

Rule 34. Oral Argument

(a) In General.

- (1) **Party's Statement.** Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.
- (2) **Standards.** Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
 - (A) the appeal is frivolous;
 - (B) the dispositive issue or issues have been authoritatively decided; or
 - (C) 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.

(b) Notice of Argument; Postponement. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(c) Order and Contents of Argument. The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(d) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(e) Nonappearance of a Party. If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

(f) Submission on Briefs. The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

(g) Use of Physical Exhibits at Argument; Removal. Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

Local Rule 34(a). Oral Argument; Pre-argument Review and Summary Disposition of Appeals; Statement Regarding the Need for Oral Argument.

In the interest of docket control and to expedite the final disposition of pending cases, the chief judge may designate a panel or panels to review any pending case at any time before argument for disposition under this rule.

In reviewing pending cases before argument, the panel will utilize the minimum standards set forth in FRAP 34(a)(2). If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument is not to be allowed, they may make any appropriate disposition without oral argument including, but not limited to, affirmance or reversal.

Because any case may be decided without oral argument, all major arguments should be fully developed in the briefs. In furtherance of the disposition of pending cases under this rule, 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(b). Informal Briefs.

Whenever the Court determines pursuant to Local Rule 22(a) that briefing is appropriate on an appeal in a non-capital case from the denial of a writ of habeas corpus or of a motion under 28 U.S.C. § 2255, or whenever any pro se appeal is filed from any other type of judgment or order, the clerk shall notify the appellant that appellant shall file, within 21 days after service of such notice, an informal brief, listing the specific issues and supporting facts and arguments raised on appeal. Appellee is permitted, but not required, to file an informal response brief within 14 days after service of appellant's informal brief, and appellant is permitted, but not required, to file an informal reply brief within 10 days after service of appellee's informal response brief. Appellant's informal brief and any informal response and reply briefs filed by the parties shall be considered, together with the record and other relevant documents, by the panel to which the proceeding has been referred. The Court will limit its review to the issues raised in the informal brief.

The informal brief may be submitted on a form provided by the clerk and shall provide the specific information required by the form. The parties need not limit their briefs solely to the form. An additional supporting memorandum may be attached if a party deems it necessary in order to address adequately the issues raised, but the informal brief and any supporting memorandum shall not exceed the length limitations established by FRAP 32(a)(7). It is unnecessary to attach record excerpts since the record is before the Court. It is not necessary to cite cases in an informal brief. Unless additional copies are requested by the Clerk, only the original informal brief must be filed with the Court and copies served on the other parties to the case.

Once an informal briefing schedule has been established the parties may file a formal brief only with the permission of the Court. The Court initially reviews cases that are informally briefed under its procedures set forth in Local Rule 34(a) pertaining to pre-argument review.

If the panel reviewing an informal brief submitted by an indigent pro se litigant determines that further briefing and possible oral argument would be of assistance, counsel will be appointed and directed to file additional formal briefs. In any appeal that has been informally briefed, the Court may direct that additional briefs be filed prior to oral argument.

Local Rule 34(c). Court Sessions and Notification to Counsel.

The Court sits in Richmond, Virginia, to hear cases during six to eight separate argument weeks scheduled between September and June. The Court also sits at law schools within the Circuit and at other special argument sessions. The Court's oral argument schedule is available on the Court's Internet site, www.ca4.uscourts.gov.

The Court initially hears and decides cases in panels consisting of three judges with the Chief Judge or most senior active judge presiding. Each panel regularly hears oral argument in four cases each day during court week; additional cases are added as required.

Attorneys appearing for oral argument must register with the Clerk's Office on the morning of argument to learn of courtroom assignment, order of appearance, and allocation of oral argument time. Counsel not already a member of the Fourth Circuit bar will be admitted to practice before the Court at that time upon compliance with the provisions of Local Rule 46(b).

The Court generally convenes at 9:30 a.m., with the exception of the last day of the session, when it convenes at 8:30 a.m., and with the exception of en banc oral arguments, which begin at 9:00 a.m. Counsel will receive notification from the Clerk's Office of the starting time for each panel.

