



GUIDE

FOR

COUNSEL

IN CASES TO BE ARGUED

BEFORE THE

UNITED STATES

COURT OF APPEALS

FOR VETERANS CLAIMS

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Prepared by:
Norman Y. Herring, Clerk of the Court
United States Court of Appeals for Veterans Claims
625 Indiana Avenue, NW
Suite 900
Washington, D.C. 20004-2950
www.uscourts.cavc.gov

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THIS COURT

I. INTRODUCTION

This guide is designed to assist attorneys, nonattorney practitioners, and self-represented appellants preparing cases for argument before this Court, especially those who have not previously argued here. It is not a substitute for the Court's Rules of Practice and Procedure. Counsel should familiarize themselves with the Rules of Practice and Procedure, including those Rules that apply to appeals filed on or before March 31, 2008 (effective July 19, 2007), and those Rules that apply to appeals filed on or after April 1, 2008 (effective March 25, 2008). The Court's Rules of Practice and Procedure are available on the Court's Website, www.uscourts.cavc.gov.

The Clerk will notify counsel when the Court enters an order setting the date and time for oral argument. Please read the Rules of Practice and Procedure and this guide carefully, as they set forth certain steps counsel must take. Any questions counsel have respecting cases to be argued shall be directed to the Clerk's Executive Assistant, Paul Everest, 202-501-5980. Counsel may also write to Mr. Everest at the U.S. Court of Appeals for Veterans Claims, 625 Indiana Avenue, NW, Suite 900, Washington, D.C. 20004-2950. Because all records are kept by docket number, it is important that counsel have at hand the docket number when seeking information. **IMPORTANT:** The Clerk's Executive Assistant must be notified immediately of any changes, including any change of counsel. The Clerk's Executive Assistant relies upon those attorneys listed as counsel of record for all communications, as do parties interested in filing amicus briefs. When a party changes counsel of record, a notice of appearance must be submitted to the Clerk and served on other counsel of record.

II. ORAL ARGUMENT

A. SCHEDULE & PREPARATION

Oral arguments are normally conducted during the second and fourth weeks of every month. (See calendar on the back page of this guide.) Arguments are scheduled on Tuesday through Thursday of each week when oral argument is held. Unless the Court directs otherwise, each side is allowed one-half hour for argument. If the Court hears more than one argument in a single day, it generally hears one argument at 10 a.m. and one at 1:30 p.m. The Court may also hear argument in two cases on a single morning, beginning at 10 a.m. and may adjourn after the argument in the second case ends, usually around noon. Rule 34 of the Court's Rules of Practice and Procedure contains additional information concerning oral arguments.

When your case has been calendared for argument, the Clerk will send a notice to counsel. For directions to the Court, see the Court's Website, www.uscourts.cavc.gov. Please note that after the argument schedule is set, the Clerk cannot make changes.

Occasionally, the court holds oral arguments on law school campuses and other locations throughout the nation. If you are preparing for such arguments and need further information about the location of the argument, please call Mr. Everest at the number provided in section I, above.

To the extent possible, the Clerk will endeavor to schedule the oral argument to avoid conflicts. If counsel have any longstanding professional or religious commitments or for some reason cannot appear for oral arguments on the date set for argument, counsel must file and serve a motion to opposing counsel to continue the argument. An affidavit providing the reasons for the request must accompany the motion.

Please advise the Clerk of any necessary accommodations (e.g., a wheelchair), to permit the Clerk and the Marshal to make suitable arrangements at the counsel tables.

B. DAY OF ARGUMENT

Arguing counsel and co-counsel who will be seated at the counsel tables for cases to be argued in the morning must report on the day of argument to the Lawyers' Lounge in the second-floor library of the Court between 9:00 and 9:15 a.m. The Clerk will brief counsel at this time on Courtroom protocol and answer any last-minute questions they may have. Arguing counsel and co-counsel whose cases are scheduled for the afternoon session need not be present in the morning for the Clerk's briefing or the oral arguments. They must report on the day of argument to the Lawyers' Lounge in the second-floor library between 12:15 and 12:30 p.m. for a briefing by the Clerk. Should counsel find themselves in need of anything unexpectedly, the Clerk will accommodate counsel's needs (e.g., needs for cough drops, a sewing kit).

Appropriate attire for counsel is conservative business dress in traditional dark colors (e.g., navy blue or charcoal gray).

No cellular phones, cameras, PDAs, or any other electronic devices are allowed in the Courtroom. They must be checked in at the Lawyers' Lounge in the second-floor library. Coats, hats, and papers of arguing counsel and co-counsel may be left in the Lawyers' Lounge.

On argument days, no interviews may be conducted and news cameras are not permitted in the Court building; however, interviews may take place and cameras are allowed in the front of the building, where reporters may wait to talk to counsel after argument has concluded.

Audio transcripts of oral arguments will be posted on the Court's Website, www.uscourts.cavc.gov, within one business day of the argument. To obtain a copy of the argument on CD, contact the Clerk's Executive Assistant, Paul Everest, at 202-501-5980.

