

UNITED STATES  
COURT OF APPEALS  
for the  
ELEVENTH CIRCUIT

PROPOSED REVISIONS TO ELEVENTH CIRCUIT RULES  
AND INTERNAL OPERATING PROCEDURES

- FEDERAL RULES OF APPELLATE PROCEDURE
- ELEVENTH CIRCUIT RULES
- *INTERNAL OPERATING PROCEDURES*

December 2016

## **FRAP 29. Brief of an Amicus Curiae**

### **(a) During Initial Consideration of a Case on the Merits.**

- (1) Applicability.** This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.
- (2) When Permitted.** The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.
- (3) Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:
  - (A) the movant's interest; and**
  - (B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.**
- (4) Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:
  - (A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;**
  - (B) a table of contents, with page references;**
  - (C) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;**
  - (D) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;**
  - (E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:**
    - (i) a party's counsel authored the brief in whole or in part;**
    - (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and**



**file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.**

**(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 28, 2010, effective Dec. 1, 2010; Apr. 28, 2016, eff. Dec. 1, 2016.)**

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11th Cir. R. 29-1 Motions for Leave. Motions for leave to file a brief of amicus curiae must comply with FRAP 27 and 11th Cir. R. 27-1, including the requirement of a Certificate of Interested Persons and Corporate Disclosure Statement as described in FRAP 26.1 and the accompanying circuit rules.

11th Cir. R. 29-2 Amicus Brief. In addition to the requirements of FRAP 29(a)(4), an amicus brief must contain items (a), (b), (d), (e), (h), (j), (k), (l), (m) and (n) of 11th Cir. R. 28-1.

11th Cir. R. 29-3 Motion for Leave to File Amicus Brief in Support of Petition for Rehearing En Banc. A request for leave to file an amicus brief in support of a petition for rehearing en banc must be made by motion accompanied by the proposed brief in conformance with 11th Cir. R. 35-5, except that subsections (f) and (k) may be omitted. The proposed amicus brief must not exceed the length limits set out in FRAP 29(b)(4), exclusive of items required by 11th Cir. R. 35-5(a), (b), (c), (d), and (j). The cover must be green. An amicus curiae must file its proposed brief, accompanied by a motion for filing when necessary, no later than ~~10~~seven days after the petition for rehearing en banc being supported is filed. **Unless the court directs otherwise, no response to the motion may be filed.**

11th Cir. R. 29-4 Motion for Leave to File Amicus Brief in Support of Petition for Panel Rehearing. A request for leave to file an amicus brief in support of a petition for panel rehearing must be made by motion accompanied by the proposed brief in conformance with FRAP 29(a)(3) and (a)(4) and the corresponding circuit rules. The proposed amicus brief must not exceed the length limits set out in FRAP 29(b)(4), exclusive of items that do not count towards page limitations as described in 11th Cir. R. 32-4. The cover must be green. An amicus curiae must file its proposed brief, accompanied by a motion for filing when necessary, no later than ~~10~~seven days after the petition for panel rehearing being supported is filed. **Unless the court directs otherwise, no response to the motion may be filed.**

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*I.O.P. -*

1. Citation of Supplemental Authorities. After an amicus brief has been filed, counsel for amicus may direct a letter to the clerk with citations to supplemental authorities. *See* FRAP 28(j). The body of the letter must not exceed 350 words, including footnotes. If a new case is not reported, copies should be appended. When such a letter is filed in paper, four copies must be filed, with service on counsel for the parties and other amicus curiae in the appeal.

2. Length of Amicus Brief in a Cross-Appeal. The maximum length of an amicus brief in a cross-appeal, regardless of the party supported, is one-half the maximum length authorized by FRAP 28.1(e) for an appellant/cross-appellee's principal brief.

Cross-Reference: FRAP 26.1

## **FRAP 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.

(As amended Mar. 10, 1986, eff. July 1, 1986; May 1, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 25, 2005, eff. Dec. 1, 2005.)

