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New York Law Journal

REAL ESTATE TRENDS

To Appeal or Not To Appeal: That Is the Question

By Gary M. Rosenberg and Bradley Silverbush
October 1, 2024

To appeal or not to appeal, that is a question faced eventually by every litigator. But questions relating to the facts of a case or the applicable law aside (for the moment), what do the statistics demonstrate for the appellate practitioner?

One of the many responsibilities of the Chief Administrative Judge for the New York State Unified Court System (UCS) is compliance with Judiciary Law Section 212 (requiring that an annual report be filed compiling and publishing the statistics of every court in the state). A review of the 2023 Annual Report (//www.nycourts.gov/legacyPDFS/23-Annual-Report.pdf) reveals statistics which underscore the UCS's commitment to justice and fairness, innovation and progress, and a staggering budget.

Some facts: in 2023, the UCS collected nearly $52 million from attorney registration revenues, and over $472 million by the Criminal History Search Unit, for criminal history search records. For the current fiscal year (April 1, 2024 through March 31, 2025), the New York State Legislature approved appropriations of $3.4 billion for the state judiciary. As Chief Administrative Judge Joseph A. Zayas stated in his opening message to the Report, "Our past is illustrious, and our future has never looked brighter, despite the challenges we all face in the elusive effort to fulfill the constitutional promise of equal justice for all. And that's what it's all about—equal justice for all. Everything else—legislative goals, budget, personnel—is merely a means to that end."

This is a commendable and admirable point that everyone should embrace; not just the

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judiciary, but attorneys and litigants as well. With this goal at the forefront of legal profession's collective mind, let's look at the statistics to see how that actually played out last year. While the number of filings at the trial court level throughout the State demonstrate a fourth consecutive year of increased filings, the actual total number for 2023 (2,472,802) is down from the pre-COVID number of filings (3,021,016).

Most attorneys, especially trial and appellate practitioners, will want to jump to look at the caseload activity at the Appellate Division and the Court of Appeals. Statewide (including all four Departments in both civil and criminal cases), the Report indicates that there were a total of 14,935 cases that were disposed of after argument or submission of an appeal. Of these, over half (8,007) were disposed of before argument or submission of the appeal (e.g., they were dismissed, withdrawn, or settled). Of the remaining 6,928 cases that were disposed of after argument or submission of the appeal, 4,138 were affirmed, 1,022 were reversed, 849 were modified, and 760 were dismissed (with 159 appeals falling into a category defined as "other").

An appellate practitioner who understands the case and knows what they are doing can turn a losing determination into a winner on appeal. And who doesn't want to be a winner?

It gets even more interesting if one focuses on the caseload activity at the Court of Appeals. Table 1 of the Report reveals the caseload activity for 2023 (the year commencing April 1, 2023 and ending March 31, 2024); the Court decided a total of 93 appeals. How did those cases go from the Appellate Division to the Court of Appeals? The statistics show that in 50 cases, the Court of Appeals granted permission, while there were 15 cases where permission was granted by the Appellate Division (there were also three cases that involved a constitutional question, and 13 in the "other" category). Of those 93 appeals, 57 involved civil cases, while 36 involved criminal cases.

What was the result of those 93 appeals? 36 affirmances and 40 reversals (with five resulting in modifications, two dismissals, and ten in the "other" category). A footnote to the table indicates that "other" category includes anomalies which did not result in an affirmance, reversal, modification or dismissal (e.g., judicial suspensions, acceptance of a case for review pursuant to Court Rule 500.27).

Put another way, one could fairly conclude that overall, state-wide decisions of the Appellate Division are more often reversed than they are affirmed. While in civil cases, it is almost an even split (with 22 affirmances and 20 reversals), in criminal cases there is a significant difference (with 14 affirmances and 20 reversals). But what does this information mean to the practitioner, and more importantly, to one's clients (aside from the obvious statistical conclusions one might infer from the foregoing)?

It certainly suggests that reasonable minds can differ on the assessment of the strength of case, the applicability of the law to one's facts, the admissibility or interpretation of evidence, or any one of dozens of legal issues that are frequently raised on appeal (e.g., the denial or granting of a motion in limine or a CPLR 4404 motion; the propriety of a jury charge; admission/exclusion of evidence; pre-trial motions relating to discovery, or dispositive motion practice). So, what does an attorney tell a client when discussing the inevitable question, whether to appeal, or not?

Naturally, the first question is what is to be gained or lost if an immediate appeal is taken. In this regard, there are three major considerations to discuss.

First, whether time will be saved or lost if an appeal is taken immediately (noting that CPLR 5501 specifically states that an appeal from a final judgment brings up for review "any nonfinal judgment or order which necessarily affects the final judgment"). In fact, there may be no compelling need to take an immediate appeal (for example, from an interlocutory order that can be raised if an appeal from the final judgment is even necessary). This is more often a major consideration when representing a plaintiff who seeks to move the case forward quickly, especially if the determination is adverse to one's client.

Of course, if an attorney is representing a client who is the defendant, then that attorney may be seeking to delay a final determination of the case and what better way is there than to seek a stay pending appeal of an interlocutory order, as provided by CPLR 5519?

Another question most clients will ask is what the financial cost of the appeal is weighed against the likelihood of gaining an economic benefit (i.e., a cost/benefit analysis). Invariably, all clients want to know about the likelihood of success. This is where an attorney may want to instill the client with a sense of confidence.

Some might say that it is better to under promise and over deliver than to over promise and under deliver. But then again, under promising might send a false signal; it may suggest to the client that perhaps the attorney lacks confidence in his or her ability, or the necessary experience, to win the appeal. And yet again, if the attorney over-promises, then the attorney may be held accountable by the client who doesn't achieve the expected result (presenting a situation where a client might assert this as an excuse not to make full payment).

Regardless, no responsible attorney should offer an assessment of the viability of an appeal without a thorough understanding of the facts and applicable law. As any experienced lawyer may tell a potential client (because it is a statistical fact, you can look it up), throughout history, lawyers have won cases that they should have lost, and lost cases that they should have won, and the one thing that all lawyers know for certain is that without a thorough examination of the record (and understanding of the applicable law), who can tell a client that anything about an appeal is certain?

Clients want to believe in their attorneys, so, perhaps an attorney should not take a case unless a satisfactory result is achievable. But consistent with that philosophy, it is impossible to determine whether an appeal is supportable and viable until the lawyer has completed their thorough review and analysis of the record and answered all of the client's questions. Only then can an attorney share and discuss their assessment with the client, including cost, time, and likelihood of success.

Review of the 2023 Report provides some comfort in the knowledge provided by those statistics. Mindful that statewide at the Division there were only 4,138 affirmance out of 6,928 post submission/argument appeals, and the affirmance/reversal statistics are even tighter at the Court of Appeals, this seems to suggest that an appellate practitioner who understands the case and knows what they are doing can turn a losing determination into a winner on appeal. And who doesn't want to be a winner?