Preparation for the argument calendar begins in the Clerk's Office at least two months prior to argument. Upon receiving notice that a case has been tentatively assigned to an argument session, counsel must inform the clerk, within the time provided in the notice, of any conflict or other matter that would affect scheduling of the case for that session. After a case has been scheduled for argument, any motion that would affect the argument date must show good cause for the requested relief and that the relief could not have been requested within the period set by the Court for notice of conflicts. Continuance of an established oral argument date is not granted because of a prior professional commitment. Although a 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.

Local Rule 34(d). Argument Time.

Briefs for the cases assigned to a hearing panel are distributed by the clerk to the judges on a hearing panel at the time the hearing panel assignments are made. The members of the Court hearing oral argument will have read the briefs before the hearing and therefore will be familiar with the case. In oral argument, counsel should emphasize the dispositive issues.

Since the appellant is allowed to open and close the argument, counsel for appellant should indicate at registration before oral argument how much time counsel wants to reserve for rebuttal. It is recommended that no more than two attorneys argue per side. Each side is normally allowed 20 minutes, even in consolidated cases, but counsel may not need the full time allotted or the Court may shorten or extend the time allotted. 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. In black lung cases in which the Director, Office of Workers' Compensation Programs, has been granted leave to file a separate brief, the Director will share argument time with whichever side the Director's brief supports.

If counsel believes that more time is needed for oral argument, a written motion setting forth the reasons for additional time and whether the other parties consent must be submitted well in advance of the hearing date. The Court may sua sponte extend the allotted time during the argument or it may terminate the argument whenever in its judgment further argument is unnecessary.

Local Rule 34(e). Motion to Submit on 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. Such motions are not granted as a matter of course. A motion to submit on briefs should not be used to alleviate a scheduling conflict after the notification of oral argument has been issued.

I.O.P.-34.1. Calendar Assignments and Panel Composition

The Clerk of Court maintains a list of mature cases available for oral argument and on a monthly basis merges those cases with a list of three-judge panels provided by a computer program designed to achieve total random selection.

The composition of each panel usually changes each day during court week except on those occasions where only one panel is sitting in a given geographical location. Every effort is made to assign cases for oral argument to judges who have had previous involvement with the case on appeal through random assignment to a preargument motion or prior appeal in the matter, 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. 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.

-34.2. Disposition Without Oral Argument.

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. 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.

-34.3. Audio Files of Oral Argument.

Audio files of oral arguments are made available on the Court's Internet site, without charge, by the next business day. Counsel are reminded that the following information should not be included in argument to the Court:

(A) Personal data protected by Fed. R. App. P. 25(a)(5):

- (1) social security and taxpayer identification numbers;*
- (2) dates of birth;*
- (3) names of minor children;*
- (4) financial account numbers; and*
- (5) home addresses in criminal cases.*

(B) Criminal case information protected by the Judiciary's Privacy Policy for Electronic Case Files:

- (1) unexecuted summonses or warrants;*
- (2) pretrial bail or presentence investigation reports;*
- (3) statements of reasons in the judgment of conviction;*
- (4) juvenile records;*
- (5) identifying information about jurors or potential jurors;*
- (6) financial affidavits filed under the Criminal Justice Act;*
- (7) ex parte requests to authorize services under the Criminal Justice Act; and*
- (8) sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation, or victim statements).*

Any motion to seal argument must be filed on the public docket at least five days before oral argument, in accordance with Local Rule 25(c)(2). Audio files of sealed arguments will not be released absent an order of the Court unsealing the argument.

Local Rule 34(a) amended December 1, 1995, and December 1, 1998.

Local Rule 34(b) amended December 1, 1995, June 5, 1996, September 25, 1996, December 1, 1998, October 9, 2003, April 1, 2008, and December 1, 2009.

Former I.O.P.-34.1 amended and redesignated Local Rule 34(c) December 1, 1995; amended April 1, 2008, and October 1, 2015.

Former I.O.P.-34.3 amended and redesignated Local Rule 34(d) December 1, 1995; amended December 1, 1998, and June 1, 1999.

Former I.O.P.-34.5 redesignated Local Rule 34(e) December 1, 1995; amended December 1, 1998, December 1, 2002, and December 1, 2009.

Former I.O.P.-34.2 redesignated I.O.P.-34.1 December 1, 1995; amended February 1, 2001.

Former I.O.P.-34.4 amended and redesignated I.O.P.-34.2 December 1, 1995.

Former I.O.P.-34.6 rescinded December 1, 1995.

I.O.P. -34.3 adopted May 2, 2011; amended April 8, 2015.