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#### 11th Cir. R. 34-1 Sessions.

(a) At least one session of the court shall ordinarily be held each court year in each state of the circuit. Sessions may be scheduled at any location having adequate facilities. The court may assign the hearing of any appeal to another time or place of sitting.

(b) Regular and special sessions of the court may be held at the following places: Atlanta, Jacksonville, Miami, Montgomery, Tallahassee and Tampa.

11th Cir. R. 34-2 Quorum. Unless otherwise directed, a panel of the court shall consist of three judges. When an appeal is assigned to an oral argument panel, at least two judges shall be judges of this court unless such judges cannot sit because recused or disqualified or unless the chief judge certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Any two judges of a panel constitute a quorum. If a judge of a panel that has taken an appeal or matter under submission is not able to participate in a decision, the two remaining judges, whether or not they are both judges of this court, may decide the appeal or may request the chief judge or a delegate of the chief judge to designate another judge to sit in place of the judge unable to participate. No further argument will be had or briefs received unless ordered.

Prior to oral argument, if a judge of an oral argument panel to which an appeal has been assigned determines that he or she cannot sit for reasons other than recusal or disqualification, the two remaining judges, whether or not they are both judges of this court, may hear oral argument. If the third judge is thereafter able to participate as a panel member, the third judge may listen to the oral argument recording and participate in the decision. If the third judge is thereafter not able to participate as a panel member, the two remaining judges may proceed as provided in the paragraph above.

Prior to oral argument, if a judge of an oral argument panel to which an appeal has been assigned determines that he or she cannot sit because recused or disqualified, the two remaining judges, whether or not they are both judges of this court, may: (1) proceed by quorum to hear oral argument and decide the appeal; (2) return the appeal to the clerk for placement on another calendar; or (3) request the chief judge or a delegate of the chief judge to designate another judge to sit in place of the recused or disqualified judge. For purposes of this rule, an appeal is considered assigned to an oral argument panel when the clerk notifies counsel of the specific day of the week on which oral argument in the appeal is scheduled to be heard. Prior to that time, a recusal or disqualification will ordinarily result in the appeal being transferred to another calendar.

Following the issuance of an opinion by a panel of three judges, if a judge of the panel recuses or is disqualified, the two remaining judges, whether or not they are both judges of this court, may proceed by quorum to take such further actions as are deemed appropriate.

## 11th Cir. R. 34-3 Non-Argument Calendar.

(a) The court maintains a two-calendar system for consideration and decision of appeals in the interest of efficient and appropriate use of judicial resources, control of the docket by the court, minimizing unnecessary expenditure of government funds, and lessening delay in decisions.

(b) When a panel of judges of the court unanimously determines, after an examination of the briefs and records, that an appeal of a party falls within one of the three categories of FRAP 34(a)(2):

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been authoritatively determined; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process will not be significantly aided by oral argument; that appeal will be placed on the non-argument calendar for submission and decision without oral argument. If at any time before decision a judge on the non-argument panel concludes that oral argument is desired, that appeal will be transferred to the oral argument calendar. Except as provided in subparagraphs (d) and (f) of this rule, decision without oral argument must be unanimous, and no dissenting or special concurring opinion may be filed.

(c) Any party may request in his or her brief that oral argument be heard, as provided in 11th Cir. R. 28-1(c).

(d) Pursuant to FRAP 34(f), if parties state that they do not desire oral argument or otherwise agree that an appeal shall be submitted on briefs, that appeal may be placed on the non-argument calendar even though it does not fall within one of the requirements of FRAP 34(a). The decision in that appeal need not be unanimous and a dissent or special concurrence may be filed.

