Your Chances on Appeal—And How To Improve Them

by Jason Steed

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Will we get oral argument? How long will it take for the court to decide? What are our chances of winning? These are common questions from clients who are facing an appeal. And they are hard questions to answer. But the federal judicial system provides some data that we can use to talk about possible answers to these questions—a statistical ballpark to play in, so to speak. So let's toss around some numbers.

Will we get oral argument?

According to data from 2012–13, the D.C. Circuit hears oral argument in more than 50 percent of its cases. Most of the other circuits hear oral argument around 20 percent of the time, with a few approaching 30 percent. These numbers might not sound encouraging at first, if you are hoping to get oral argument, but you should consider a few important factors.

First, most federal appeals arise in criminal cases, where oral argument is much less frequently granted. So, if a court hears argument in 20 percent of its cases, and more than half of its cases are criminal, then the rate of oral argument in the court's *civil* cases is likely much higher than 20 percent. Second, the court will not grant oral argument if the issues are simple enough to be decided on the briefs—and most appeals involve relatively simple issues.

So, if a court hears argument in 20 percent of all cases, and most of its cases are criminal or simple in nature—where the rate of oral argument is very low—then the frequency of oral argument in complicated civil cases could be as high as 70 to 80 percent. A recent study conducted in the Ninth Circuit supports that estimate. This means that, if you have a complicated civil appeal and you ask for oral argument, you will probably get it.

And if you are the appellant, you should definitely ask for it. Reversal rates are higher in cases that hear oral argument than in cases that don't.

Does this mean appellees should avoid oral argument? Not necessarily. I recently heard a Fifth Circuit judge say that oral argument is the best opportunity an appellee has to respond to the appellant's reply brief. And it is your chance to resolve any remaining concerns the judges might have about the decision you are trying to preserve. It is bad enough to have a victory overturned on appeal; it is much worse to have it overturned after you declined the opportunity for oral argument.

Yes, in some cases you should tell the court that oral argument is unnecessary. But in many cases you want it. And, again, if your case is complicated, you will probably get it—unless you are in the Third Circuit, which hears argument in only 8 percent of its cases.

How long will it take to get a decision?

The cold, hard truth is that you never know. The federal courts of appeals are not obligated to decide cases on any timetable—and unlike the Supreme Court, which decides only 70 to 80 cases per term, the courts of appeals must dispose of hundreds and even thousands of cases every year.

Despite that heavy caseload, most appeals are relatively straightforward and are decided within three months of submission. A case is "submitted" at the completion of briefing or, if oral argument was granted, at the completion of oral argument. According to data collected by the federal government, the D.C. Circuit is the fastest. From 2012 through 2013, the D.C. Circuit had just *one* case that remained pending for longer than three months after submission. The Fourth and Eighth Circuits were almost as fast as D.C.

In flat numbers, the Second Circuit was the slowest, with 294 cases pending for more than three months and 74 cases pending for more than a year. The Seventh, Ninth, and Tenth circuits were also slower, each having more than 100 cases pending more than three months.

Bottom line: If your case is even mildly complicated and you are not in one of the fastest circuits, then the conservative answer to "How long will this take?" is "Six months to a year after submission." So sit back and wait. And be thankful you are not one of my clients who waited four years for a decision from the Texas Supreme Court.

What are your chances of winning?

Obviously, this depends heavily on the details of each case and on a host of other factors that are sometimes beyond anyone's control. (Some would say it depends on what the judges ate for breakfast that morning.) But the Fifth Circuit collects and provides some numbers that are interesting to consider.

In 2014, the Fifth Circuit affirmed the lower court's decision in nearly 58 percent of all cases brought on appeal. And it affirmed "in part" the decisions in another 6.1 percent of all cases. Moreover, nearly 28 percent of all appeals were dismissed without a ruling—usually due to a procedural flaw. So, looking at it one way: In 2014, appellants in the Fifth Circuit *failed* nearly 92 percent of the time.

Does this mean it is a waste of time to appeal? Not at all.

