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What Are Your Chances of Winning on Appeal?

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The Legal Intelligencer | March 08, 2011

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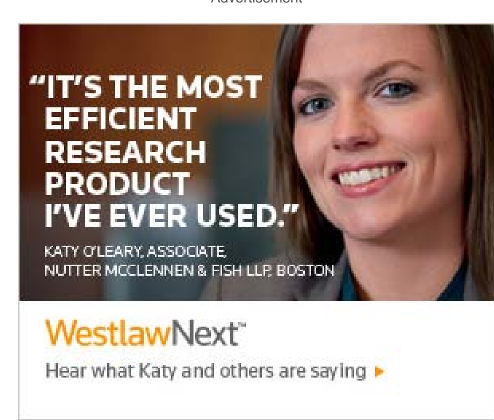
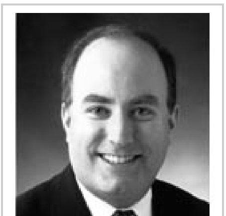




Howard Bashman

Upon Further Review

One thing that the administrators who help run appellate courts are good at is statistics. Every year, appellate courts churn out statistics revealing how many cases were decided on the merits, how many of those were affirmed or reversed, and what percentage were criminal cases or civil cases or prisoner petitions. Likewise, statistics can show you that the Supreme Court of Pennsylvania in a typical year grants a larger percentage of petitions for allowance of appeal than the Superior Court of Pennsylvania grants petitions for reargument.

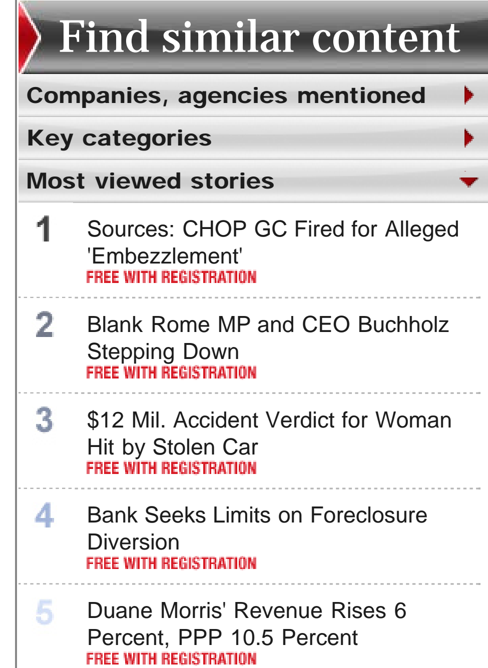
The other day, a lawyer from outside of the 3rd Circuit with whom I had never spoken or corresponded before phoned me out of the blue because the 3rd U.S. Circuit Court of Appeals had recently notified him that an appeal on which he is working would be submitted on the briefs instead of orally argued. This lawyer was concerned about whether the court's decision not to entertain oral argument essentially guaranteed affirmance. Of course, as a purely statistical matter, the cases in which the 3rd Circuit does not hear oral argument are affirmed at a much higher rate than the cases in which the 3rd Circuit's judges choose to hear oral argument.

But, as with anything, statistics only prove so much, and in fact statistics about results on appeal can be extremely misleading if the presumption is that results occur randomly. In other words, it may be accurate that the U.S. Supreme Court only grants review on average of 2-3 percent of all paid (non-indigent) cases. But, of course, that does not mean that any given case has only (or sometimes even) a 2-3 percent chance of being granted review.

On the contrary, although the average rate of obtaining review on petition for writ of certiorari at the U.S. Supreme Court is extremely low, certain cases exhibit features that can make the likelihood of review quite high. For example, if your case involves an important issue as to which intermediate federal appellate courts are divided, and your case presents a good vehicle for resolving that issue, then the chances of obtaining U.S. Supreme Court review in that case would seem to be far better than average and might even be much greater than 50-50.