C. SEATING FOR COUNSEL

After you have met with and been briefed by the Clerk, you should report immediately to the Courtroom. You should advise the Courtroom officials if you are scheduled to move the admission of an attorney.

Three seats are available at each counsel table in the Courtroom. When only one counsel is to argue a case per side, the arguing counsel and two co-counsel will be accommodated at the table. If divided argument has been granted and two counsel are to argue on the same side, the Court will accommodate only one co-counsel per each arguing counsel at the table.

It is appropriate for co-counsel to occupy the arguing counsel's chair when the latter is presenting argument. Except in extraordinary circumstances, co-counsel do not pass notes to arguing counsel during argument.

D. IN THE COURTROOM—ORDER OF BUSINESS

Arguing counsel and their co-counsel should be settled in the Courtroom and seated in their assigned seats at the counsel tables about 5 minutes before Court is scheduled to open. The Clerk of the Court cries the Court in at 10 a.m. The Presiding Judge makes routine announcements. Motions for admission to the bar occur next. The Presiding Judge will then announce that the Court will hear the scheduled argument. If you are counsel for the appellant, you should proceed promptly to the lectern—do not wait for the Presiding Judge to issue an invitation. Remain standing at the lectern and say nothing until the Presiding Judge recognizes you. Once the Presiding Judge has done so, you may acknowledge the usual: "Judge ____, and may it please the Court" Introduce yourself or co-counsel. "Chief Judge" is used only in addressing the Chief Judge, who, you should note, may not always be part of the panel. Judges are referred to as "Judge Kasold" or "Judge Hagel," for instance, or, "Your Honor." If you are in doubt about the name of a Judge who is addressing you, look to the Judge's nameplate. Remember, it is better to use "Your Honor" than to address one Judge by another's name.

E. YOUR ARGUMENT

Demonstrating the principles recommended below, the attorneys in *Ramsey v. Nicholson*, 20 Vet.App. 16 (2006) (argued Sept. 22, 2005), provide an example of excellence in oral argument. The attorneys offer a commanding knowledge of the facts and law at issue; they articulate issues clearly and concisely; and they answer Judges' questions promptly, directly, and incisively. Oral argument in *Ramsey* illustrates that counsels' preparedness and understanding of protocol enable the Judges to efficiently probe and comprehend the parties' arguments.

Counsel are encouraged to listen to the oral argument in *Ramsey*. An audio file of the argument is available on the Court's Website, www.uscourts.cavc.gov, under "Oral Arguments," "Audio," "2005."

1. Preparation

Remember that briefs are different from oral argument. A complex issue might take up a large portion of your brief, but there might be no need to argue that issue. Merits briefs should contain a logical review of all issues in the case. Oral arguments are not designed to summarize briefs, but to present the opportunity to stress the main issues of the case that might persuade the Court in your favor.

It has been said that you should prepare for an oral argument before a court as if you are packing for an ocean cruise: You should lay out all the clothes you think you will need, and then return half of them to the closet. Likewise, when preparing for oral argument, eliminate half of what you initially planned to cover. Your allotted time passes quickly, especially when numerous questions come from the Court. Be prepared to skip over much of your planned argument and stress your strongest points.

Some counsel find it useful to have a section in their notes entitled "cut to the chase." They refer to that section in the event that most of their time has been consumed by answering questions posed by the Judges. Consulting a list of essential points allows counsel to efficiently use the few precious minutes remaining to stress main points.

If your argument focuses on caselaw, statute, regulation, or other enactment, be sure that the authority is printed in full in one of your pleadings so that you can refer the Judges to it and they can look at it during your argument.

Do not bring numerous volumes to the lectern. One notebook will suffice. Turning pages in a notebook appears more professional than flipping pages of a legal pad. Some brave counsel know their cases so well, they argue without any notes.

Be well acquainted with the entire body of law that relates to each issue, not just the cases you cite in your brief.

Know the record, especially the procedural history of the case. Be prepared to answer a question such as: "Why didn't you make a motion for expedited consideration?" You have the opportunity to inform the Judges about facts of which they are not aware. Judges frequently ask: "Is that in the record?" Be prepared to answer. It is impressive when you can respond with the page where the information is located. It is also quite effective to quote from the record of proceedings.

Do not make assertions about issues or facts not in the record.

Know your client's claim. Know the circumstances of your client's medical examinations, names of physicians, dates of examinations, and whether there are conflicting opinions. For an example of a brief that demonstrates that its author's excellent grasp of the facts in his client's case, see the statement of facts in the brief in *Lewis v. Shinseki*, No. 08-0245. (The brief is attached to this guide at the Appendix.)

Many attorneys find it instructive to attend a courtroom session before their scheduled argument day. If you choose to do this, feel free to come by the Clerk's Office and introduce yourself to the Clerk.

