

## Argued Vs. Submitted Cases At 9th Circ. During Pandemic

By **Blaine Evanson, Taylor King, Jessica Hudak and Monica Paladini**

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The COVID-19 outbreak has placed significant pressure on courts and resulted in a surge of courts submitting cases on the briefs without oral argument.

In response to COVID-19, the U.S. Court of Appeals for the Ninth Circuit recently took the unusual step of canceling en banc oral arguments for the months of March, April and May. The court also announced that its panel hearings would be rescheduled, submitted on the briefs (without oral arguments), or argued remotely via teleconference or video.

Since the Ninth Circuit's March notice, the percentage of cases submitted on the briefs without oral argument has increased from about 43% of the cases on the court's calendar in January, February and the first half of March to about 69% of cases in the second half of March and April. As illustrated below, this increase in the number of cases submitted on the briefs has affected all aspects of the court's docket, but the effect on the court's civil cases has been particularly notable.[1]

### **The Ninth Circuit's General Standards and Rules for Argued and Submitted Cases**

The Ninth Circuit follows Federal Rule of Appellate Procedure, or FRAP, 34, which allows oral argument in all cases unless a panel of three judges agrees that oral argument is unnecessary because (1) the appeal is frivolous, (2) the dispositive issues have been authoritatively decided, or (3) the facts and legal arguments are adequately presented in the briefs and the record such that the panel's decision would not be significantly aided by oral argument.



Blaine Evanson



Taylor King



Jessica Hudak

The Ninth Circuit’s case management attorneys review the court’s docket and assign a numerical weight to each case based on the type of case, the issues presented, and the difficulty or complexity of those issues. Cases that are eligible for submission without oral argument under FRAP 34 and for which the result is deemed clear and the applicable law is established may be decided by an oral or written screening panel.



Monica Paladini

The court schedules the remaining cases on its calendar and assigns a three-judge panel. The three-judge panel chooses whether to decide the case after holding oral argument or to decide the case on the briefs if FRAP 34 is satisfied and the judges do not think oral argument will enhance their review and decision-making. The Ninth Circuit’s Appellate Practice Guide explains that the court holds oral argument in less than one quarter of the appeals filed.

