



**4TH CIRCUIT COURT OF APPEAL'S
PRO SE HANDBOOK
VOLUME 5: CALENDARING & ARGUMENT**

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E: TextBook.Discrimination@outlook.com
W: www.TextBookDiscrimination.com

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4TH CIRCUIT COURT OF APPEALS'
PRO SE HANDBOOK

VOLUME 5 CALENDARING & ARGUMENT

CHAPTER 1 PRE-ARGUMENT REVIEW & CALENDARING

ITEMS 5.1.01 through 5.1.04

DATE 12/1/2023



5.1.01 | 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).

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5.1.02 | 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.

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5.1.03 | 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 10 days of the date of the notice. Loc. R. 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. 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.

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5.1.04 | 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).

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VOLUME 5 CALENDARING & ARGUMENT

CHAPTER 2 ORAL ARGUMENT

ITEMS 5.2.01 through 5.2.14

DATE 12/1/2023



5.2.01 | RICHMOND SESSIONS

The court sits in Richmond, Virginia from Tuesday-Friday during six separate "court weeks" scheduled between September and June. The court 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.

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5.2.02 | SPECIAL 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.

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5.2.03 | COURTHOUSE SECURITY

All visitors are required to show photo identification before they are directed through screening by Court Security Officers. Prohibited at all times are weapons and potential weapons, including firearms, pocket knives, scissors, letter openers, screw drivers, mace, and pepper spray. Umbrellas must be left at the entrance. Food and beverages may not be brought into the Courthouse or Annex. Storage lockers are not available. Additional time should be allowed to complete security screening.

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5.2.04 | ELECTRONIC DEVICE POLICY

On the days the court is hearing argument, attorneys and their staff may bring electronic devices into the Courthouse or Annex (other than devices that serve only as cameras or recorders). All electronic devices must be turned off in any courtroom or chambers but may be turned on with all sounds muted during oral argument of counsel's case to enable counsel to refer to documents previously downloaded to the device. Wireless Internet access is available for use of personal electronic devices in the library but not in the courtrooms. Electronic devices are prohibited on days the court is not hearing argument. More information may be found in the court's Electronic Device Policy

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5.2.05 | PRE-ARGUMENT REGISTRATION

Attorneys appearing for oral argument must register at least 30 minutes in advance on the morning of argument to learn of panel assignment, courtroom assignment, order of appearance, and allocation of oral argument time.

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5.2.06 | 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. IOP 36.2.

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5.2.07 | ARGUMENT TIME

A digital clock is used to track argument time. The time appears green until only five minutes of argument time remain, at which point it changes to yellow. It changes to red 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. Loc. R. 34(d).

Since the appellant is allowed to open and close the argument, counsel for appellant is asked to allocate their time between opening and rebuttal. Loc. R. 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. Loc. R. 34(d). 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. Loc. R. 34(d). At argument, the panel may reduce or increase the amount of time allotted for oral argument. Loc. R. 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. Loc. R. 34(d). Counsel should not read at length from briefs, records, or authorities. Fed. R. App. P. 34(c).



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5.2.08 | INTERNET AVAILABILITY OF ARGUMENT AUDIO FILES

Audio links to the court's digitally recorded oral arguments are made available on the court's internet site, without charge. 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).

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5.2.09 | INTERVENORS

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

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5.2.10 | **AMICUS**

Amici curiae 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.

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5.2.11 | EXHIBITS

Counsel wishing to use physical exhibits at argument should make prior arrangements in writing with the clerk. Exhibits must be part of the lower court record to be used during argument. The court may request the exhibits be distributed as copies rather than enlarged for presentation in open court. Prior motion and leave of court are required to use physical or electronic exhibits at argument. The motion must 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. Loc. R. 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).

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5.2.12 | 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 begin argument.

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5.2.13 | RECESS

The court may choose to hear the day's cases without a break or may take a brief recess between cases.

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5.2.14 | GREETING

Traditionally, Fourth Circuit judges come down from the bench following argument to shake hands with counsel and thank them for their advocacy.

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APPENDIX



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