In addition, the following are excellent sources of information for counsel to consult in preparing for argument: *Making Your Case: the Art of Persuading Judges*, by Justice Antonin Scalia and Bryan A. Garner; Chapter 14, "Oral Argument," *Supreme Court Practice* (9th ed.), by Eugene Gressman, Kenneth Geller, Stephen Shapiro, Timothy Bishop, and Edward Hartnett; and *Supreme Court Appellate Advocacy: Mastering Oral Argument*, by David Frederick.

2. Time

Argument time is normally limited to 30 minutes. You need not use all your time. In several U.S. Supreme Court cases, counsel for respondents used only a third or less of the time allotted and nonetheless prevailed in their cases. For example, counsel for the respondent in *Burgess v. United States*, 553 U.S. ___, 2008 U.S. Lexis 5850 (Oct. 6, 2008), argued for only 7 of the allotted 30 minutes and yet prevailed in a unanimous decision of the Court.

Unless you make other arrangements with the Courtroom Clerk, the yellow light on the lectern will be activated when 5 minutes of your allotted time remains. The red light will be activated when your time has expired.

When the Courtroom Clerk activates the yellow light you should be prepared to stop your argument in 5 minutes. When the red light comes on, terminate your argument immediately and sit down. If you are answering a question from a Judge you may continue your answer and respond to any additional questions from that Judge or any other Judge. If you are answering a question from a Judge, you need not worry that the red light is on. Do not, however, continue your argument; in other words, do not speak in response to a Judge's question after the red light comes on.

In a divided argument, it is effective for counsel to inform the Court of their argument plan. For example, appellant's counsel might say: "I will address the relevant statutes and regulations and counsel for the amicus will address the arguments of General Counsel."

Appellant's counsel who wants to reserve time for rebuttal should, prior to arguing, say: "I would like to reserve __ minutes for my rebuttal." Appellant's counsel then argues, and the Clerk of the Court will set the time for 30 minutes minus the requested rebuttal time. Appellee's counsel proceeds to the lectern, waits for acknowledgment by the Presiding Judge, and then opens with the following: "Judge [Name of Presiding Judge], and may it please the Court." When appellee's counsel has finished and gathered all items from the lectern, appellant's counsel should return to the lectern and wait for acknowledgment by the Presiding Judge, at which time the Presiding Judge will say, e.g.: "You have 5 minutes remaining." You may begin your rebuttal at this time without having to repeat: "Judge [Name of Presiding Judge], and may it please the Court."

If two counsel argue for the appellant, the one who argued first should be the one to present rebuttal.

Promptly and quietly vacate the front argument table after the Presiding Judge announces: "The case is submitted." At this point, the Presiding Judge may announce that the panel will greet counsel, at which time the Judges will pass by counsel tables and greet counsel by shaking their hands.

3. Protocol

The Court is not a jury. A trial lawyer tries to persuade a jury with facts and emotion. At this Court, counsel should try to persuade the Court by arguing points of law.

Your argument should focus only on the question or questions presented in the briefs and record on appeal. Do not deviate from that question or those questions. It is unfair to both opposing counsel and to the Court to introduce arguments for which they have not prepared.

Ordinarily the Judges will know whether you are making your first argument before the Court. Be assured that some first-time arguments have been far superior to presentations from counsel who have argued several times.

As noted above, if your argument focuses on caselaw, statute, regulation, or other enactment, be sure that the authority is printed in full in one of your pleadings so that you can refer the Judges to it and they can be looking at it during your argument.

Counsel for the appellant need not recite the facts of the case before beginning argument. The facts are set out in the briefs, which the Judges have read.

Please speak clearly and distinctly, and try to avoid a monotone delivery. Speak into the microphone so that the Judges can hear you and you can be recorded clearly. Do not allow notes or books to touch the microphones. Never read your argument from a prepared script.

You should not attempt to enhance your argument time by a rapid-fire, staccato delivery.

Exhibits can be useful in appropriate cases, but be very careful to ensure that any exhibit you use is appealing, accurate, and capable of being read from a distance of about 25 feet. Be sure to explain to the Court precisely what the exhibit is. Counsel must advise the Clerk of the intent to use an exhibit as promptly as possible and certainly before oral argument. (See Rule 34(e) of the Court's Rules of Practice and Procedure.) For a good example of an exhibit used at an oral argument, see the U.S. Supreme Court's decision in *Shaw v. Reno*, 509 U.S. 630, 658 (1993).

You should be knowledgeable about what is and is not in the record in your case. Judges frequently ask counsel if particular matters are in the record. If you are asked a question that will require you to refer to matters not in the record, your answer should so state; then proceed to respond to the question unless advised otherwise by the Judge.

Never interrupt a Judge who is addressing you. Give your full time and attention to that Judge—do not look down at your notes, and do not look at your watch. If you are speaking and a Judge interrupts you, cease talking immediately and listen.

When a Judge makes a point that is adverse to you, do not "stonewall." Either concede the point, as appropriate, or explain why the point is not dispositive of your case and proceed with your argument. Conceding when appropriate gives you greater credibility with the Court with regard to the rest of your argument.