### **The Ninth Circuit’s Published Response to COVID-19**

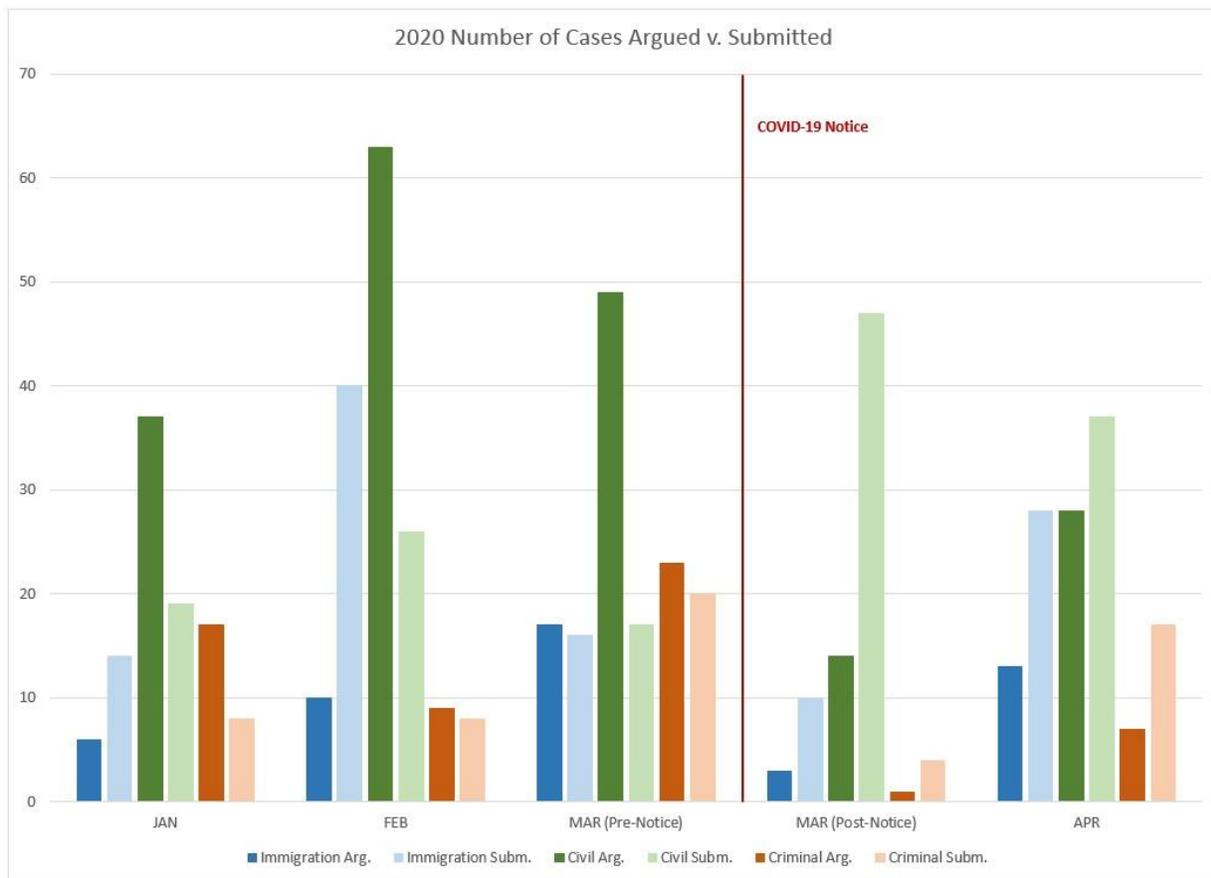
On March 6, in response to the spread of COVID-19, the Ninth Circuit announced that it was postponing all en banc oral arguments scheduled for the week of March 9. The three-judge panels assigned to cases scheduled for the week of March 9 decided on a case-by-case basis whether to hold oral arguments or submit the cases on the briefs. In cases where the court held oral argument, the court permitted counsel to seek leave to appear remotely.

On March 16, the Ninth Circuit issued a notice extending this policy to all “[a]rguments currently scheduled in March, April, and May 2020.”[2] The notice, updated on March 26, provided that each three-judge panel may “exercise their discretion under the rules to submit cases without argument; to postpone argument to a later date; or to hold argument via telephone or video.”

Interestingly, the Ninth Circuit’s recent announcements addressing oral arguments have not changed the standard by which its panels determine whether to hear oral argument in a case; the same rule set forth in FRAP 34 applies. The court also has not identified any specific change in its procedure for analyzing which cases it will decide on the briefs without oral argument. Yet the court’s change in approach to oral argument since the COVID-19 notice, as demonstrated below, is striking.

### **Comparison of Pre- and Post-Notice Percentages of Submitted Cases**

A review of the cases on the court’s calendar between January and April reveals a dramatic increase in submitted cases following the court’s COVID-19 notice. The court’s civil, criminal and immigration docket — which accounts for a significant majority of its calendared cases assigned to three-judge panels — experienced the most dramatic changes after the COVID-19 notice, as shown in the graph and tables below.



In 2020 before the court’s notice, on average, the court submitted calendared civil cases on the briefs about 30% of the time. This increased dramatically to, on average, the court submitting 67% of the civil cases on its calendar since the court’s COVID-19 notice.[3]

The percentage of criminal cases submitted on the briefs increased from about 42% pre-notice to almost 76% post-notice. Immigration cases remained relatively stable — increasing from an average of 66% to about 73%. This relative stability may be due, at least in part, to the court’s practice of always hearing argument for pro bono cases.

