NEW YORK COUNTY LAWYERS' ASSOCIATION

Committee on Federal Courts
Thomas V. Marino, Chair
Dunnington Bartholow & Miller LLP
477 Madison Avenue, 12th Fl
New York NY 10022
Tel: (212) 682-8811
tmarino@dunnington. *com*

September 26, 2007

Catherine O'Hagan Wolfe, Esq.
Clerk of Court
United States Court of Appeals
40 Foley Square
New York, NY 10007

Re: Comments onInterim (andProposed) Local Rule 34

Dear Ms. Wolfe:

This constitutes the comments of the Committee on the Federal Courts (the "Committee") of the New York County Lawyers' Association on Interim Local Rule 34, the new interim and proposed rule of the United States Court of Appeals for the Second Circuit (the "Court"), which new rule essentially places the burden on attorneys to affirmatively request oral argument when it is desired. For the reasons set forth below, the Committee endorses Interim Local Rule 34, and the changes embodied therein, with a caution that the Committee continues to value the Court's tradition to hear oral argument in the vast majority of cases on the general calendar, and with the trust that the Court will continue to honor that tradition where oral argument is desired.

On August 27, 2007, the Court ordered that its Local Rules be amended on an interim basis effective immediately by the adoption of Interim Local Rule 34, as replacement for the current Local Rule 34 (both governing oral argument). By the order, the Court proposed furthermore to adopt Interim Local Rule 34 on a permanent basis, following publication for notice and comment, with comments to be submitted by September 27, 2007.

The Committee appointed a subcommittee to review Interim Local Rule 34. This letter reflects the subcommittee's comments, as approved in substance by the Committee at its meeting on September 24, 2007.

Interim Local Rule 34 changes the title of the rule from "Oral Argument" to "Oral Argument and Submission on Briefs." The essence of what is new in Interim Local Rule 34 is found in new subsection (a), which reads as follows:

(a) Party's Statement and Submission on Briefs

(1) Request for Oral Argument, An opportunity for oral argument will be provided only upon request made pursuant to this subsection (a). This subsection (a) does not apply to appeals placed on the Non-Argument Calendar pursuant to Interim Local Rule 0.29.

(2) Counseled Appeals. For an appeal in which all parties are represented by counsel: counsel for all parties must confer (by any convenient means) and must file, within 14 days after the due date of the last brief, a joint statement indicating whether the parties-specifying which, if fewer than all-seek oral argument, or whether the parties agree to submit the case for decision on the briefs. Unless the Court directs otherwise, failure to timely file the joint statement will result in submission of the case for decision on the briefs.

(3) Pro Se Appeals. For an appeal in which at least one party appears pro se: after the due date of the last brief, the Clerk of Court will mail to each party a questionnaire asking whether the party would like to have the case decided on the briefs, or whether the party seeks oral argument. All parties must return the questionnaire within 14 days of its date. Failure by a party to timely return the questionnaire will be deemed to mean that the party does not seek oral argument.

Interim Local Rule 34 also deletes a provision of the former rule, subsection (d)(2),

requiring incarcerated pro se appellants requesting oral argument to state the reasons for hearing oral argument at the time they file their briefs. Otherwise, Interim Local Rule 34 preserves the substance of the former rule, and changes the order of the former rule's subsections.

The essential change effected by Interim Local Rule 34 is that it places the burden on attorneys to affirmatively request oral argument where it is desired. Interim Local Rule 34 mandates that, when all parties are represented by counsel, counsel must confer and then file (within 14 days of the due date of the last brief) a joint statement indicating whether the parties (and which if not all) request oral argument. Failure to file this joint statement results in submission on the briefs (unless the Court orders otherwise). When at least one party is pro se, the parties are prompted to provide such a statement after the due date of the last brief, with the Court mailing to each party a questionnaire requiring a response within 14 days thereof. The balance of Interim Local Rule 34, concerning the criteria under which the Court may decline to hear argument and other ancillary oral argument procedures, remains the same. The rule does not apply to appeals placed on the Non-Argument Calendar pursuant to Interim Local Rule 0.29, which limits oral argument in asylum appeals.

Subsection (b) of Interim Local Rule 34 (essentially what was previously subsection (d) of the former rule), provides that subject to subsection (a), "oral argument will be allowed in all cases except those in which a panel of three judges, after examination of the briefs and record, shall be of the unanimous view that oral argument is not needed for one of the following reasons: (1) the appeal is frivolous; (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) 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." Pursuant to this subsection, if the Court contemplates deciding an appeal without hearing oral argument, each of the parties is given an opportunity to file a statement setting forth reasons for hearing oral argument.