(e) Panels of three judges are drawn to serve as non-argument panels to determine whether appeals should be placed on the non-argument calendar and to receive submission of and decide non-argument appeals. In appeals involving multiple parties, a non-argument panel judge may determine that the appeals of fewer than all parties shall be scheduled for oral argument, and that the appeals of the remaining parties shall be submitted to the assigned oral argument panel for decision on the briefs. Or, a non-argument panel may decide the appeals of fewer than all parties without oral argument and may schedule the appeals of the remaining parties for oral argument.

(f) When an appeal is assigned to an oral argument panel, the oral argument panel, whether or not composed of only active judges, may by unanimous vote determine that the appeal will be decided by the panel without oral argument, or transfer the appeal to the non-argument calendar. In appeals involving multiple parties, an oral argument panel may by unanimous vote determine that the appeals of fewer than all parties will be decided by the panel without oral argument, and that the appeals of the remaining parties will be scheduled for oral argument.

11th Cir. R. 34-4 Oral Argument Calendar.

(a) General. All appeals not assigned to the non-argument calendar shall be assigned to the oral argument calendar. Appeals to be orally argued will be calendared by the clerk based upon the court’s calendaring priorities. Counsel for each party scheduled to present oral argument to the court must appear for oral argument unless excused by the court for good cause shown. The oral argument calendar will show the time the court has allotted for each argument.

(b) Waiver or Submission Without Argument. After an appeal has been scheduled for oral argument, argument may only be waived by the court upon motion filed in advance of the date set for hearing. If counsel for parties agree to submit the appeal on briefs, that appeal will be governed by FRAP 34(f).

(c) Failure to Appear for Oral Argument. If counsel for appellant fails to appear in an appeal from criminal conviction, the court will not hear argument from the United States; in all other appeals, the court may hear argument from counsel present.

(d) Number of Counsel to Be Heard. Only two counsel will be heard for each party whose appeal is scheduled to be argued, and the time allowed may be apportioned between counsel at their discretion.

(e) Expediting Appeals. The court may, on its own motion or for good cause shown on motion of a party, advance an appeal for hearing and prescribe an abbreviated briefing schedule.

(f) Continuance of Hearing. After an appeal has been set for hearing it may not be continued by stipulation of the parties or their counsel but only by an order of the court on good cause shown. Usually the engagement of counsel in other courts will not be considered good cause.

(g) Recording Oral Arguments. With advance approval of the court, counsel may arrange and pay for a qualified court reporter to be present to record and transcribe the oral argument for counsel’s personal use. When counsel has received such approval, counsel must provide the court with a copy of the transcript without delay and at no expense to the court. Except as otherwise provided in this rule, recording of court proceedings by anyone other than the court is prohibited. Also see I.O.P. 16, CD Recordings of Oral Arguments **and I.O.P. 17, Posting of Oral Argument Recordings on the Website**, following this rule.

(h) Citation of Supplemental Authorities During Oral Argument. If counsel intend to cite supplemental authorities during oral argument that were not provided to the court and opposing counsel prior to the day of oral argument, counsel must bring to oral argument a sufficient number of paper copies of the opinion(s) or other authorities being cited to permit distribution to panel members and opposing counsel.

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*I.O.P. -*

*1. Non-Argument Calendar. When the last brief is filed an appeal is sent to the office of staff attorney for classification. If the staff attorney is of the opinion that the appeal of a party does not*

warrant oral argument, a brief memorandum is prepared and the appeal is returned to the clerk for routing to one of the court's active judges, selected in rotation. In appeals involving multiple parties, the staff attorney may recommend that appeals of fewer than all parties be decided without oral argument but that the appeals of the remaining parties be scheduled for oral argument. If the judge to whom an appeal is directed for such consideration agrees that the appeal of a party does not warrant oral argument, that judge forwards the briefs, together with a proposed opinion, to the two other judges on the non-argument panel. If a party requests oral argument, all panel judges must concur not only that the appeal of that party does not warrant oral argument, but also in the panel opinion as a proper disposition without any special concurrence or dissent. If a party does not request oral argument, all panel judges must concur that the appeal of that party does not warrant oral argument.