My point, if it is not already obvious, is that appellate courts do not decide cases by throwing a pile of briefs down a staircase with the briefs that land on the lowest two steps constituting the cases in which reversals will issue. Although from time to time the result that an appellate court reaches may seem random in that it might not be the result anyone would have predicted, appellate courts do not review cases on appeal with a particular quota for reversal or affirmance in mind.

Rather, the reason why most appeals result in affirmance is a combination of at least two things. First, most trial judges are doing a good job and thus manage to avoid committing reversible error much of the time. And, second, certain litigants may not have the usual incentives not to appeal because the appeal in essence costs them nothing, in the case of a criminal defendant represented by court-appointed counsel or in the case of a party whose litigation costs are being paid for by an insurance company. Similarly, if the amount of a money judgment is large, it may be cost-effective for the defendant simply to roll the dice on appeal even if the chances of winning a reversal are remote.



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The good news, however, for those of us who believe that appeals should in fact be decided on the merits is that appeals are indeed being decided on the merits. Thus, initially, appellate judges learn about the case and form their initial impressions about whether the order or judgment appealed from should be affirmed or reversed based on the parties' appellate briefs, the trial court's opinion, and the underlying record. Next, the judges can test those initial impressions at oral argument if the judges request argument or if the case is pending in a court where the parties can obtain argument at their own request.

Lastly, the judges ordinarily must provide in writing at least some explanation for why they have reached the outcome they have in fact reached in the appeal. That process begins with one judge writing out his or her proposed disposition and then hoping that a sufficient number of his or her colleagues will agree to join in the decision to attain either a majority or a unanimous result.

The authoring judge will be aware that eventually all of his or her colleagues on the court may be reviewing that opinion if the losing party requests en banc review from the full court. Moreover, the judge will know, if he or she serves on an intermediate appellate court, that judges serving on a higher court might also someday be reviewing his or her work product if the losing party seeks further review from a higher court.

The end result, ordinarily, is that an appellate judge will seek to prepare a well-reasoned opinion that communicates to his or her colleagues and to the parties that the court has understood the issues presented on appeal and has sought to reach the result the law dictates. Of course, the outcome of any given appeal may depend on a host of factors, including whether the appellate briefs were persuasive and reliable and whether the party offered helpful responses to whatever concerns the appellate judges may have voiced at oral argument.

Having a high quality and highly regarded appellate lawyer on your team may not turn a dead loser of a case into a winner, nor should it, but it certainly can increase a party's chances of succeeding on appeal. In the adversarial system of justice over which the courts serve as referee in the United States, it is not the duty of judges to invent and decide arguments that the parties perhaps should have but did not actually present. This is one of the main reasons why the selection of which arguments are presented, or the manner in which the arguments presented are responded to, can make such an important difference on appeal.

As for the lawyer based outside of the 3rd Circuit who recently phoned me to get my views on whether the denial of oral argument in the 3rd Circuit is tantamount to affirmance, I was able to deliver at least a glimmer of hope. At one time, I shared the view that failing to obtain oral argument at the 3rd Circuit was a sure harbinger of affirmance. As a result, several years ago I was very disappointed when I learned that a 3rd Circuit appeal on which I worked had not been selected for oral argument, because I had thought that we presented a very strong case for reversal. Fortunately for my client, and admittedly to my surprise, not too long after the case was submitted on the briefs without oral argument we received a non-precedential ruling from the 3rd Circuit that reversed the trial court's decision. In the end, my client emerged victorious in the 3rd Circuit even in an appeal that the 3rd Circuit had failed to select for oral argument.

This, of course, is not to suggest that the odds of attaining reversal in the 3rd Circuit remain anything other than dismal in a case that was not selected for oral argument, but fortunately appeals are not decided based on the odds of affirmance or reversal. Rather, appeals continue to be decided based on the appellate briefs, the trial court's opinion, the trial court record, and oral argument (if any). Knowing the odds of a particular outcome on appeal may be useful as a starting point in thinking about whether seeking further review may be worthwhile, but because the outcome of appeals are not based on truly random events, actual insight into the merits of a given case will provide a much more reliable guidepost for determining the likely outcome on appeal. •

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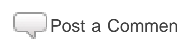

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