up repeatedly for which published guidance would be helpful?
 - Does the case present an issue of first impression?
 - Is there a circuit split?
 - Have the parties requested oral argument?

- **NOTE:** This is only an initial determination. As explained below, the case may be returned to the Clerk's Office for placement on the oral argument calendar at any time prior to disposition.

B. The Role of the Office of Staff Counsel

1. History

The Fourth Circuit first established a central legal office in the late 1960s. Originally constituted with a single law clerk, the office has gradually grown in size and responsibilities. With the passage of 28 U.S.C. § 715 in 1982, Congress accorded statutory recognition to federal appellate central legal staff and permitted each court of appeals to employ a senior staff attorney, staff attorneys, and support staff.

2. Responsibilities

OSC's primary responsibility is to assist all of the circuit judges in their disposition of cases on appeal. OSC discharges this responsibility by preparing factually accurate and legally well-reasoned memoranda for all appeals diverted from the oral argument calendar and all pro se appeals. OSC essentially serves as a pool of general law clerks to the judges to assist the Court with its caseload.

3. Staffing at OSC

OSC staff currently consists of the following:

- Senior staff attorney
- Deputy senior staff attorney
- 4 supervising staff attorneys
- 27 staff attorneys
- 7 administrative employees

4. Agency specialists

Some staff attorneys have a background or have developed an interest in a particular area of agency law. Because of their specialized knowledge of the relevant regulations, caselaw, and emerging issues in their subject matter of expertise, these staff attorneys serve as valuable resources to the Court. For example, OSC's immigration specialists are generally assigned appeals originating from the Board of Immigration Appeals; these attorneys are well-versed on the Immigration and Nationality Act as well as Fourth Circuit and Supreme Court precedent in this area. Agency specialists are also available to assist circuit judges, law clerks, and the Clerk's Office with any issues that may arise related to their area of expertise.

OSC currently has the following agency specialists:

- Immigration (4)
- Social security (2)
- Tax/bankruptcy (2)
- Black lung (1)

C. More calendaring considerations

Following review, cases sent to OSC for a recommendation may be returned to the oral argument calendar by a staff attorney or judge.²

- If, upon review, OSC finds that the case warrants oral argument, the staff attorney will refer the case to the Clerk's Office for placement on the calendar.

² If the petitioner is pro se and proceeding in forma pauperis, counsel will be assigned. If the pro se petitioner is not proceeding in forma pauperis, the petitioner will be invited to retain counsel to file a formal brief and to participate in oral argument.

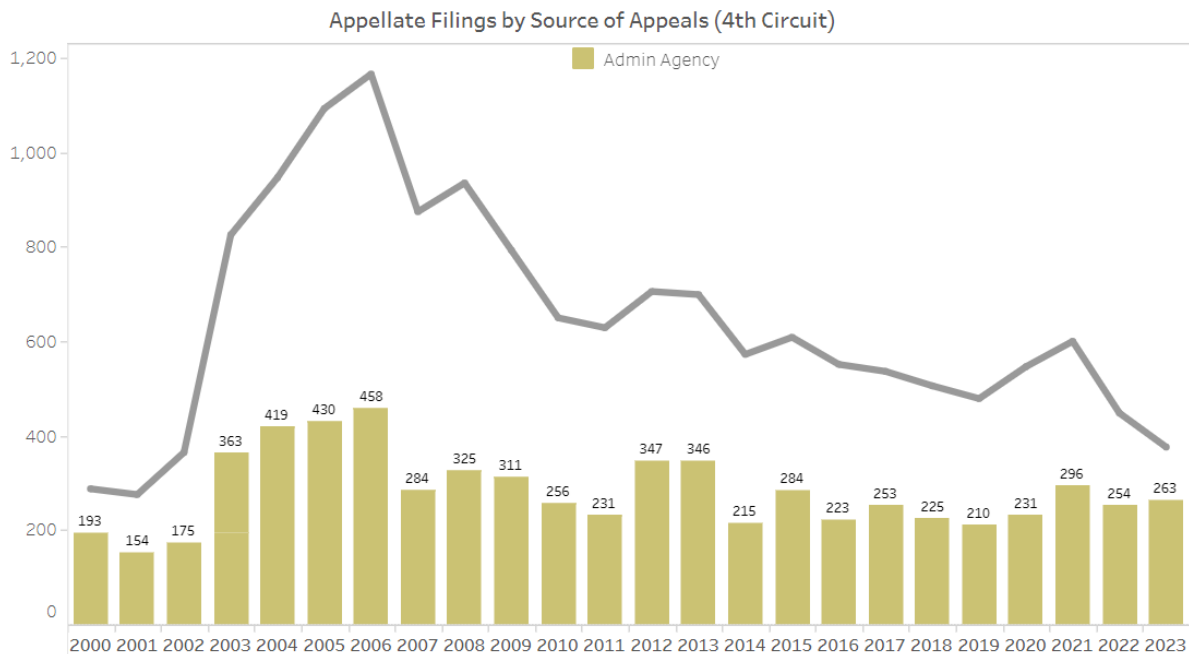
- If the judges do not agree on the disposition of a case submitted by OSC, the case is ordinarily calendared for oral argument. Additionally, at every stage of a panel’s consideration of a proposed disposition, all panel members retain individual authority to direct that a submitted case be calendared for argument; a majority vote of the panel is not required for this purpose. *See* 4th Cir. I.O.P. 34.2.

