

Clients & Friends Memo

COVID-19 Update: COVID-19 and the Courts: Part II

How Appellate Court Procedures Are Changing and What May Be Here to Stay

April 15, 2020

Overview

In the second of our series of articles examining emergency procedures in the wake of the COVID-19 pandemic (“pandemic”), we examine the emergency procedures put into place in Federal Appellate Courts and explore which changes may disappear as the pandemic wanes and which are likely to stick around. Most commonly, appellate courts have changed proceedings for oral arguments, either postponing them or allowing them to continue by telephone or video or allowing some cases to be decided on the briefs alone, without oral argument. One court is even canceling oral arguments for *en banc* matters during May, and requesting, instead, attorneys submit written answers to written questions. Many courts have also temporarily suspended the requirement that paper copies be submitted with filings. A full overview is provided below:

Federal Circuit

In its response to the pandemic, the Federal Circuit first acted to restrict public access to the National Courts Building Complex. Pursuant to a March 16, 2020 advisory issued by the court, no members of the public are permitted to attend oral arguments. On scheduled argument and hearing days, only (a) arguing counsel and parties with a scheduled in-person hearing and (b) credentialed members of the press are permitted in the National Courts Building.

In an updated public advisory issued March 18, 2020, the Federal Circuit ordered that all cases scheduled for argument during April 2020 would be conducted via telephonic conference, with no in-person hearings to be held. Prior to the crisis, the Federal Circuit had an established practice of releasing same-day audio of its oral arguments, and continues to release them on its website.

In an order dated March 20, 2020, the Federal Circuit suspended all requirements to provide paper copies of documents submitted electronically filed on or after March 20, 2020. Of note, the order applies only to documents electronically filed on or after the date of the order; paper copies are still

required for documents electronically filed before that date. The order also specified that all existing case deadlines remain in effect.¹

DC Circuit

On March 17, 2020, the DC Circuit suspended all in-person onsite oral arguments pending further order of the court. In addition, each panel will decide whether scheduled arguments would proceed by teleconference, be postponed until a later date, or be decided without oral argument on the briefs.

Though arguments are proceeding with this “new” technology approach, attorneys have reported some hiccups in arguing telephonically; Judge Thomas Griffith reported being dropped from the conference call and locked out of an oral argument for five to six minutes in the DC Circuit.²

The DC Circuit Court of Appeals also offers live audio streaming of oral arguments.³

First Circuit

In response to the COVID-19 pandemic, on March 26, 2020, the First Circuit ordered automatic extensions for all non-emergency filing deadlines due between March 26, 2020 and April 24, 2020 for all cases not presently calendared for oral argument, not having been argued before a panel and not otherwise expedited.

The sitting of the United States Court of Appeals for the First Circuit scheduled for April 6 through April 9, 2020 was cancelled. Further information regarding the cases previously scheduled for argument in that period will be provided by further court order in those cases.

Second Circuit

The Second Circuit ordered, effective March 23, 2020, that oral arguments would be heard by way of teleconference and, further, provided for public access by way of livestreaming the oral

¹ <http://www.ca9c.uscourts.gov/sites/default/files/rules-of-practice/Administrative-Orders/AdministrativeOrder-ModifiedOperations-03202020.pdf>.

² Jacqueline Thomsen, “It’s Kind of a Mess’: Phone Arguments Get Rocky Debut at DC Circuit During COVID-19 Pandemic,” THE NATIONAL LAW JOURNAL (March 20, 2020), <https://www.law.com/nationallawjournal/2020/03/20/its-kind-of-a-mess-phone-arguments-get-rocky-debut-at-dc-circuit-during-covid-19-pandemic/>.

³ [https://www.cadc.uscourts.gov/intranet/home.nsf/Content/Announcement+-+Standing+Order+In+Re+Oral+Arguments+COVID-19/\\$FILE/COVIDStandingOrder.pdf](https://www.cadc.uscourts.gov/intranet/home.nsf/Content/Announcement+-+Standing+Order+In+Re+Oral+Arguments+COVID-19/$FILE/COVIDStandingOrder.pdf).

arguments. In addition, the Second Circuit, like many of its sister circuits, suspended the paper copy requirement for non-*pro se* litigants.

The New York Law Journal reported that the maiden voyage of this technology was not without its hitches. Attorneys and judges sometimes spoke over each other without meaning to without visual cues. Otherwise, Chief Judge Robert A. Katzmann had positive things to say about the new use of technology, stating in an interview, "It isn't perfect, but I think it works pretty well under the circumstances."⁴ (Interestingly, the California Supreme Court may have anticipated such a potential talk-over problem by allocating up to 5 minutes for each side to make uninterrupted opening statements.⁵)

Third Circuit

In the Third Circuit, oral arguments are set to go forward as scheduled, though parties may request to appear by audioconference by filing a motion. Recordings of oral arguments will be made available on the court's website within 24 hours after the argument concludes.

