Staff-Attorneys in Non-argument Cases in the Different Circuit Courts, Part-1

Non-argument tracks have become one of the most widely used tools for managing case loads before courts, and one of the most controversial. Their use is usually defended upon the grounds that fewer oral arguments provides judges the time to deliberate on more difficult cases, thus minimizing the costs to the parties.

In his work “Improving the Appellate Process Worldwide Through Maximizing Judicial Resources” 38 VAND. J. TRANSNAT’L L. 187, 192 (2005), Judge Wallace says:

“The amount of time saved by foregoing oral argument is significant, and it affords the court that much more time to allocate to more difficult cases. Dispensing with unnecessary oral argument also enables the parties to avoid the substantial costs associated with having their attorneys prepare presentations and attend the hearing. Incurring these expenses is a waste if further efforts to persuade the court would be futile.”

And the really critical part of this opinion is "if further efforts to persuade the court would be futile." The use of non-argument tracks has been controversial exactly on this point because grievances remain that cases that warrant oral argument are not being heard. In fact, on the same point Minnesota Supreme Court Justice David Stras and Shaun Pettigrew hold that "the curtailment of oral arguments in the courts of appeals has gone so far that even cases that would benefit from oral argument are decided solely on the briefs with the assistance of staff attorneys and law clerks.”(David R. Stras & Shaun M. Pettigrew, The Rising Caseload in the Fourth Circuit: A Statistical and Institutional Analysis, 61 S.C.L. REV. 421, 2010)

Non-argument tracks increase the dependence of the courts on court staff including staff attorneys. In a majority of cases which follow the non-argument track, the staff attorneys need to prepare a memorandum and draft a disposition. However, the degree to which staff attorneys prepare cases and the manner in which the judges review the work of the staff attorney varies greatly from one circuit to another.

In the D.C. Circuit, the convention is that the staff attorney would create and draft a proposed disposition (a de facto order which is not officially published) and submit the same to the court along with an explanatory memorandum. A three-panel judge discusses the case-related questions and can address the questions to the concerned staff attorney who needs to be present, along with his supervisor. Then the judges decide whether to accept the recommendation of the staff attorney or to send the case back for oral arguments. However this process happens only with cases that are considered to have sufficient merit to deserve such attention. The fate for the remainder of the cases is not so kind.

Non-argument cases that are deemed to be frivolous are handled by a rapid response program where a staff attorney prepares the memorandum (a brief abstract) and a proposed judgment to be approved and passed by the court. Cases are decided in batches of ten to twenty at a time then sent up to the chief judge. If the chief judge approves the proposed dispositions then the memoranda are forwarded to two members of the motions panel. Then the judges can decide whether a case should be placed on the argument calendar or not. A party notified of a case moving to the non-argument track has only ten days to file a motion for reconsideration of the decision. If the party does not object or fail to file a petition for reconsideration the
proposed judgment of the staff attorney becomes final with suitable modifications by the court.

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