Cases initially identified for oral argument may be removed from the calendar:

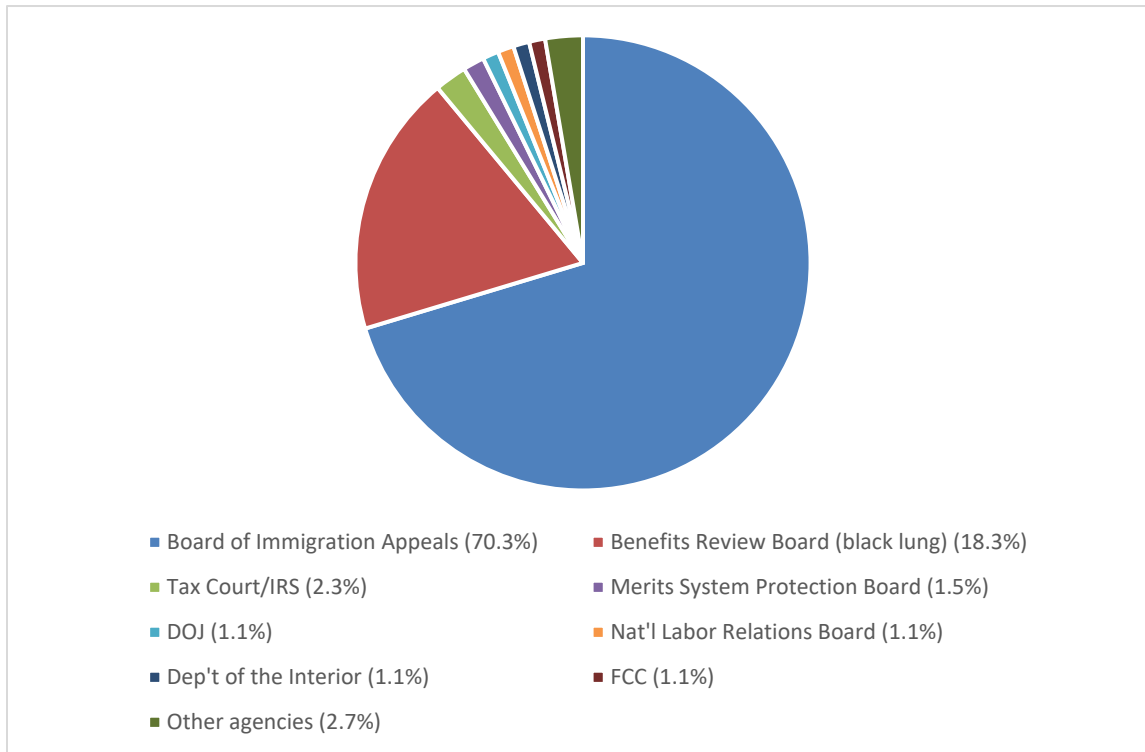
- Any party may file a motion to submit an appeal on the record and briefs without oral argument. If such a motion is granted by a panel, the case is then referred to OSC.
- If, following pre-argument review of the briefs and record, the panel of judges to whom a case has been assigned concludes that oral argument is unnecessary, the case is referred to OSC for a recommendation.