Electronically filed documents received within 3 days of the current deadlines are deemed to be timely without parties having filed a motion unless the parties are specifically advised otherwise.

The court also stated that during this time, the requirement to file hard copies of filings is deferred until further notice.⁶

Fourth Circuit

In a standing order issued March 23, 2020, the Fourth Circuit temporarily suspended the requirement that an oral argument take place before the publication of an opinion. Cases calendared for oral argument in March or April 2020 but not presented at oral argument may be decided by published opinion by unanimous consent of the panel.⁷

⁴ Tom McParland, "'Maiden Voyage' on a Stormy Sea: 2nd Circuit Holds 1st Set of Oral Argument Teleconferences in Face of Coronavirus", NEW YORK LAW JOURNAL (March 19, 2020), <https://www.law.com/newyorklawjournal/2020/03/19/maiden-voyage-on-a-stormy-sea-2nd-circuit-holds-1st-set-of-oral-argument-teleconferences-in-face-of-coronavirus/>.

⁵ Second Standing Order Concerning Oral Argument, Admin. 2020-03-27 (Cal. 2020).

⁶ <https://www.ca3.uscourts.gov/sites/ca3/files/COVID%20Notice.pdf>.

⁷ <http://www.ca4.uscourts.gov/docs/pdfs/noticestandingorder20-01.pdf?sfvrsn=8>.

Cases previously scheduled for argument during the March 17-20, 2020 and April 7, 2020 argument sessions will be heard at a later session, heard by teleconference or videoconference, or submitted on the briefs at the discretion of assigned panels.

The Fourth Circuit, as of March 17, 2020, suspended the requirement of paper copies of formal briefs and appendices pending further notice.⁸

Fifth Circuit

In an order dated March 25, 2020, the Fifth Circuit canceled oral arguments scheduled for April 27-30, 2020.⁹ The court initially cancelled oral arguments scheduled to take place between March 30, 2020 and April 2, 2020 and rescheduled them to take place April 27-30, 2020. The court is working with counsel in those cases for the submission of those cases to three-judge panels.¹⁰

The Fifth Circuit also suspended all requirements to file paper copies until further notice of the court. The Clerk of the Court may direct the parties or counsel to provide paper copies on a case-by-case basis, and at a future date, parties or counsel may be directed to provide paper copies of filings previously submitted electronically. Otherwise, all current deadlines remain in effect.

Although we haven't yet located a general (or case-specific) order from the Fifth Circuit, in an interview with LAW360, Judge Jennifer Elrod provided another unique — at least as best as we can tell — procedural change whereby the Court decided to forgo oral arguments for *en banc* matters during May and, instead, will ask the lawyers to submit answers to written questions.

Sixth Circuit

On March 16, 2020, the Sixth Circuit announced that oral arguments scheduled to take place during March 17-20, 2020 would be postponed. On April 7, 2020, the Sixth Circuit announced that in-person oral arguments have been cancelled for the weeks of April 27 and May 4, 2020. The court will reschedule some arguments to be heard remotely. All remote arguments will be recorded and posted to the court's website on the same day that arguments are held.¹¹

⁸ <http://www.ca4.uscourts.gov/docs/pdfs/publicadvisorycovidoperatingprocedures.pdf?sfvrsn=4>.

⁹ http://www.ca5.uscourts.gov/docs/default-source/default-document-library/general-order-2-covid-19.pdf?sfvrsn=17ffcb2d_0.

¹⁰ http://www.ca5.uscourts.gov/docs/default-source/default-document-library/order-1-clerks-office-covid-19.pdf?sfvrsn=def8cb2d_2.

¹¹ <https://www.ca6.uscourts.gov/sites/ca6/files/2nd%20Web%20Notice-April%207%202020.pdf>.

The requirement that non-prisoner *pro se* litigants file exclusive in-paper format was temporarily suspended, and the suspension is effective until May 30, 2020. Litigants in this category can submit their documents to a dedicated e-mail address.

Seventh Circuit

In a notice dated March 18, 2020, the Seventh Circuit announced that all cases scheduled for oral argument from March 30, 2020 through the end of April 2020 will be argued telephonically by counsel. The courtroom will be closed to the public, but arguments will be recorded and posted on the court's website. The court did not give a timeline for posting arguments. If all parties agree among themselves to waive oral argument, they may jointly file a motion with the court seeking permission to do so.