Do not "correct" a Judge unless the matter is essential. In one case before the U.S. Supreme Court, a Justice asked a question and mentioned "waiver." Counsel responded by stating that a "forfeiture" rather than "waiver" was involved. The distinction was irrelevant, but the comment generated more questions and wasted valuable time.

Be careful not to use the jargon of the military or Department of Veterans Affairs. Even if the jargon is widely understood within those entities, the Court may not be familiar with it. Similarly, during argument do not use the familiar name of your client. For instance, say: "Mr. Clark timely filed the Notice of Appeal," rather than "Bob timely filed the Notice of Appeal."

Do not refer to an opinion of the Court by saying: "In Judge Kasold's opinion." Rather, you should say: "In the Court's opinion, written by Judge Kasold."

If you quote a document (e.g., a statute or regulation) verbatim, tell the Court where to find the document (e.g., page 4 of the record of proceedings).

Attempts at humor usually fall flat. The same is true of attempts at familiarity. For example, do not say something such as, "This is similar to a case argued when I clerked here."

Do not denigrate opposing counsel. It is far more appropriate and effective to be courteous to your opponent. The Court has reprimanded counsel from the bench and in its opinion for counsel's use

of derogatory terms to refer to the opposing party. See *Lamb v. Peake*, 22 Vet.App. 227, 236 (2008).

Avoid emotional oration and loud, impassioned pleas. A well-reasoned and logical presentation without resort to histrionics is easier for listeners to comprehend.

Do not argue facts (unless your point is that a Board finding of fact was clearly erroneous or constituted clear and unmistakable error). Argue to the question or questions of law presented.

Counsel for the appellee are often effective when they preface their argument by answering questions that appellant's counsel could not answer or answered incorrectly or ineffectively. This can often get you off to a positive start.

If your opponent is persuasive on a certain theme during argument, especially one that was not anticipated, you should address that issue at the outset of argument or rebuttal argument rather than adhere to a previously planned presentation. You take a great risk if you ignore a persuasive point made by your opponent.

Rebuttal can be very effective. But you can be even more effective if you thoughtfully waive it when your opponent has not been impressive. If you have any rebuttal, make it and stop. There is no requirement that you use all your allotted time.

4. Answering Questions

You should assume that all of the Judges have read the briefs filed in your case, including amicus curiae briefs.

Anticipate the questions the Judges will ask and be prepared to answer those questions. If a case with issues similar to yours was previously argued in this Court, consider reviewing the oral argument in that case. Reviewing oral argument from a similar case might help you anticipate questions from those Judges who heard the previous case. If an audio file of the oral argument you seek is not available on the Court's Website, please call the Clerk's Executive Assistant, Paul Everest, at 202-501-5980, to find out whether a recording of the oral argument is otherwise available.

Make every effort to answer the Judges' questions directly. If at all possible, say "yes" or "no," and then expand upon your answer if you wish. If you do not know the answer, you should say so.

When a Judge asks you a question, do not respond by posing another question to the Judge.

If counsel stumbles on a question from the Court or does not fully answer it, it is a good tactic for an amicus curiae counsel or other counsel supporting that counsel's side to begin argument by repeating the question and answering it correctly and completely. Other supporting counsel will have had time to reflect on the question and perhaps develop a better answer.

A Judge will often ask a counsel seeking to establish a new precedent: "Do any cases from this Court support your position?" Be ready for the question, but be careful to cite only those cases that truly support your position. Do not distort the meaning of a precedent. The author of the opinion is likely to be a member of the Court and to have a remarkable memory of exactly what the opinion says. If you are relying on a case that had a dissent or multiple dissents in an en banc decision, be sure to mention that there was a dissent by Judge ___ in the case.

In appropriate cases, suggest to the Court that bright-line rules should be adopted and suggest what they should be.

If a question seems hostile to you, do not answer with a short and abrupt response. It is far more effective to be polite and accurate.

If a Judge poses a hypothetical question, you should respond to that question on the facts given in the question. In the past, several attorneys have responded: "But those aren't the facts in this case!" The Judge posing the question is aware that there are different facts in your case, but wants and expects your answer to the hypothetical question. Answer, and after that, if you feel it is necessary, say something such as: "However, the facts in this case are distinguishable."

Your answer should be carefully tailored to fit the question. A "yes" or "no" answer might be suitable for a narrow question. However, a simple "yes" or "no" in response to a broad question might unintentionally concede a point and prompt a follow-up question or statement that may ultimately damage your position.

In recent years, in response to a Judge's question at oral argument, one counsel responded, "I'll get to that." Never respond to a Judge's question with, "I'll get to that." If a Judge is asking the question it means that he or she would like the answer immediately. Evading Judges' questions contravenes the purpose of oral argument, frustrating the Judges' efforts to find answers to the questions they bring to oral argument.

