

What's Changing At The Remote Fed. Circ.

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(May 6, 2020, 2:57 PM EDT) - As courts across the country grapple with the COVID-19 pandemic, the U.S. Court of Appeals for the Federal Circuit has streamlined its docket and moved oral arguments from the courtroom to conference calls. Early indications suggest that this is changing how the court decides cases — cases in the past that would have been affirmed without an opinion under Federal Circuit Rule 36 may now be decided by short nonprecedential opinions.

The Federal Circuit, unlike many other courts of appeals, normally allows oral argument in every case in which all parties are represented by counsel. In mid-March, however, the Federal Circuit announced that it would remove some of those cases from the April argument calendar and submit them on the briefs. In the remaining cases, the court would hold oral argument by telephone and livestream those arguments to the public.

In all, 35 of the 54 cases originally scheduled during the court's April session were submitted on the briefs, and oral argument was held in only 19 cases. In at least one of the cases submitted on the briefs, the court issued a few written questions to the parties and asked for letter briefing.

The 54 cases originally scheduled for argument had a similar number of patent and nonpatent cases: 30 (55%) were patent cases (from district courts, the U.S. Patent and Trademark Office, or the International Trade Commission), and 24 (45%) were nonpatent cases (from, for example, the U.S. Court of Appeals for Veterans Claims or the U.S. Court of Federal Claims). And of the 19 cases in which argument actually was held, the patent and nonpatent cases were split about equally — 10 (52%) were patent cases and nine (48%) were nonpatent cases.

Thus, the Federal Circuit submitted on the briefs a roughly equal proportion, approximately two-thirds, of both its patent and nonpatent cases.

Last month, the Federal Circuit conducted its first round of telephonic oral arguments. They proceeded much like the court's in-person arguments. There was no uniform practice of allowing the advocates to speak uninterrupted for the first few minutes of argument or each judge asking all of his or her questions before moving to the next judge, as some other courts have done in their telephonic arguments. Rather, the judges generally acted



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as they did during in-person arguments, with some particularly active questioners jumping in before advocates could complete their first sentence and others asking relatively few questions.

The most notable difference was that few arguments lasted longer than their scheduled duration, likely because an audible chime sounded at the end of each advocate's allotted time. Overall, the new system worked without any noticeable technical difficulties.

The Federal Circuit's cancellation of oral arguments may lead to a concomitant change in its disposition of cases: There may end up being fewer cases in which the court issues an affirmance without an opinion under Federal Circuit Rule 36. Before COVID-19, the court regularly issued so-called Rule 36 affirmances in argued cases. In recent years, nearly half the court's patent cases were decided as Rule 36 affirmances. By contrast, the court issued written opinions in almost all cases submitted without oral argument.

So far, the court's April sitting has produced a lower-than-average number of Rule 36 affirmances. None of the cases where the court canceled argument have been affirmed under Rule 36. Instead, the court has issued relatively short opinions in those cases, many within a few days of when each case was scheduled to be heard.

To date, all those opinions (17 total) have been affirmances, and all but one have been nonprecedential, though the sample size is still relatively small. In cases where the Federal Circuit still held argument, the court has issued just five Rule 36 affirmances — three in patent appeals from the U.S. Patent and Trademark Office, one in a patent appeal from the U.S. International Trade Commission, and one in a nonpatent appeal from the Armed Services Board of Contract Appeals.

One possible explanation for the lower-than-usual rate of Rule 36 affirmances in the Federal Circuit's April sitting is that cases that previously would have been disposed of under Rule 36 instead were submitted on the briefs after the panel prescreened the cases and determined that oral argument was unnecessary. Because the court held no argument in those cases, it appears to have followed its past practice of writing in cases submitted without oral argument and drafted short summary affirmances explaining its reasoning.

As the COVID-19 pandemic continues, the Federal Circuit likely will continue this new system for the foreseeable future. The court appears to be nearly done with its process of screening cases for oral argument or submission on the briefs for its May sitting. Of the 58 cases originally scheduled for argument in May, the court is currently scheduled to hear arguments in 26 of those cases — about 45%, a slightly higher percentage than in April (35%), though the court still could cancel oral argument in additional cases.

Once again, the choice of whether to set a case for argument seems largely independent of patent versus nonpatent cases; for May, the court has canceled argument in a slightly greater proportion of patent cases than in nonpatent cases.

The May sitting has already produced two noteworthy situations.

In one case, *In re: Publicover*, the Federal Circuit initially canceled oral argument, only to reschedule argument after a motion by the appellant. The motion had asked the court to reconsider because the case was part of a push to give young, diverse attorneys the chance to argue at the Federal Circuit.

In another case, *Biogen International GmbH v. Banner Life Sciences LLC*, the Federal Circuit issued its decision on a case submitted on the briefs three weeks before the scheduled May submission date. That case is likely an outlier — it involved the launch of a new drug and the court had granted an earlier request to expedite the appeal while denying an injunction pending appeal.

The Federal Circuit's approach to oral argument in the face of a pandemic seems to be allowing cases to progress toward oral argument at roughly the same pace as before the pandemic — the court has not automatically extended briefing deadlines, and it continues to request notification of scheduling conflicts from the parties shortly after the filing of the joint appendix in each case. Of course, once the pandemic ends, it will remain to be seen whether the court makes any of these changes permanent, such as whether the court will revert back to its pre-COVID-19 practice of holding oral argument in every case where parties are represented by counsel.

Other federal courts of appeals have taken a variety of approaches to scheduling and conducting oral arguments:

- U.S. Court of Appeals for the First Circuit: canceled April sitting, no further announcement yet;
- U.S. Court of Appeals for the Second Circuit: conducting all arguments by telephone or video with live public access;
- U.S. Court of Appeals for the Third Circuit: appears to be conducting all arguments by telephone;
- U.S. Court of Appeals for the Fourth Circuit: submitting on the briefs, conducting arguments remotely with live public access, or delaying arguments;
- U.S. Court of Appeals for the Fifth Circuit: submitting on the briefs, conducting arguments remotely with live public access, or delaying arguments;
- U.S. Court of Appeals for the Sixth Circuit: submitting on the briefs or conducting arguments by telephone or video;
- U.S. Court of Appeals for the Seventh Circuit: conducting all arguments by telephone or video;
- U.S. Court of Appeals for the Eighth Circuit: submitting most cases on the briefs, but conducting limited arguments by telephone with live public access;
- U.S. Court of Appeals for the Ninth Circuit: submitting on the briefs, conducting arguments remotely with live public access, or delaying arguments;
- U.S. Court of Appeals for the Tenth Circuit: submitting on the briefs, conducting arguments remotely, or delaying arguments;
- U.S. Court of Appeals for the Eleventh Circuit: conducting all arguments by telephone or video with live public access; and

- U.S. Court of Appeals for the D.C. Circuit: submitting on the briefs, conducting arguments remotely with live public access, or delaying arguments.
- U.S. Supreme Court: holding arguments by telephone for some of its cases originally scheduled to be argued in March and April, and those arguments also will be livestreamed to the public.

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