Remember, 28 percent of those appeals were dismissed, often due to a procedural flaw (e.g., the appeal was untimely)—meaning, in those cases, the appeal might have been successful if only it had been handled correctly. Also, we can recharacterize those cases where the decision was affirmed "in part" as cases where the decision was vacated, reversed, or remanded "in part." And 8.4 percent of all appeals resulted in outright vacatur, reversal, or remand. Thus, looking at it from another angle, in 2014, appellants in the Fifth Circuit *succeeded* about 14.5 percent of the time—and might have succeeded more often if only they had avoided procedural errors.

And that is not all. A large number (28 percent) of the appeals filed in the Fifth Circuit are filed by prisoners, most of whom are appealing pro se. If we include successive habeas petitions, criminal appeals, and mandamus petitions, we are talking about 69.5 percent of the Fifth Circuit's docket where reversal rates are very low. So it is reasonable to assume that the reversal rate in the remaining 30.5 percent of the court's docket is significantly higher than 14.5 percent. As a semi-educated guess, let's say it is around 25 percent.

This would mean a generic civil appellant has roughly a 1-in-4 chance of turning something around on appeal, and a generic civil appellee has roughly a 1-in-4 chance of watching some part of its victory get overturned. Of course, as always, these odds might get better—or much worse—depending on the strength of the party's arguments. And this brings us to the most important question of all.

How can you improve your chances on appeal?

Having strong arguments is the best way to win. So how do you make sure your appeal is as strong as it can get? Well, the data shows you should call in an appellate attorney.

Most litigators understand that a trial is predominantly about *facts*, whereas an appeal is predominantly about *law*. Trial lawyers are busy thinking about depositions, expert reports, affidavits, key documents, and other discovery—and trial strategy, which involves dealing with opposing counsel, dealing with the district judge, and possibly dealing with a jury. Trial lawyers do not have much time to think about an appeal until it is time for the appeal. And by then it might be too late.

With an appellate lawyer on the team, you will have someone to focus on the *law*, and to help you shape your arguments at every stage so they will be as strong as they can be for the inevitable appeal. Your appellate lawyer can help with preserving error, of course. But it runs much deeper than that. For example, your appellate lawyer might know that Argument X will be more persuasive to the court of appeals—even though Argument Y is more obvious and more interesting to the trial judge. Trial lawyers, understandably, will want to argue Y in the district court. But your appellate lawyer will ensure that Argument X is teed up for later.

This is why appellate judges like appellate lawyers. At one conference, a panel of Fifth Circuit judges agreed that they prefer to see appellate specialists on the briefs and at oral argument because it means the arguments will be helpful. Far too often, said one judge, trial lawyers make arguments that are better suited for a jury. That is great for the trial court—but it is not helpful to the court of appeals.

Several justices on the U.S. Supreme Court have similarly expressed a preference for seeing appellate lawyers on the briefs and before the Court. Appellate practice is so different from trial practice that Justice Elena Kagan said it is sometimes "as if [trial lawyers] are arguing with one hand tied behind their back." And Justice Sonia Sotomayor even suggested it is "malpractice" for a trial lawyer to argue an appeal when appellate specialists are available.

Two recent studies support the claim that the presence of experienced appellate counsel will improve your chances on appeal. The authors of a study conducted in the Ninth Circuit confirmed that appellate judges are more receptive to arguments from appellate lawyers. And their data showed that appellees, in particular, "appeared to enjoy some advantage in preserving trial court victories" when they hired an appellate attorney.

Similarly, another study showed that certiorari petitions to the Supreme Court are more likely to be granted when an experienced Supreme Court practitioner is involved. And getting certiorari granted, of course, is a crucial step for those hoping to reverse a decision by the court of appeals. (The Supreme Court reverses about 70 to 75 percent of the decisions on which it grants certiorari.)

All this makes perfect sense. Just as all clients want the best trial lawyer they can find when going to trial, they should likewise want the best appellate lawyer they can find when going up on appeal. After all—while it is hard to estimate your chances of winning on appeal—it is nearly certain those chances will improve if you involve a good appellate lawyer. Just ask the judges. ⊙