If you are finishing one Judge's question when second Judge asks you another, ask the second Judge's indulgence to finish answering the first Judge's question. Although there is no definite rule of protocol, if two Judges start to speak at once, the junior Judge will generally withdraw in deference to the senior. Perhaps by analogy you could respond to the senior Judge's question first, and then address questions from junior Judges. These are the Judges of the Court in order of seniority: Chief Judge Greene, Judge Kasold, Judge Hagel, Judge Moorman, Judge Lance, Judge Davis, and Judge Schoelen.

III. COURTROOM SEATING

Courtroom seating is extremely limited. Spectators are seated first come, first seated. Groups can request reserved seating of up to 15 persons by writing the Clerk of the Court as far in advance as possible.

If arguing counsel desires to reserve space in the public section, counsel must contact the Clerk's Office after receiving notice of the argument. A letter concerning reservations, including the names of guests, should be sent to: Clerk of the Court, United States Court of Appeals for Veterans Claims, 625 Indiana Avenue, NW, Suite 900, Washington, D.C. 20004-2950. The Clerk, depending on available space, will endeavor to accommodate as many of your guests as possible.

When your guests arrive at the Court on the day of argument, they should deposit coats, hats, briefcases, cameras, electronic equipment, and similar items in the Lawyers' Lounge in the library on the second floor. They should then proceed to the ninth floor, to the Public Office. From there, a Marshal will escort them to the Courtroom, which is on the eleventh floor.

If you or a guest needs a device for the hearing impaired, please request assistance from the Clerk's Office.

IV. DECISIONAL PROCESS

After a case has been argued, the panel will hold a conference and develop a decision. The case will be assigned to a Judge to write the majority opinion. Decisions may be issued at any time after the argument. The only information the Clerk or his staff can give you in this regard is that cases that have been argued will be decided as expeditiously as possible.

Opinions are issued by the Court on any business day the Court is open. (A Court calendar is available on the last page of this guide.) Copies of opinions are electronically transmitted to arguing counsel and counsel of record on the day of issuance. Soon after they are issued, opinions are available on the Court's Website, www.uscourts.cavc.gov, and on LEXIS and Westlaw.

As for entry of judgment, pursuant to Rule 36 of the Court's Rules of Practice and Procedure, "[u]nless the Court orders otherwise," the judgment of the Court will be entered by the Clerk after the later of "the date on which the time allowed in Rule 35(d)(1), (2), or (4) has expired,^[1] or . . . the date on which the Court has denied a motion for reconsideration or has denied a motion for full-Court decision after a panel decision, if no other timely motion under Rule 35 is pending."

¹ At subsection (d)(1), (2), and (4), Rule 35 provides that appellants located in the United States, Puerto Rico, or the Virgin Islands may file motions for Clerk, single-judge, panel, and full-Court reconsideration within 21 days after the Court's decision or dispositive action. Rule 35.

As for issuance of mandate, Rule 41(a) of the Court's Rules of Practice and Procedure provides:

The mandate of the Court (which is executed by the Clerk as a ministerial action and is merely evidence that a judgment has become final) will issue no earlier than 60 days after the date of entry of the judgment pursuant to Rule 36 unless the time is shortened or extended by order. If a timely Notice of Appeal to the United States Court of Appeals for the Federal Circuit is filed with the Clerk, the mandate of the Court will issue in accordance with 38 U.S.C. § 7291(a).

If the appellant prevails, an application for attorney fees and expenses may be submitted after mandate is issued.

At subsection (b), Rule 41 further provides that "[a]n order on consent (1) dismissing, terminating, or remanding a case or (2) granting or dismissing an uncontested application for attorney fees and expenses will also constitute the final judgment and mandate of the Court."

V. TRANSCRIPTS

Audio transcripts of oral arguments will be posted on the Court's Website, www.uscourts.cavc.gov, within one business day of the argument. To obtain a copy of the argument on CD, contact the Clerk's Executive Assistant, Paul Everest, at 202-501-5980.

VI. RECORDS

The Court's Rules of Practice and Procedure address the **original record**, the **record on appeal**, the **record before the agency**, the **record of proceedings**, and the **original record before the agency**. The Rules also permit the parties to inspect the materials that were before the Board and to file motions to supplement the record.

● *For appeals filed on or before March 31, 2008*

Rule 10, "**Designation of the Record on Appeal**," requires the Secretary to file with the Clerk and serve on the appellant a designation of all material in the record of proceedings that the Board relied upon in ruling against the appellant, as well as any other material from the record that the Secretary considers relevant to the appeal.

Rule 10 further directs the Secretary to serve on the appellant a copy of materials and a list of any record matter that cannot be duplicated.

Pursuant to Rule 10(b), "**Counter Designation**," after the Secretary serves the designation of the record on appeal, the appellant must file with the Clerk and serve on the Secretary either a counter

designation of any additional material that was before the Secretary and the Board that the appellant considers relevant to the appeal, or a statement that the appellant accepts the content of the record as designated by the Secretary.

At subsection (c), "Disputes," Rule 10 empowers the Court to resolve disputes regarding the content of the record on appeal.