		Jan 2020	Feb 2020	Mar 2020 (Pre-Notice)	Mar 2020 (Post-Notice)	Apr 2020
<b>Civil</b>	<b>Arg.</b>	66%	71%	74%	23%	43%
	<b>Subm.</b>	34%	29%	26%	77%	57%
<b>Criminal</b>	<b>Arg.</b>	68%	53%	53%	20%	29%
	<b>Subm.</b>	32%	47%	47%	80%	71%
<b>Immigration</b>	<b>Arg.</b>	30%	20%	52%	23%	32%
	<b>Subm.</b>	70%	80%	48%	77%	68%

		Jan 2020	Feb 2020	Mar 2020 (Pre-Notice)	Mar 2020 (Post-Notice)	Apr 2020
<b>Civil</b>	<b>Arg.</b>	37	63	49	14	28
	<b>Subm.</b>	19	26	17	47	37
<b>Criminal</b>	<b>Arg.</b>	17	9	23	1	7
	<b>Subm.</b>	8	8	20	4	17
<b>Immigration</b>	<b>Arg.</b>	6	10	17	3	13
	<b>Subm.</b>	14	40	16	10	28

Notably, the number of submitted civil cases in the second (post-notice) half of March (47) was greater than the number of submitted civil numbers for full months in January (19) and February (26) combined.

A comparison between March and April 2019 and the post-notice time period in 2020 shows the same significant changes in the number and percentage of cases submitted on the briefs rather than receiving oral argument.

		Mar 2019 (Full Month)	Apr 2019	Mar 2020 (Post-Notice)	Apr 2020
<b>Civil</b>	<b>Arg.</b>	77%	71%	23%	43%
	<b>Subm.</b>	23%	29%	77%	57%
<b>Criminal</b>	<b>Arg.</b>	70%	62%	20%	29%
	<b>Subm.</b>	30%	38%	80%	71%
<b>Immigration</b>	<b>Arg.</b>	48%	52%	23%	32%
	<b>Subm.</b>	53%	48%	77%	68%

		Mar 2019 (Full Month)	Apr 2019	Mar 2020 (Post-Notice)	Apr 2020
<b>Civil</b>	<b>Arg.</b>	85	51	14	28
	<b>Subm.</b>	25	21	47	37
<b>Criminal</b>	<b>Arg.</b>	39	26	1	7
	<b>Subm.</b>	17	16	4	17
<b>Immigration</b>	<b>Arg.</b>	19	17	3	13
	<b>Subm.</b>	21	16	10	28

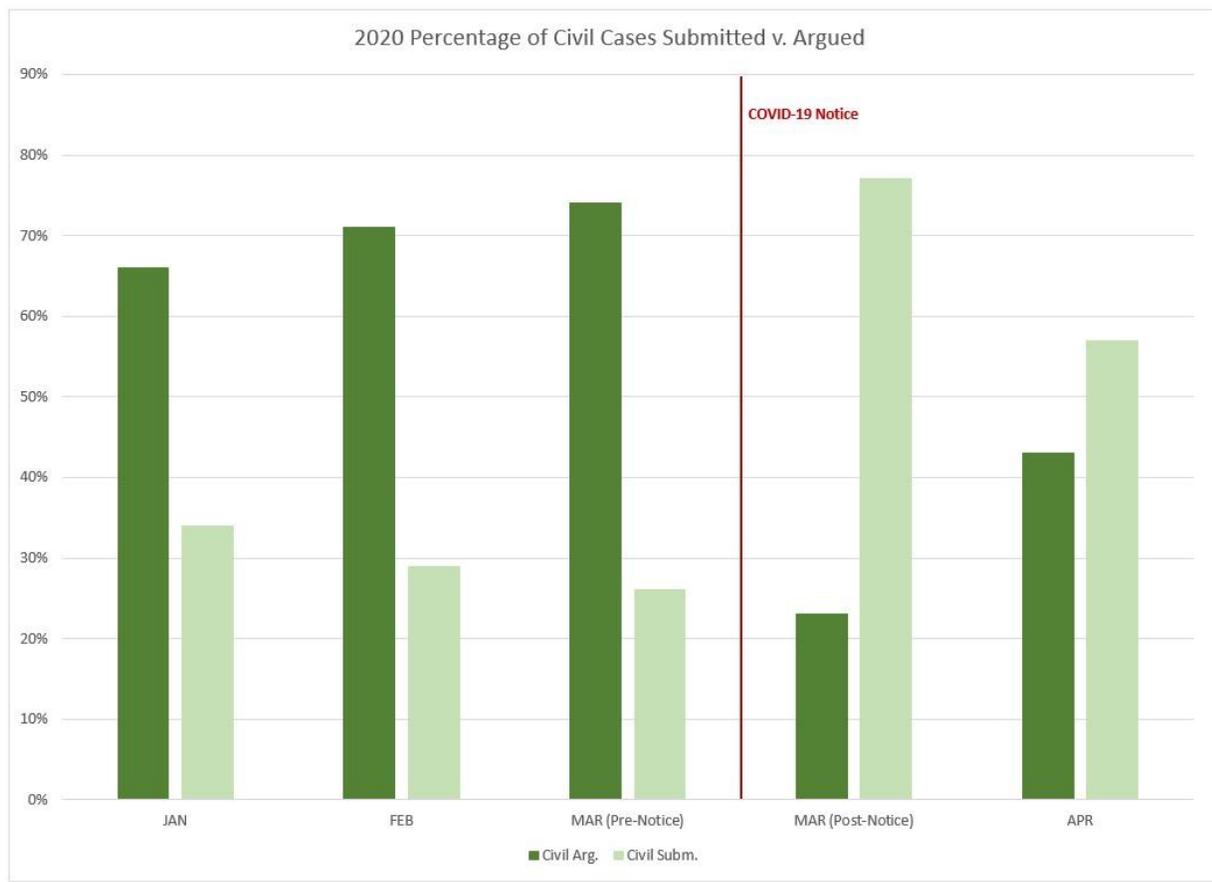
Similar to the 2020 data presented above, the number of civil cases submitted in the second half of March 2020 was also more than the total number of submitted civil cases in March 2019 (25) and April 2019 (21) combined.

