D.C. Bar's CLE Program

on

Appellate Advocacy

in conjunction with

The U.S. Court of Appeals for the D.C. Circuit

A Snapshot of the D.C. Circuit

and

A Survey of the Judges' Views on Appellate Advocacy

Table of Contents

Data Compiled by the Clerk's Office

Analyzing the Work

of the

D.C. Circuit

Over the Past Three Terms

[These data are not routinely compiled and distributed as shown. The information here was compiled at the request of Judge Edwards for the *2020 D.C. Bar's CLE Program on Appellate Advocacy*.]

For each of the past three terms (2017-18, 2018-19, and 2019-20)

1. How many <u>Active Judges</u> were on the court each term (names and dates when each Judge started).

<u>2017-2018</u>	**<u>2018-2019</u>**	**<u>2019-2020</u>**
Active Judges: 11	**Active Judges: 11**	**Active Judges: 11**
Karen LeCraft Henderson (07/05/1990)	Karen LeCraft Henderson (07/05/1990)	Karen LeCraft Henderson (07/05/1990)
Judith A. Rogers (03/11/1994)	Judith A. Rogers (03/11/1994)	Judith A. Rogers (03/11/1994)
David S. Tatel (10/07/1994)	David S. Tatel (10/07/1994)	David S. Tatel (10/07/1994)
Merrick B. Garland (03/20/1997)	Merrick B. Garland (03/20/1997)	Merrick B. Garland (03/20/1997)
Thomas B. Griffith (06/29/2005)	Thomas B. Griffith (06/29/2005)	Thomas B. Griffith (06/29/2005) (**retired**)
Brett M. Kavanaugh (05/30/2006)	Srikanth Srinivasan (05/24/2013)	Srikanth Srinivasan (05/24/2013)
Srikanth Srinivasan (05/24/2013)	Patricia A. Millett (12/10/2013)	Patricia A. Millett (12/10/2013)
Patricia A. Millett (12/10/2013)	Cornelia T.L. Pillard (12/17/2013)	Cornelia T.L. Pillard (12/17/2013)
Cornelia T.L. Pillard (12/17/2013)	Robert L. Wilkins (12/27/2013)	Robert L. Wilkins (12/27/2013)
Robert L. Wilkins (12/27/2013)	Gregory G. Katsas (11/28/2017)	Gregory G. Katsas (11/28/2017)
Gregory G. Katsas (11/28/2017)	Neomi Rao (03/18/2019)	Neomi Rao (03/18/2019)
		Justin Walker (joined court in 2020)

Source (*Nonpublic Internal Report*): U.S. Court of Appeals for the District of Columbia Circuit, Washington, D.C., Judges' Monthly Sittings table and judge data from CM/ECF.

2. How many <u>Senior Judges</u> were on the court each term (names and dates when each Judge started).

<u>2017-2018</u>	**<u>2018-2019</u>**	**<u>2019-2020</u>**
Senior Judges: 6	**Senior Judges: 6**	**Senior Judges: 6/5**
Harry T. Edwards (02/20/1980)	Harry T. Edwards (02/20/1980)	Harry T. Edwards (02/20/1980)
Laurence H. Silberman (10/28/1985)	Laurence H. Silberman (10/28/1985)	Laurence H. Silberman (10/28/1985)
Stephen F. Williams (06/16/1986)	Stephen F. Williams (06/16/1986)	Stephen F. Williams (06/16/1986) (**deceased**)
Douglas H. Ginsburg (10/14/1986)	Douglas H. Ginsburg (10/14/1986)	Douglas H. Ginsburg (10/14/1986)
David B. Sentelle (09/11/1987)	David B. Sentelle (09/11/1987)	David B. Sentelle (09/11/1987)
A. Raymond Randolph (07/16/1990)	A. Raymond Randolph (07/16/1990)	A. Raymond Randolph (07/16/1990)

Source (*Nonpublic Internal Report*): U.S. Court of Appeals for the District of Columbia Circuit, Washington, D.C., Judges' Monthly Sittings table and judge data from CM/ECF.