Rule 11, "**Transmission of the Record on Appeal**," directs the Secretary to transmit two copies of the record on appeal to the Clerk and to serve a copy on each party. Pursuant to the Rule, when the Clerk receives the record on appeal he must notify the parties when the appellant's brief is due.

At subsection (b), "**Supplementation**," Rule 11 enables each party to file a motion to supplement the record on appeal before the appellant's brief is due. The opposing party may file an opposition to the motion. If the Court grants the motion to supplement, the Secretary must transmit to the Clerk two copies of the supplemental record.

Rule 11(c), "**Access of the Parties or Representatives to Original Record**," requires the Secretary to permit the parties to inspect and copy material in the record before the board. Rule 11(c) also enables the parties to file motions to prevent disclosure of confidential information contained in the original record.

● *For appeals filed on or after April 1, 2008*

Rule 10, "**Designation of the Record Before the Agency**," directs the Secretary to prepare and serve on the appellant the record before the agency. Subsection (b) empowers the Court to resolve disputes arising regarding the record before the agency. Subsection (c) provides that because the record before the agency may include many documents not relevant to the appeal, it will not be filed with the Court "unless so ordered." At subsection (d), the Rule provides that after the Notice of Appeal has been filed, the Secretary shall permit a party to inspect and copy the original record before the agency.

Rule 28.1, "**Record of Proceedings**," requires the Clerk to prepare and file the record of proceedings. The Rule provides that the Secretary must compile the record of proceedings exclusively from the record before the agency.

Subsection (c) empowers the Court to resolve disputes arising over the Secretary's preparation of the Record of Proceedings, and subsection (d) enables the Court to direct the Secretary or appellant to file additional record material.

● *For all appeals*

Rule 37, "**Contingency Planning**," imposes upon the parties certain duties that arise in the event that the Court's regular file becomes inaccessible. The Rule serves to provide the Court with replacement copies of essential papers.

VII. GETTING TO THE COURT & MISC. INFORMATION

The Clerk and staff wish to be helpful to counsel and will endeavor to answer all requests to assist them in their visit to the U.S. Court of Appeals for Veterans Claims.

1. The Court's Website

The Court's Website, www.uscourts.cavc.gov, provides access to the automated docket, opinions, Court calendar, argument calendar, audio files of oral arguments, bar and admission forms and instructions, Rules of the Court, guides to filing appeals, this guide, and other information about the Court.

2. Storing Coats, Umbrellas, Cameras, Etc.

Topcoats, raincoats, umbrellas, hats, cameras, cell phones, PDAs, and recording devices are not permitted in the Courtroom. They may be left in the Court's library on the second floor. Although they may not use recording devices in the Courtroom, members of the bar and spectators in the public section may, however, use written materials in the Courtroom.

3. The Court Building: Location and Hours

The U.S. Court of Appeals for Veterans Claims is located in the city's "Penn Quarter," at 625 Indiana Avenue, NW, Suite 900, Washington, D.C. 20004-2950. The Court is open from 9 a.m. to 4:30 p.m., Monday through Friday. The Court is easily reached by taxi or Metro (subway) from Ronald Reagan (National) Airport. The building is closed Saturdays, Sundays, and holidays. It is accessible to persons with disabilities.

4. Getting to the Court by Metro (Subway)

The Archives-Navy Memorial-Penn Quarter Station (Green and Yellow Lines) lies within one block (.1 miles) of the Court. The following stations are also near the Court: Judiciary Square (Red Line) (.26 miles from the Court) and Gallery Place-Chinatown (Red Line) (.28 miles from the Court).

5. Parking

There is parking available in the vicinity of the Court building at commercial garages.

6. Lodging in Washington, D.C.

There are many hotels in the Washington metropolitan area, several of which are in the vicinity of the Court. Travel Websites provide information about hotels for all budgets in the Washington metropolitan area. To search for hotels located near the Court, search for hotels in "Penn Quarter" or in the vicinity of the Verizon Center.

**STATEMENT OF FACTS
FROM SAMPLE BRIEF**

(See pages 3 through 12 of the brief, *infra.*)

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

Vet. App. No. 08-0245

DIANA L. LEWIS
Appellant,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

BRIEF OF THE APPELLANT

Michael R. Viterna
Attorney for Appellant
41700 West Six Mile Road, Suite 101
Northville MI 48168
(248) 380-0128

GUIDE FOR COUNSEL, APPENDIX

III. Statement of the Facts

The Appellant served on active duty in the United States Navy from December 1979 to June 1989. R. at 2, 27.