As the April 2019 and April 2020 data show, not only did the percentage of cases submitted on the briefs increase significantly, but the overall number of cases currently on the court's calendar in April (i.e., during the pandemic) is also lower. Although the court would have initially calendared its April cases

months before the March COVID-19 notice, the court may have removed or postponed some of the April cases in response to the notice.

For example, the Ninth Circuit announced on March 12 that it was postponing two arguments originally scheduled for March 23. Most notably, on April 15, there was only one criminal case on the court's calendar for April 2020 as compared to 42 in April of last year. As of April 24, the court still only has 24 criminal cases on its April calendar this year.

The civil cases on the court's calendar have seen the most significant impact from the court's recent change in procedure.



Whereas about 71% of the civil cases on the court's calendar in January, February and the first half of March this year received oral argument, the Ninth Circuit panels in the second half of March and April decided a similar percentage of civil cases (67%) on the briefs without oral argument, representing a complete flip of the percentage of civil cases receiving oral argument in the post-notice time period.

### Looking Ahead

As parties look ahead to cases on the court's calendar in the coming months, it will be interesting to see whether the Ninth Circuit's current approach remains constant.

For example, as Ninth Circuit judges grow more familiar with holding oral arguments using videoconferencing technology, the percentage of cases receiving oral argument may return to (or at least approach) pre-COVID-19 averages. Alternatively, because the court is applying the same FRAP 34 standard now as it was before the COVID-19 pandemic, perhaps the court's current willingness to decide more cases on the briefs will continue even after things have returned to normal.

For now, the Ninth Circuit's calendar page already shows that at least 57% of the cases decided by three-judge panels during the first court week in May will be decided on the briefs without oral argument, and this number may increase further.

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*Blaine Evanson is a partner, and Taylor King, Jessica Hudak and Monica Paladini are associates at Gibson Dunn & Crutcher LLP.*

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[1] The raw data identified in this article is available from the Ninth Circuit's website at <https://www.ca9.uscourts.gov/calendar/archive.php>.

[2] United States Court of Appeals for the Ninth Circuit, COVID-19 Notice (Mar. 26, 2020). Available at <http://cdn.ca9.uscourts.gov/datastore/general/2020/03/16/COVID-19%20Notice.pdf>.

[3] If some cases on the court's calendar for March or April have been postponed (for a future hearing) rather than submitted in March or April, which seems likely, the specific percentages of submitted cases identified herein may be artificially high. Data on the number of postponed cases is not widely available and it is still unclear whether those cases, if postponed, will be heard or submitted on the briefs in the future. Regardless, the court clearly has seen an increase in cases submitted on the briefs, as seen in the tables showing the number of submitted cases, provided below.