3. Total number of lead-case dispositions on the merits each term?

- **What percentage were agency?**
- **What percentage were civil?**
- **What percentage were criminal?**

Cases Terminated on the Merits, by Nature of Proceeding, from October 1st through September 30th (FY)						
	2017-2018		2018-2019		2019-2020	
Total Dispositions	**553**		**468**		**466**	
Agency	159	**28.7%**	102	**21.8%**	92	**19.7%**
Civil	299	**54.1%**	279	**59.6%**	288	**61.8%**
Criminal	42	**7.6%**	37	**7.9%**	38	**8.2%**
Orig. Proc./Misc.	53	**9.6%**	50	**10.7%**	48	**10.3%**

Source (*Published*): Administrative Office of the United States Courts, Washington, D.C., Caseload Statistics Data Tables, Table B-5. U.S. Courts of Appeals-Decisions in Cases Terminated on the Merits, by Circuit and Nature of Proceeding, During the 12-Month Period Ending September 30, 20XX.

4. What percentage of the cases in each category was affirmed each term?

Percentage of Cases Affirmed, by Nature of Proceeding, from October 1st through September 30th (FY)									
	2017-2018			2018-2019			2019-2020		
	Total	Affirm	%	Total	Affirm	%	Total	Affirm	%
All Dispositions	553	437	**79.0**	468	376	**80.3**	466	357	**76.6**
Agency	159	107	**67.3**	102	75	**73.5**	92	60	**65.2**
Civil	299	252	**84.2**	279	230	**82.4**	288	230	**79.9**
Criminal	42	31	**75.6**	37	31	**83.8**	38	31	**81.6**
Orig. Proc./Misc.	53	47	**88.7**	50	40	**80.0**	48	36	**75.0**

Source (*Published*): Administrative Office of the United States Courts, Washington, D.C., Caseload Statistics Data Tables, Table B-5. U.S. Courts of Appeals-Decisions in Cases Terminated on the Merits, by Circuit and Nature of Proceeding, During the 12-Month Period Ending September 30, 20XX.

5. What percentage of the cases was disposed of pursuant to a published opinion each term?

Type of Opinion or Order Filed in Cases Terminated on the Merits from October 1st through September 30th (FY)						
	2017-2018		2018-2019		2019-2020	
Total	553		468		466	
Published	216	**39.1%**	167	**35.7%**	186	**39.9%**
Unpublished	337	60.9%	301	64.3%	280	60.1%

Source (*Published*): Administrative Office of the United States Courts, Washington, D.C., Caseload Statistics Data Tables, Table B-12. U.S. Courts of Appeals-Type of Opinion or Order Filed in Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 20XX.

6. What percentage of the cases was resolved without oral argument each term?

Cases Terminated on the Merits After Oral Arguments or Submission on Briefs from October 1st through September 30th (FY)						
	2017-2018		2018-2019		2019-2020	
Total	553		468		466	
After Oral Argument	261	47.2%	211	45.1%	212	45.5%
Without Oral Argument	292	**52.8%**	257	**54.9%**	254	**54.5%**

Source (*Published*): Administrative Office of the United States Courts, Washington, D.C., Caseload Statistics Data Tables, Table B-10. U.S. Courts of Appeals-Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 20XX.

7. Number of cases in which there was en banc review each term?

2017-2018: 0
2018-2019: 1
2019-2020: 4

Source (*Nonpublic Internal Report*): U.S. Court of Appeals for the District of Columbia Circuit, Washington, D.C., Statistical Tables, En Banc Oral Arguments Held.

8. Average time from case filing to disposition each term?

See #10 below.

9. Average time from case filing to oral argument each term?

See #10 below.

10. Average time from oral argument to disposition each term?

Average Time Intervals in Months for Cases Terminated from September 1st through October 30th			
	2017-2018	2018-2019	2019-2020
From Filing to Oral Argument (Argued Cases Only)	15.7	11.7	13.0
From Argument to Disposition (Argued Cases Only)	3.3	3.6	3.2
From Filing to Disposition (All Cases)	12.9	12.7	11.5

Source (*Nonpublic Internal Report*): U.S. Court of Appeals for the District of Columbia Circuit, Washington, D.C., Monthly Report, Average Lead Case Processing Time table (converted to months).