A. Abnormal Menses with Intermittent Anemia

A service medical record (SMR) dated January 3, 1980 from NTC Branch Clinic, Florida reflects that the Veteran presented to the clinic with complaints of late menses. R. at 118. A later SMR dated November 12, 1981 from NRMC Branch Hospital, New York, notes that the Veteran's left tube had been previously removed due to an infection. R. at 150. This was explained in a service medical record dated August 31, 1983 from the U.S. Navy Regional Medical Center which states that the left ovarian tube of the Veteran was removed in April 1979 during an appendectomy due to the presence of fluid. R. at 187. In addition, cysts were removed from both the ovaries at that time. *Id.*

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A medical record dated September 10, 1984 from the Military Screening Clinic, New York reports that the Veteran was experiencing menstrual cramps and heavy menstrual flow. R. at 219. Thereafter, a SMR dated May 2, 1985 from the U.S. Naval Hospital, Spain reflects that the Veteran was experiencing irregular menses. R. at 738. This was noted again on October 16, 1987 at Branch Medical Clinic, California. R. at 736.

The Veteran continued to experience abnormal menses post-service as reflected in a medical record dated June 4, 2002 from Central Texas VA Hospital which states that the Veteran was experiencing heavy clotting on the first three days of her menstrual cycle. R. at 806. Although the Veteran initially filed a claim on August 29, 1998 for a disability unrelated to her abnormal menses, she amended her claim for service connection for abnormal menses, premenstrual syndrome and blood cell disorder in a Statement in Support of Claim (SISC) dated September 23, 2002. R. at 338-41, 723.

The VA conducted Compensation & Pension (C&P) examinations in October of 2002. R. at 856-67. As a result of a gynecological examination of the Veteran, the Veteran was diagnosed with abnormal menses. R. 858. The examiner concluded, based upon the history given by the Veteran, that the abnormal menses was a condition that pre-existed service. R. at 858. The Veteran was also examined for hemic (blood) disorders. R. at 860. The examiner concluded that the Veteran's resistant normocytic hypochromic (iron deficiency) anemia was most likely

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regularly influenced if not actually caused by her menstrual patterns. *Id.* A VA rheumatic consultation dated November 11, 2002 agreed that the Veteran's chronic iron deficiency anemia was likely menstrual. R. at 885.

By a rating decision, dated January 20, 2003, the VA Regional Office (RO) denied service connection for abnormal menses. R. at 890-892. The RO found that there was no evidence showing that the disability related to menstruation began in service or that a pre-existing condition was permanently worsened by active duty. R. at 891. Thereafter, on March 27, 2003, the Veteran filed a Notice of disagreement with the decision. R. at 895-899. In it, the Veteran pointed out that her pre-service entrance exam did not show any current gynecological problems. R. at 897.

The RO then issued a Statement of the Case (SOC) on May 26, 2004. R. at 1207-27. In the SOC, the RO once again found no evidence establishing that the menstruation or blood disorders began in service or preexisted service and permanently worsened because of the Veteran's active duty. R. at 1226.

A Supplemental Statement of the Case (SSOC), dated November 12, 2004, confirmed the finding that there was no evidence to show that the disability related to menstruation began in service or that a preexisting condition was permanently worsened by active duty. R. at 1368-70. Another SSOC, dated March 6, 2007, denied service connection for abnormal menses with intermittent anemia and

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fatigue on the ground that there was no medical evidence showing a relation to the Veteran's military service. R. at 1467-71.

The Board denied the Veteran's claim to entitlement to service connection for abnormal menses with intermittent anemia in its most recent decision. R. at 1-20. It found that "while a history of pre-existing abnormal menses, which was not aggravated in-service accompanied by clinical findings of anemia and complaints of fatigue, was of record, there was no competent medical evidence relating either of these claimed conditions specifically to the veteran's service." R. at 12. The Board also found that the Veteran had not submitted any medical evidence showing a current chronic disability manifested by anemia which was related to her military service. R. at 14.

B. Premenstrual Syndrome

While on active duty, a service medical record from Branch Medical Clinic dated November 7, 1988, shows that the Veteran was suffering from premenstrual syndrome. R. at 732. However, during the October 2002 C&P examination for gynecological conditions, the examiner noted the Veteran's premenstrual syndrome history and use of Naproxen for pain, but concluded that there was no documentation of occurrence or treatment for premenstrual syndrome in service. R. at 858.

By a rating decision, dated January 20, 2003, the RO denied service connection for abnormal menses and premenstrual syndrome. R. at 890-892. The

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decision stated that there was no evidence to show that the disability related to menstruation began in service or that a preexisting condition was permanently worsened by active duty. R. at 891.

In a notice of disagreement dated March 27, 2003, the Veteran argued that her premenstrual syndrome condition was aggravated during active duty. R. at 897. A SOC dated May 26, 2004 found that the service medical records do not show any disability associated with the Veteran's premenstrual syndrome. R. at 1227. A later SSOC dated November 12, 2004 states that the Veteran's medical reports do not provide a link between the premenstrual syndrome and the Veteran's military service. R. at 1370. Thereafter, a SSOC dated March 6, 2007 denied service connection for premenstrual syndrome on the basis that there was no evidence providing a link to the Veteran's military service. R. at 1470.

The BVA decision, dated November 28, 2007 denied the claim for service connection for a disability due to premenstrual syndrome because the Veteran had not submitted any medical evidence showing a current chronic disability manifested by premenstrual syndrome associated with her military service. R. at 12-13. The Board found that the Veteran had only the symptoms and that no underlying disability was identified as the cause of the Veteran's premenstrual syndrome. R. at 12.