In an order dated March 31, 2020, the Seventh Circuit suspended the paper copy requirement for all electronically filed briefs, appendices and petitions for rehearing required by F.R.A.P. 30(a)(3), C.R. 31(b) and C.R. 40(b). The order specified that the court may direct the counsel of parties to provide paper copies of filings on a case-by-case basis. The suspension does not apply to any cases currently scheduled for oral argument. Paper copies must still be served on *pro se* litigants.

Eighth Circuit

The Eighth Circuit has restricted access to its courthouse but otherwise remains open for business.¹²

Ninth Circuit

As of March 26, 2020, oral arguments currently scheduled in March, April and May of 2020 are being evaluated one at a time, and individual orders will issue in those cases giving direction to the parties. Panels may exercise their discretion under the rules to submit cases without argument, to postpone argument to a later date, or to hold argument via telephone or video. When argument is held, it will be livestreamed to facilitate public access.

The court will extend filing deadlines as needed. For any case not yet calendared, the Court asked that paper copies of electronically filed briefs or excerpts not be submitted until further order of the court. This suspension does not apply to cases that are already calendared.¹³

¹² <https://ecf.ca8.uscourts.gov/files/coronavirusweb.pdf>.

¹³ <http://cdn.ca9.uscourts.gov/datastore/general/2020/03/16/COVID-19%20Notice.pdf>.

Tenth Circuit

In a general order filed March 16, 2020, the Tenth Circuit closed its courthouse to the public, effective March 17, 2020. Filings are to be made electronically or via mail.

In addition, the order stated that the requirement for parties to submit paper copies of briefs, appendices, and petitions for rehearing *en banc* is temporarily suspended until further notice. However, the paper-copy requirement will be reinstated at a later date. At that time, parties may be required to submit paper copies of briefs, appendices and petitions for rehearing *en banc* filed during the period of suspension.¹⁴

Cases scheduled for argument in April or May of 2020 will be argued telephonically, submitted on the briefs, or be reset for in-person argument at a later date. The court has not made a statement about whether recordings of arguments that take place will be made available online.

Eleventh Circuit

In a general order submitted March 15, 2020, the Eleventh Circuit announced that access to the courthouse would be restricted to judges, court staff, members of the media, and visitors with official business with the court.¹⁵

Parties who have filed their briefs through CM/ECF will temporarily not be required to file paper copies of briefs and appendices should that party file a notice stating that they are unable to comply with the requirement but will do so at a future date to be established by the court.¹⁶

In an order dated March 20, 2020, the Eleventh Circuit authorized panels to hear any and all oral arguments by audio or teleconferencing instead of in person. Where feasible, oral arguments not conducted in the open courtroom but instead are done by audio or teleconferencing will be livestreamed to the public at no cost to anyone who wishes to listen. In any event, recordings of oral arguments will be made available to the public without cost on the court's website after the argument.¹⁷

¹⁴ https://www.ca10.uscourts.gov/sites/default/files/clerk/RestrictionsOnPublicAccess_March162020%20%28002%29.pdf.

¹⁵ <http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/GeneralOrder44.pdf>.

¹⁶ <http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/GeneralOrder44.pdf>.

¹⁷ <http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/GeneralOrder45.pdf>.

What's Ahead

Some appellate courts have been offering live or same-day access to oral arguments since before the crisis hit, and more are signing on to offer increased public access. Access to live or same-day audio is likely to persist, in the name of offering increased public access to court proceedings, even after the pandemic. In contrast, the relaxed requirements for paper filings are likely to be temporary; many appellate courts have explicitly stated that the suspension is temporary, and parties and counsel may be asked to provide paper copies at a later date. Some courts, such as the Federal Circuit, are still actively collecting paper copies of submissions. It remains to be seen whether the option to proceed with oral arguments remotely will last beyond the current crisis. Some courts, such as the Tenth Circuit, have already offered the option of presenting oral arguments by interactive videoconference to reduce the cost of litigation for attorneys and their clients, and this option may continue to be provided by appellate courts in the future.

The Fifth Circuit's use of written questions/answers in lieu of oral argument for *en banc* hearings presents an interesting consideration — not so much whether it will persist as a substitute for hearings once the pandemic subsides, but also whether it might find utilization in conjunction with hearings. Perhaps, then, depending on the Fifth Circuit experience, we may see follow-up interviews with judges and/or attorneys praising the written questions/answers procedure as being efficient, allowing deeper elucidation of issues, etc. or criticizing it as being too rigid or confining, etc. We will monitor and follow up as this practice unfolds.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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