11. What was the backlog of lead cases at the end of each term?

2017-2018: 748 Cases
2018-2019: 721 Cases
2019-2020: 757 Cases

*Backlog is represented by the number of lead cases pending on the last day of the term.

Source (*Nonpublic Internal Report*): U.S. Court of Appeals for the District of Columbia Circuit, Washington, D.C., Monthly Report, Number and Age of Pending Lead Cases Last Twelve Months table.

12. How many motions (not involving lead-case dispositions) were resolved each term?

The court does not keep statistics on the disposition of motions.

JUDGES' SURVEY
ON APPELLATE ADVOCACY

"When court of appeals judges decide a case, they focus on legal materials to reach their result. These materials include the case record compiled in the trial court or agency; the judgment, decision, or verdict under review from the trial court or agency; the precise issues that have been raised and preserved by the litigants; the parties' arguments as reflected in written briefs and oral arguments; the applicable constitutional, treaty, statutory, rules, or contractual provisions; the applicable standards of review; and controlling case precedent where applicable."

Edwards & Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1897 (2009).

Great advocates ably assist the judges in unearthing, sorting, and processing these legal materials and then aim to persuade the judges that the legal materials support the position they have advanced on behalf of their clients. Even when attorneys do not prevail, their skilled and faithful attention to the applicable legal materials invariably helps the court to reach the right results, craft worthy opinions, and adhere to precedent.

JUDGES' SURVEY ON APPELLATE ADVOCACY

Each year a member of the U.S. Court of Appeals for the D.C. Circuit is asked to address the D.C. Bar's Appellate Advocacy program. The court established the program more than two decades ago to address basic appellate advocacy issues among those practicing before it. Since then, the Bar has kept true to the original mandate, which was to provide new and less experienced attorneys, including many in government service, with a primer on the various aspects of appellate advocacy. I have drawn the assignment this year to offer remarks to members of the bar who will be attending the Appellate Advocacy Program.

In fulfilling my assignment, I decided that it might be illuminating for those who are participating in the program to learn something about how the members of the D.C. Circuit regard appellate advocacy. To this end, I conducted a survey of my colleagues to collect some information.

What appears below are the results of my brief survey taken of the members of the D.C. Circuit to get a sense of how, in the view of the judges, appellate advocacy affects decision making in the court of appeals. Thirteen of the sixteen members of the court participated in the survey. Each judge answered each question without collaboration or consultation. The judges' responses were returned to me so that I could, as best possible, collate their answers.

Obviously, it cannot be said that every judge agrees with everything that is said in the survey responses. And the responses merely reflect judges' impressions based on their years of experience on the bench and in practice. Nevertheless, although the judges often used different words to answer the questions posed, the general sentiments expressed in the responses to each question often were similar. You will see that on the lines just below each question, I offer a very brief overview to give my sense of the flavor of the judges' responses to a particular question. I then group similar responses together and quote the words used by the judges. Whenever there were a number of responses that said essentially the same thing, I quoted from only one such response. Although I have used quotation marks to indicate that the words come from a member of the court, the responses are otherwise anonymous.

Harry T. Edwards
Senior Circuit Judge
November 2020

1. WHICH IS MORE IMPORTANT, COUNSEL'S BRIEF OR ORAL ARGUMENT?

The clear consensus among the members of the court is that briefs are more important, but that oral arguments can be significant.

- "Briefs are much more important than oral argument, because they frame the case and the issues." Often, after reading the briefs, "I have a pretty good idea of how the case should be decided (at least tentatively) before I get to oral argument."

- "Briefs are more enduringly useful to judges because they lay out the parties' statements of the facts, procedural history, issues, summary of the argument, authorities, and argument, and the information they provide is easily accessible."

- "Sometimes oral argument is a revelation, clarifying what was in the brief or resulting in a significant concession."

- Oral argument can be helpful in "clarifying the record."

- "When I'm on the fence going into argument, counsel can win the case at argument."

- One judge, who agrees that briefs are "definitely" more important "in terms of what's most likely to shape a judge's thinking about a case," nevertheless asks: "Query what we'd think if we did it in the reverse order and did oral argument first?"