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C. Blood Disorders

A medical record dated January 18, 2001 from Central Texas VA Hospital states that the Veteran had mild pancytopenia² with a possible etiology being her menses. R. at 852. A further medical record dated July 23, 2002, from the Central Texas VA Hospital, states that the Veteran was suffering from leukopenia³ or anemia and was advised to start FeSo4 (an iron supplement). R. at 811. Thereafter, a private medical examination from Cedar Crest Clinic on August 13, 2002 diagnosed the Veteran with dysphoric disorder.⁴ R. at 772-73. According to the Veteran, she had her menarche at the age of 17 and then she began to have dysphoric episodes one or two weeks before her menses which continued to the present time. *Id.*

During the C&P examination for hemic disorders dated October 2002, Dr. Davis noted that the Veteran's service records revealed a modest decrease in the number of white (leucopenia) and red (anemia) blood cells in 1988 and 1989. R. at 859-860. The examiner observed that excessive menstruation in service was noted to have resulted in mild anemia. *Id.* Current blood tests were reported to show values similar to those during the Veteran's period of service. *Id.* The November 2002 VA rheumatology consultation report stated that the Veteran's anemia was related to her menstrual cycle. R. at 885.

² A deficiency of all cellular elements of the blood. Dorland's at 1389.

³ Reduction in the number of leukocytes in the blood below about 5000 per mm. Dorland's at 1044.

⁴ Dysphoria: a disorder of affect characterized by depression and anguish. Mosby's Medical, Nursing & Allied Health Dictionary (5th Ed. 1998) (Mosby's) at 526.

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The Veteran stated in a notice of disagreement dated March 27, 2003 that her blood cell disorder began in service. R. at 896. In the SOC dated May 26, 2004, the RO found no evidence of a disability related to blood disorders that began in service or that preexisted service and permanently worsened because of the Veteran's active duty. R. at 1226. In response, the Veteran stated in her SISC dated June 4, 2004 that while on active duty she was exposed to hazardous chemicals known to cause blood disorders. R. at 1197. The Veteran further pointed out that she had no blood disorder when she began her active duty. *Id.*

By a rating decision, dated October 25, 2004, the VA denied service connection for blood cell disorder. R. at 1305-08. The decision stated that, although there was evidence of a current diagnosis of leukopenia and anemia, there was no evidence of a link between the Veteran's blood disorders and her possible exposure to military hazardous chemicals. R. at 1306. A later SSOC, dated November 12, 2004, confirmed this finding. R. at 1368-1370.

The Veteran underwent a subsequent C&P examination for hemic disorders, dated September 21, 2005. R. at 1416-1422. In it, the examiner could not determine the cause of the Veteran's leukopenia. R. at 1417. The examiner noted that the low red blood cell count could be due to excessive menstrual loss and also from possible blood loss due to esophageal reflux. *Id.* The examiner added that it was "less likely than not" that the anemia was related to activity in service. *Id.*

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The RO issued a SOC on September 26, 2005. R. at 1436-1455. The SOC stated that service connection for blood cell disorder secondary to hazardous chemicals was denied because current medical evidence showed normal blood cell counts for red blood cells, hemoglobin and white blood cells. R. at 1455. This decision was continued by the SSOC dated March 6, 2007 because no additional evidence was received showing a current blood disorder and medical link between the disorder and the Veteran's military service. R. at 1470.

The Board concluded that the persistent leucopenia was not likely to be related to service activity and subsequent blood studies did not reveal competent evidence of a current disability. R. at 14. As a result, the Board concluded that the Veteran failed to present any medical evidence to support that she currently has leucopenia. *Id.*

D. Right Ankle Disability

A service medical record dated June 24, 1987 shows that the Veteran was first treated while on active duty for a right ankle contusion. R. at 263. Thereafter, a medical record dated November 25, 1998 from the Central Texas VA Hospital shows that the Veteran was suffering from a swollen right ankle that was tender to touch. R. at 536. A progress note dated July 1, 2003 from Dr. Jeffrey C. Bates state that the Veteran was experiencing bilateral ankle pain at a level of 9. R. at 1004. The Veteran continued to treat on August 6, 2003 at Central Texas VA Hospital at which time she was taking Etodolac and Tramadol for ankle pain. R. at

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The Board denied the right ankle disability claim finding that in the absence of any competent evidence to the contrary, the preponderance of the evidence demonstrates that the veteran did not have a right ankle disability which was related to an injury or disease incurred or aggravated by active duty service. R. at 14-15.

A timely appeal, of all of the issues discussed above, ensued.



COURT CALENDAR

2009

January						
Su	M	Tu	W	Th	F	Sa
4	5	6	7	8	9	10
11	12	13	14	15	16	17
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February						
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- Highlighted weeks are those in which the Court holds oral argument.
- Blackened days are Federal holidays and other days on which the Court is closed.