

Two Appellate Arguments on the Same Day

By Jeffrey Sarles

Earlier this year I argued two cases on the same morning in the U.S. Court of Appeals for the Seventh Circuit. This was the third consecutive year I've had two arguments on the same day before the same panel in a federal court of appeals. Two of those pairings were in the Seventh Circuit, and one was in the Federal Circuit. From what I can tell, this is quite an unusual happenstance.

For the benefit of those who may find themselves in similar straits, I thought I'd explain how this came to be and offer a few suggestions for how to deal with such unfortunate scheduling.

The Seventh Circuit cases were scheduled together coincidentally, resulting from briefing schedules on parallel paths. The first "twofer" involved completely unrelated cases, one a challenge to class certification and the other a challenge to a labor-arbitration award. The next Seventh Circuit pairing also involved completely unrelated cases, one involving a post-bankruptcy trustee's standing and the other the propriety-of-a-jury verdict.

The Federal Circuit cases at least had some relation. Although these patent-infringement appeals involved different patents and arose from different district-court proceedings, the parties were the same and the issues were similar, which undoubtedly explains why the court scheduled the arguments for the same day.

I won both Seventh Circuit cases the first time this happened and split the two Federal Circuit cases. The score remains to be determined the third time around. In any event, I don't think any of the

outcomes can be attributed to the unusual scheduling.

The first time I was notified that I had two same-day arguments, I moved to postpone one of them. The Seventh Circuit denied the motion on the ground that two arguments in one morning is not the kind of "extraordinary circumstance" that would justify a rescheduling. I can't disagree with that ruling. After all, the Seventh Circuit panels hear six cases in one day, so a lawyer should be able to argue two.

In truth, my primary concern was that my clients would be upset that I wasn't devoting 100 percent of my attention to their respective cases. But as it happened, each took the news gracefully.

Nevertheless, I would recommend trying to avoid double-argument days if possible. As any appellate advocate knows, one oral argument is stressful enough. So after the first two experiences, I vowed, if I had two appeals on parallel briefing paths, to file an appropriate motion *before* the arguments got scheduled. In my two recent Seventh Circuit appeals, I planned to file such a motion as soon as the reply briefs were filed. But the Seventh Circuit foiled me again by scheduling the two arguments before the reply briefs were filed.

How does one prepare for two arguments in one day? Alternating preparation days certainly helps, at least until the issues are clearly crystallized. But I would say the key is to have the piles of paper devoted to each case sufficiently separated on your desktop to avoid intermingling.

Once you're in front of the bench, you must take care not to raise points and

cite cases in one case that actually belong to the other case. That was particularly challenging in the Federal Circuit cases, where we were asking the court to hold patents valid and infringed in one case and invalid and noninfringed in the other. A touch of schizophrenia may be helpful in such circumstances. Similarly, asking for a deferential standard of review in one case and *de novo* in the next case may require a bit of fancy footwork. But any parent who has ever allowed one child to stay up and told the other to go to bed should have no trouble shifting the standard of review.

One way to prepare for two arguments on the same day before the same panel is to schedule successive moots on the same day before the same panel of moot court judges. That not only will give you an opportunity to practice your two-step, but you'll be able to see whether your approach confuses the judges and, if so, do some follow-up planning to prevent that from happening at the real show.

In sum, facing two appellate arguments on the same day may not be at the top of one's to-be-desired list, but if it does happen, it might as well be embraced as one of those unfortunate experiences that enriches one's life. Lawyers are often called on to multitask, and we certainly don't want it said of us (as was said of a former public figure) that we can't walk and chew gum at the same time. In fact, maybe next time I'll ask for three arguments on the same day. ■

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