2. WHAT ARE THE MOST TELLING MISTAKES THAT ATTORNEYS MAKE IN THEIR BRIEFS?

Mistakes in a brief – including lack of authority, poor organization, deficient writing, errors in style, and lack of clarity – seriously affect an attorney's ability to communicate effectively with the judges. The judges listed a number of potentially costly mistakes:

- "Ignoring the most difficult arguments on the other side." "Not grappling with precedent." "Failing to distinguish precedent that cuts against the party." "Misciting and misreading case law and the record." "Making too many arguments." "Bad organization." "Too verbose."

- Failing to explain what the case is about in "the issues and statement of the case sections." "Hiding critical facts." "Failure to simplify and crystallize the facts and issues." "Assuming the judges' knowledge of technical subjects." "Failure to convey a coherent theory of the case." "Failure to write an effective Summary of the Argument. If the Statement of the Case is compelling, the Summary of the Argument may cinch it for judges who are well versed in the legal principles that are at issue."

- Using acronyms, abbreviations, italics, bombastic language, and insulting opposing counsel or the District Court Judge.

3. WHAT ARE THE MOST TELLING MISTAKES THAT ATTORNEYS MAKE DURING ORAL ARGUMENT?

Probably the most telling mistake that attorneys make during oral argument is failing to answer questions raised by the judges. The judges described the following mistakes made by attorneys that detract from their oral arguments:

- "Failure to answer questions directly - or to listen to what the question is asking." "Evading the judges' questions." "Failure to prepare to answer the most difficult questions." "Unable or unwilling to answer key questions about the law and record." "Not knowing the record." "Failing to give calm, responsive answers that invite a dialog with the questioning judge."

- "Using a style that is argumentative or emotional." "Misstating case law and the record." "Acting defensively, as if judges are boneheaded obstacles rather than informed and open-minded neutrals, and potential allies." "Interrupting, especially male advocates cutting in on and speaking over the women on the bench." "Disrespecting opposing counsel."

- "Resisting a judge's hypothetical." One judge's response pleadingly said: "*Of course we know a hypothetical is 'not this case,' but please answer the question and don't make me ask it again*." "[Judges] must write opinions, and arguments should appreciate what we are looking for, the assistance we want, and the ways in which we have to articulate and explain our legal rulings. That is why we use hypotheticals. We have to take potential legal rulings out on a test drive."

4. THINK OF THE BEST APPELLATE ADVOCATES WITH WHOM YOU ARE FAMILIAR. WHAT MAKES THEM GREAT? IN OTHER WORDS, HOW DOES A GREAT ADVOCATE MAKE A DIFFERENCE AT ORAL ARGUMENT?

The members of the court generally agree that, fortified by knowledge, preparation, and focus, a great oral advocate has the ability to engage in a compelling "conversation" with a panel of judges. The judges amplified the point as follows:

- "A great advocate enters into a conversation with the judges." "They listen well." "They are very conversational, responsive, and informative. Those are the keys. They are definitely arguing in favor of the disposition that favors their client but doing so in a way that betrays honesty and a genuine interest in helping the court."

- "They understand the broader framework of law around their case and the consequences of their arguments for the law." "They answer directly or say when they cannot. They capture the complexities of a case in a way that makes the path to decision easier. They know when not to ask for everything; when half a loaf will do."

- "They have anticipated every question and are ready to provide answers that respond directly to the information sought by the judges. They are candid. They know the record and case law inside out and are completely reliable in that regard."

- "They can articulate in words the legal rule that the court should adopt. It is amazing how few lawyers can answer the question: *What is the legal rule you think we should adopt and why?*"

- The most effective oral advocates "really care about trying to understand what may be bothering the members of the panel."

- "The best advocates get straight to the point. They don't belabor unnecessary points, and they answer the questions raised by the judges." "They acknowledge weaknesses and explain why they nonetheless should not be dispositive." "They have a core theory that works to bring together facts, law, justice, and common sense all in the client's favor."