III. AGENCY APPEALS—BY THE NUMBERS

Fourth Circuit agency appeals from June 2000 through June 2023 compared to average national filings.



Fourth Circuit agency appeals from June 2022 through June 2023



IV. TIPS FOR LITIGATING AGENCY APPEALS IN THE FOURTH CIRCUIT

- Do not presuppose specialized knowledge on the part of the judge, law clerk, or staff attorney reading your brief. Instead, be a resource for the Court and clearly explain the facts, issues, and relevant terminology.
- Explain all acronyms and avoid their overuse.

The use of obscure acronyms, sometimes those made up for a particular case, is an aggravating development of the last twenty years. Even with a glossary, a judge finds himself or herself constantly looking back to recall what an acronym means. Perhaps not surprisingly, we never see that in a brief filed by well-skilled appellate specialists. It has been almost a marker, dividing the better lawyers from the rest.

Del. Riverkeeper Network v. FERC, 753 F.3d 1304, 1321 (D.C. Cir. 2014) (Silberman, S.J., concurring).

- If it is customary in your area of expertise to cite directly to an Act as opposed to the corresponding U.S. Code section, be sure to include the U.S. Code section as a parallel cite. For example, immigration practitioners commonly cite directly to the Immigration and Nationality Act (INA) rather than to Title 8 of the U.S. Code. If only the INA citations are provided, judges and law clerks must refer to a conversion table to locate the applicable statute.
- Thoroughly research the statutes and regulations applicable to your agency appeal. For example, petitioners frequently fail to timely petition for review from an adverse decision of the Board of Immigration Appeals before seeking (or while simultaneously seeking) reopening or reconsideration before the Board. The filing of a timely motion to alter or amend judgment under Fed. R. Civ. P. 59 tolls the time period for filing an appeal from *a district court's decision in a civil action*. See Fed. R. App. P. 4(a)(4). In immigration cases, however, the filing of a timely motion to reopen or reconsider does *not* toll the time period for seeking review of a decision of the Board of Immigration Appeals. See 8 U.S.C. § 1252(b)(1); *Stone v. INS*, 514 U.S. 386, 394 (1995).

Although the quote below addresses “reinsurance jargon,” the sentiments expressed by Judge Posner are equally applicable to any area of specialty law:

A note, finally, on advocacy in this court. The lawyers' oral arguments were excellent. But their briefs, although well written and professionally competent, were difficult for us judges to understand because of the density of the reinsurance jargon in them. There is nothing wrong with a specialized vocabulary—for use by specialists. Federal district and circuit judges, however, with the partial exception of the judges of the court of appeals for the Federal Circuit (which is semi-specialized), are generalists. We hear very few cases involving reinsurance, and cannot possibly achieve expertise in reinsurance practices except by the happenstance of having practiced in that area before becoming a judge, as none of us has. Lawyers should understand the judges' limited knowledge of specialized fields and choose their vocabulary accordingly. Every esoteric term used by the reinsurance industry has a counterpart in ordinary English, as we hope this opinion has demonstrated. The able lawyers who briefed and argued this case could have saved us some work and presented their positions more effectively had they done the translations from reinsurancese into everyday English themselves.

Ind. Lumbermens Mut. Ins. Co. v. Reinsurance Results, Inc., 513 F.3d 652, 658 (7th Cir. 2008) (Posner, J.).