In other appeals, when oral argument is requested by a party and the staff attorney is of the opinion that oral argument should be heard, the staff attorney may recommend that an appeal be assigned to the oral argument calendar, subject to later review by the assigned oral argument panel.

If a determination is made that oral argument should be heard, the appeal is placed on the next appropriate calendar, consistent with the court's calendaring priorities. At that time a determination is made of the oral argument time to be allotted to each side.

The assignment of an appeal to the non-argument calendar does not mean that it is considered to be an appeal of less importance than an orally argued appeal.

## 2. Oral Argument.

a. Court Year Schedule - A proposed court schedule for an entire year is prepared by the circuit executive in collaboration with the clerk's office, and then approved by the scheduling committee of the court which consists of active judges. The court schedule does not consider what specific appeals are to be heard, but only sets the weeks of court in relation to the probable volume of appeals and judgeship availability for the year.

b. Separation of Assignment of Judges and Calendaring of Appeals - To insure complete objectivity in the assignment of judges and the calendaring of appeals, the two functions of judge assignment to panels and calendaring of appeals are intentionally separated. The circuit executive and the scheduling committee take into account a fixed number of weeks for each active judge and the available sittings from the court's senior judges, visiting circuit judges, and district judges. After this determination, names of the active judges for the sessions of the court are drawn by lot from a matrix for the entire court year.

This schedule is available only to judges and the circuit executive for their advance planning, not to the clerk. The clerk is not furnished with names of the panel members for any session until after the court calendars of appeals have been prepared and approved as described below.

## 3. Preparation and Issuing of Calendars.

a. General - The clerk's office prepares oral argument calendars approximately one month in advance of oral argument.

b. Calendaring by Case Type - The clerk attempts to balance the calendars by dividing the appeals scheduled for oral argument among the panels by case type so that each panel for a particular week has an equitable number of different types of litigation for consideration.

c. Non-Preference Appeals - Appeals are calendared for hearing in accordance with the court's "first-in first-out" rule. Absent special priority, those appeals which are oldest in point of time of availability of briefs are calendared first for hearing, insofar as practicable with other requirements of the docket.

d. Number of Appeals Assigned - Ordinarily the court hears argument Tuesday through Friday. A regular oral argument session consists of up to 22 appeals with up to 6 appeals scheduled per day.

e. Advance Notice - Counsel are provided the maximum advance notice of scheduling for oral argument practicable. Ordinarily counsel will receive notice of oral argument at least three weeks in advance. Counsel are expected to make all reasonable efforts to adjust conflicts in their schedule which will permit them to attend oral argument as scheduled. Motions for continuance are disfavored in recognition of the difficulty in scheduling panels and the commitment of the court to dispose of appeals as promptly as possible and of the fact that there is no backlog of appeals awaiting oral argument.

4. Location of Court Sessions - Convenience of Counsel. Appeals to be assigned to oral argument sessions are, if possible, selected from the area where the session is to be held.

5. Forwarding Briefs to Judges. Immediately after issuance of the calendar and receipt by the clerk of names of the panel members, the clerk forwards to panel members copies of the briefs for the appeals set on the calendar.

6. Pre-Argument Preparation. The judges read the briefs prior to oral argument.

7. Identity of Panel. The clerk's office may disclose the names of the panel members for a particular session two weeks in advance of the session, or earlier as determined by the court. At the time the clerk issues a calendar assigning an appeal to a specific day of oral argument, the clerk will advise counsel of when the clerk's office may be contacted to learn the identity of the panel members.

8. Checking In with Clerk's Office. On the day of hearing counsel should check in with the clerk's office at least 30 minutes in advance of the convening of court to advise the courtroom deputy of the name of the attorney or attorneys who will present argument for each party and how the argument time will be divided between opening and rebuttal. Timely check-in is necessary so that the clerk can inform the panel of the names of attorneys presenting argument and their time division.