5. THINK OF THE BEST APPELLATE BRIEFS THAT YOU HAVE READ. WHY DID THEY STAND OUT?

The members of the court agree that a good brief is well-organized, concise, clear, carefully proofread and error-free, and, ideally, elegant in telling "a great story and explaining why the point being urged is persuasive." A strong brief "builds around a theory in which the law and the facts appear actually to express the soundest, most appealing result." The judges added the following thoughts to explain what is necessary to reach these high goals:

- "The best briefs offer a clear and easily understood presentation of the facts, along with a well-researched argument that persuades by explaining how the precedent and doctrine supports their requested outcome without misrepresenting the holdings of the cases (which happens way too often)." "The arguments in a brief are much more important than the cases; but too often, a brief reads like a rote download of a series of cases: *In X case, the court held 1, and then in Y case, the court held 2*, etc."

- Strong briefs "focus on the key issue. They are easy to read with few footnotes; their cites to cases and the record are always accurate; and they're short." "They earn the trust of the court. They answer directly or say when they cannot. They capture the complexities of a case in a way that makes the path to decision easier." And memorable briefs "use graphics to tell their story visually and succinctly."

- Compelling briefs minimize complexities. They address "highly complex areas of the law and explain them clearly, but without oversimplifying." "They explain difficult facts in a manner that seems to compel the position being advocated."

- Good briefs avoid "overstatements." They are not "extended with unnecessary adjectives and adverbs." They reflect a "clear, plain-English writing style," employ "few acronyms," and "they include an introduction at the beginning that sets the table for judges to read the brief."

6. IF ALL THE ISSUES IN A CASE HAVE BEEN PROPERLY RAISED AND PRESERVED, CAN A PARTY LOSE A CASE BECAUSE COUNSEL'S BRIEF OR ORAL ARGUMENT IS SUBPAR?

This is an interesting issue. If all of the issues have been properly preserved and the applicable law and record support a certain result, many judges agree that the court is obliged to follow the law without regard to whether an attorney has submitted a subpar brief or presented a poor oral argument. However, as you can see from the judges' responses, there are some caveats and there may be some confusion.

- As a general matter, "we have an obligation to get the law right when answering a question that is properly raised." So, generally, a party should not lose a case because of poor advocacy, especially not in a "criminal" matter. However, "there will be times when the correct legal answer goes undiscovered, despite the judge's best efforts to supplement for the advocate's deficiencies through the judge's own research and reading of the record." Parties lose cases they should win "probably more often than we realize."

- "Just raising and preserving an argument is the beginning of advocacy, not the end. It truly helps to have counsel explain why ruling one way is far superior as a matter of legal principles to ruling the other way."

Can the next two responses be reconciled?

- "I tend to doubt that someone could lose a case because of a subpar brief or argument. The judges and their law clerks are a backstop. However, I am pretty sure that an excellent brief and oral argument can win a case that otherwise might have been lost."

- A party can lose a case that, arguably, it should win "if the other side's brief or argument is quite strong. Advocacy can matter." "Bad arguments can lose cases more easily than good arguments can win them."

The take-away is to avoid submitting a subpar brief or presenting a bad argument.

7. ANYTHING ELSE? [*A FEW ADDITIONAL COMMENTS OFFERED BY SOME JUDGES*.]

- "My number one suggestion is that an advocate should aim to be someone whom the judges want to talk to. Argument is just a stylized version of conversation, and we all know people we like to speak with and other people we do not like to speak with. Think about what makes someone a pleasant and effective conversation partner, and try to do that at the podium, while still of course advocating zealously for one's client."

- "Use graphics wherever there is a good opportunity. If a law professor finds it useful to draw out relationships on a blackboard so students will understand a transaction, then it is a good bet judges would be aided, too. Plus, it is an opportunity to reach the judge who learns better with pictures than with words."

- "We very much want to get it right. That is our whole job. But we get the case as you have litigated it. If there are limitations in the record, we are stuck. If you have not raised a potentially winning argument, we are stuck. If we have questions that we did not find clear answers to in the briefs or record, quizzing you at oral argument is our last chance – we cannot give you a call next week. We are not trying to be imperious, but we do feel urgency to make sure we are well prepared to get it right and avoid mistakes. The more you can meet us with that understanding and help us with the task, the better."