Interim Local Rule 34 was likely prompted by, and we are mindful of, the tremendous pressure exerted upon the Court due to the volume of cases (in large part due to the number of immigration appeals, as already recognized by Interim Rule 0.29, limiting oral argument in asylum appeals). The Committee believes that the decision to require attorneys (or pro se parties) in all cases where they desire oral argument to request argument will have the salutary effect of eliminating oral argument in most of the cases in which the parties do not desire it or think it necessary, thereby reducing the weight of the docket.

The Committee further believes that the mechanism to request argument set forth in

Interim Local Rule 34 is fair and reasonable, particularly given that it provides the parties a cushion of two weeks after the last brief is due to make the request for oral argument. This two-week period allows the parties ample time to review and reflect upon the full set of briefs, and to determine whether oral argument would be beneficial for the Court.

The Committee also finds encouraging that Interim Local Rule 34 seems to contemplate that the Court might order oral argument in the appropriate case, even if the parties do not request it. Specifically, the rule provides that the failure to timely file the joint statement will result in submission of the case for decision on the briefs, "[u]nless the Court directs otherwise" (Interim Local Rule 34(a)(2)). We can contemplate, for example, cases where the Court identifies issues that the parties might have overlooked. This would serve to ease the Court's burden while affording the parties the full and fair opportunity to address all of the issues that the Court deems essential.

The Committee notes that the joint statement required by Interim Local Rule 34 for requesting oral argument obliges the parties to specify which, if fewer than all, of the parties seeks oral argument (Interim Local Rule 34(a)(2)). The Committee also notes that the questionnaire for parties in an appeal in which at least one party appears pro se also would reveal which of the parties requests oral argument *(Id.* 34(a)(3)). The filing of the joint statement or the questionnaire results in oral argument being allowed (under the combination of subsections (a) and (b)), unless a unanimous panel makes the determination that oral argument is not needed (under the criteria of subsection (b) (previously subsection (d))). The Committee presumes that the revelation that some, or of which, of the parties did or did not seek oral argument will not be a factor in determining whether oral argument should be allowed, as subsection (b) provides that such determination is made by a unanimous panel "after examination of the briefs and record." Thus, while this subsection sets forth the materials that the panel must examine prior to determining not to hear oral argument, the subsection does not enumerate the joint statement or the questionnaire among those materials for the panel to examine prior to making the determination not to hear oral argument.

There is also a concern that, notwithstanding an obligation to be familiar with the rules, because the rule is new, parties expecting oral argument might inadvertently overlook requesting oral argument. However, subsection (a)(2) of the rule - requiring submission on the briefs "[u]nless the Court directs otherwise" - seems to allow the Court to remedy such oversight. This provision leaves room for the Court to consider late requests for argument, which might be especially appropriate during the transition period following implementation of Interim Local Rule 34. It would seem prudent for the Court's administration to point out, as part of the instructions to parties to an appeal, the new aspects of Interim Local Rule 34

and include the substance of the new rule.

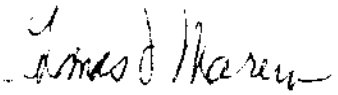
Finally, this Court's tradition of hearing argument on all cases is greatly appreciated by the bar and considered to be a venerable feature of the Court. Even though former Local Rule 34, since 1994, enumerated criteria according to which the Court may decline to hear cases, the perception of the Committee is that the Court rarely, if ever, has done so. As recently as earlier this year, Chief Judge Jacobs reiterated to this Committee the Court's commitment to hearing oral argument whenever possible.

Oral argument provides a tangible forum for parties to engage the Court, and for clients to see their counselors make their case and observe our judges carefully considering their rights. In addition, given the large body of important jurisprudence emanating from this Court, the opportunity for argument to contribute to the decision-making process is vital, even if sometimes superfluous.

In short, the Committee endorses Interim Local Rule 34 as a reasonable measure to ease the burden of the Court's docket, with the hope that the Court will retain its tradition of allowing oral argument in the vast majority of cases on the general calendar, or, as Interim Local Rule 34 is now structured, cases on the general calendar where the parties so desire and have requested oral argument.

Thank you for your kind consideration of these comments.

Respectfully submitted,



Thomas V. Marino, Chair
Federal Courts Committee

Subcommittee:
Richard S. Ciacci, Esq., Chair,
Brian D. Graifman, Esq.