9. Submission Without Argument. When an appeal is placed on the oral argument calendar, a judge of the court has determined that oral argument would be helpful in that particular appeal. Therefore, requests by the parties to waive oral argument are not looked upon with favor, and counsel may be excused only by the court for good cause shown. Attorneys appointed by the court

under the Criminal Justice Act must personally appear for oral argument unless excused by the court for good cause shown.

10. Time for Oral Argument. The time for oral argument will be indicated on the calendar. The time specified is per side. In the event that more than one attorney will present oral argument per side, arrangements among counsel regarding the division of time and the order of presentation should be made before counsel check in with the clerk's office.

11. Additional Time for Oral Argument. Additional time for oral argument is sparingly permitted. Requests for additional time for oral argument should be set forth in a motion to the clerk filed well in advance of the oral argument.

12. Calling the Calendar. Usually the court hears the appeals in the order in which they appear on the calendar, and will not call the calendar unless there are some special problems requiring attention. All counsel, however, must be present at the beginning of the court session for the day.

13. Presenting Argument. Counsel should prepare oral arguments with the knowledge that the judges have already studied the briefs. Reading from briefs, decisions or the record is not permitted except in unusual circumstances. Counsel should be prepared to answer questions by the court. The essay Twenty Pages and Twenty Minutes Revisited by Judge John C. Godbold is available from the clerk on request.

14. Timer and Lighting Signal Procedure. The courtroom deputy will monitor time and use lighting signals. In Atlanta, Miami, and Montgomery, and sometimes in other locations where court is held, an easily readable timer visible both to counsel and the court is also used.

a. Appellant's Argument - A green light signals the beginning of the opening argument of appellant. Two minutes prior to expiration of the time allowed for opening argument, the green light goes off and a yellow light comes on. When the time reserved for opening has expired, the yellow light goes off and a red light comes on.

b. Appellee's Argument - The same procedure as outlined above for appellant is used.

c. Appellant's Rebuttal - A green light signals commencement of time; a red light comes on when the time expires. No yellow caution light is displayed for this argument.

15. Appeals Conference and Designation of Writing Judge. At the conclusion of each day's arguments the panel usually has a conference on the appeals heard that day. A tentative decision is usually reached, a tentative determination is made as to the kind of opinion necessary and the presiding judge, when in the majority, makes opinion writing assignments. Judges do not specialize. Writing assignments are made so as to equalize the workload of the entire session.

16. CD Recordings of Oral Arguments. ~~Oral argument is recorded for the use of the court. Although the court is not in the court reporting or audio recording business, e~~ Copies of the court's audio recordings of oral arguments are available for purchase on CD upon payment of the fee prescribed by the Judicial Conference of the United States in the Court of Appeals Miscellaneous Fee Schedule issued pursuant to 28 U.S.C. § 1913, payable to Clerk, U.S. Court of Appeals,

*Eleventh Circuit. CD recordings of oral arguments are available for oral arguments held after August 1, 2012. The court makes no representations about the quality of the CD recordings or about how quickly they will become available. **CD recordings of sealed oral arguments will not be released absent an order of the court. Any motion to seal argument must be filed at least five days before oral argument, unless the court extends that period upon a showing of good cause.** Oral argument recordings are retained for a limited time by the court for its use and then the recordings are destroyed.*

**17. Posting of Oral Argument Recordings on the Website. Recordings of oral arguments held after April 1, 2017 are available on this court's website. Recordings are posted as soon as practicable after the date of argument. The court makes no representations about the quality of the posted recordings. Recordings of sealed oral arguments will not be released absent an order of the court. Any motion to seal argument must be filed at least five days before oral argument, unless the court extends that period upon a showing of good cause.**

Cross-Reference: FRAP 45; 28 U.S.C. §§ 46, 48