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Statistics Confirm Growing Rarity of Oral Arguments at Third Circuit

In May 2006, one of the shining stars of the entire federal appellate judiciary, and of the U.S. Court of Appeals for the Third Circuit in particular, passed away. One of the many things that distinguished Judge Edward R. Becker from his many colleagues was the extent to which he valued the benefit of appellate oral argument.

Howard J. Bashman

2013-02-12 12:00:00 AM

Upon Further Review

In May 2006, one of the shining stars of the entire federal appellate judiciary, and of the U.S. Court of Appeals for the Third Circuit in particular, passed away. One of the many things that distinguished Judge Edward R. Becker from his many colleagues was the extent to which he valued the benefit of appellate oral argument. At the Third Circuit, a case will be scheduled for oral argument if any one of the three judges on a panel desires it. And when Becker was on a panel, invariably many more cases would be scheduled for oral argument than otherwise would be the case.

Statistics showing the rate at which the Third Circuit's judges are requesting oral argument are available by year for the 10-year period ending September 30, 2011. Becker served as the Third Circuit's chief judge until he opted for senior status in May 2003. On taking senior status, a judge ordinarily is assigned to fewer oral argument days per year.

Cases terminated on the merits in the Third Circuit during the 12-month period ending September 30, 2002, were orally argued 25 percent of the time. The following year experienced a slight dip to just over 24 percent. For the year ending September 30, 2004, the percentage of cases orally argued increased slightly to 24.6 percent. Thereafter, the percentage of cases being decided on the merits that received oral argument at the Third Circuit began to sharply decline.

For the year ending September 30, 2005, the percentage of cases orally argued fell to 22.4 percent. For the

year ending September 30, 2006 — the same year in which Becker passed away — only 19.5 percent of the Third Circuit's appeals decided on the merits had received oral argument. The next year, slightly fewer than 16 percent of the appeals were orally argued. The number of cases orally argued remained in that range for the years ending September 30, 2008, and 2009. For the final two years for which these statistics are available, the rate of cases being orally argued at the Third Circuit has plunged even further. For the year ending September 30, 2010, the rate was only 13.9 percent, while for the year ending September 30, 2011, the rate was only 12.9 percent.

To be sure, over this same 10-year period, there has been an upward trend in the number of cases that the Third Circuit has decided on the merits each year. For example, in the year ending September 30, 2002, the Third Circuit disposed of 1,965 cases on the merits, whereas for the year ending September 30, 2011, the Third Circuit disposed of 2,484 cases on the merits. Because more cases are being decided, the availability of oral argument could decline somewhat and yet the total number of cases being orally argued could stay the same or even grow. That, however, is not what has happened.

For the year ending September 30, 2002, when 25 percent of the cases disposed of received oral argument, the Third Circuit heard oral argument in 491 cases. By contrast, for the year ending September 30, 2011, when the Third Circuit only heard oral argument in 12.9 percent of the cases, the number of cases orally argued totaled just 320. The Third Circuit disposed of 520 more cases on the merits in the year ending September 30, 2011, than the Third Circuit disposed of in the year ending September 30, 2002, but it is unrealistic to think that the only way the Third Circuit could have efficiently disposed of those additional cases was by dispensing with orally arguing 171 cases.

In fairness to the Third Circuit, the overall availability of oral argument in the federal appellate courts (excluding the Federal Circuit) declined from 32.9 percent at the start of the 10-year period to 25.1 percent at its conclusion. But at least four circuits — the D.C., Fifth, Seventh and Tenth — show little to no changes in the percentage of cases being orally argued when comparing their statistics for the years ending September 30, 2002, and 2011. And the Third Circuit appears to have the largest percentage-rate decline in the availability of oral argument when comparing the rates at which oral argument was available for the years ending September 30, 2002, and 2011.

As longtime readers of my column already know, I actually favor a system, such as the Third Circuit's, whereby the appellate judges, rather than the appellate advocates, decide whether a case will receive oral argument. But the growing rarity of oral argument at the Third Circuit should be viewed with increasing concern. Perhaps the overall quality of appellate advocacy at the Third Circuit is so low as to cause it to be infrequently of help to the judges, or perhaps the quality of the parties' written briefing at the Third Circuit is so high as to render oral argument irrelevant.

Yet, as Becker recognized as much as anyone, appellate oral argument does not exist merely for the benefit of the judges. It is also a benefit to the parties and the public to see that the judges have heard and understood what the parties are arguing to the court. At the end of the day, what more oral argument may require is that the Third Circuit's judges work a bit harder. Once again, Becker stands as a prime example of a Third Circuit judge who was extremely hardworking and especially brilliant, known throughout the federal judiciary for his smart and comprehensive opinions.

But if too many cases were being set for oral argument during the Becker era, I think that it would be difficult to dispute that now the pendulum has swung too far in the other direction. It may require at least a bit more work from the Third Circuit's judges to slightly relax their current extreme reluctance to grant oral argument, but I cannot help but think that the extra work would yield great benefits in the form of stronger rulings and more satisfied litigants who will know that, win or lose, their arguments have been heard. •

Howard J. Bashman operates his own appellate litigation boutique in Willow Grove, Pa., and can be reached at 215- 830-1458 and via email at hjb@hjbashman.com. Visit his appellate blog at <http://howappealing.law.com>.