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Brooklyn Law Review

Volume 58
Issue 2
The Second Circuit Review - 1990-1991 Term

Article 9

2-1-1992

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Recommended Citation
Jon O. Newman, *STUDY: Study of Appellate Reversals*, 58 Brook. L. Rev. 629 (1992).
Available at: https://brooklynworks.brooklaw.edu/blr/vol58/iss2/9

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A STUDY OF APPELLATE REVERSALS

*Jon O. Newman**

INTRODUCTION

It has been said that appellate judges and trial judges are natural enemies. Having served in both capacities—nearly eight years as a trial judge and now thirteen years as an appellate judge—I do not think that aphorism is true. There is, however, an undeniable basis for some tension between judges of trial and appellate courts, borne of the structural relationship in which they both function. Appellate judges have jurisdiction to reverse the judgments entered by trial judges. When that authority is exercised, the potential arises for some strain upon the normally cordial relationships between trial and appellate judges.

This Article is an attempt to ease that strain by providing some perspective on the process of appellate reversal. Like many concepts, "reversal" is a general term that applies to widely differing occurrences. I have undertaken to examine a large group of decisions of an appellate court and identify the various categories of decisions in which a "reversal" occurred. My basic point is that a sounder basis for assessing the work of both appellate courts and trial courts is achieved by considering the various categories of cases in which the decision of an appellate court alters in any way the judgment of a trial court, instead of lumping them together under the all-encompassing rubric of "reversal." Thus, I am not using the term "reversal" in the technical sense of an appellate judgment that requires the trial court to rule in favor of the appellant. The "reversals" examined in this study include dispositions that alter a trial court's judgment in any way (reversing in whole or only in part) or remand for further findings or for clarification.

Not surprisingly, I have examined decisions of the court on which I serve, the United States Court of Appeals for the Second Circuit. My review covered all Second Circuit decisions rendered during the two-year period from July 1, 1989 to June 30,

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1991.[1]

I was prompted to undertake this study by two circumstances. First, as a district judge, I was often asked, usually by law students, how I felt when I was reversed. I would reply that my reaction to a reversal depended on the grounds of the reversal. If I had been reversed for making a mistake on some matter of routine trial procedure, like omitting a required portion of a jury charge or excluding some obviously admissible evidence, I would have been chagrined; in such circumstances, I would have needlessly wasted the time of all the participants in that trial. Fortunately, I could honestly have said that I had not been reversed for an "error" of that sort. On the other hand, if I had been reversed because I rendered a legal decision on a close question, like an interpretation of an ambiguous provision of a newly enacted federal statute, and the Second Circuit resolved the question differently, I would perhaps have been disappointed, but not the slightest bit distressed. Reasonable judges will inevitably come out differently on close questions of law. The hierarchical structure of a judicial system requires that even a well-reasoned view of a trial judge will be displaced by the well-reasoned view of a panel of appellate judges. But the questioning by those students started me thinking about categories of reversals.

The second circumstance prompting this study occurred at a judicial workshop of the Second Circuit a few years ago at which, as a circuit judge, I participated on a panel with district judges discussing aspects of the roles of our respective courts. A district judge expressed the view that the reported rate of appellate reversals, most recently said to be about 14%,[2] demonstrated that something was seriously wrong. As he put it, either the district judges are not doing *their* jobs properly (by making too many errors) or the circuit judges are not doing *their* jobs properly (by reversing too many decisions that are not

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[1] My law clerks during 1991-92, Claudia Hammerman and Victor Hong, helpfully analyzed all of the dispositions by summary order; I analyzed all of the dispositions by published opinion.

[2] For the court year ending June 30, 1991, the Administrative Office of the United States Courts reports that all the courts of appeals recorded 22,707 "terminations on the merits" and reversed 2503 cases and remanded another 595, for an overall reversal rate of 13.6%. Admin. Off. U.S. Courts, *Annual Report* 177, tbl. B-5 (1991) [hereinafter *AO Annual Report*].

erroneous).

I replied that I did not think the 14% reversal rate told us anything about the quality of the job being done by either group of judges. In fact, I continued, that rate might just indicate that both groups are performing well—the trial judges are being affirmed in the overwhelming percentage of cases and perhaps being reversed only in the inevitable number of close calls where reasonable judicial minds may differ. I suggested (admittedly from my provincial perspective on the appellate court) that if the reversal rate was high, it might well indicate that district judges were not doing their jobs properly, and if the reversal rate was low, it might well indicate that circuit judges were not doing their jobs properly. But before I could assess the significance of the reported 14% reversal rate, I would have to know a good deal more about the kinds of cases in which reversals were occurring. Since then, I have discovered that there has been only a single published study that systematically analyzes appellate reversals, and it makes no attempt to categorize grounds of reversals.[3]

I. THE DATA

The Court of Appeals for the Second Circuit, during the two years of this study, was a court of thirteen active judges, who, along with six senior judges, sit in panels of three to review judgments of the six district courts of the Second Circuit. The district courts encompass the four geographic districts of New York and the single districts of Connecticut and Vermont. At the end of the two years studied, there were forty-seven active and twenty-eight senior district judges serving in those six districts.[4] The study examined only appellate decisions rendered in ap-

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[3] Margaret P. Mason, Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191 (1978) (analyzing state supreme court reversals in the aggregate and factoring in such variables as the nature of the parties, the complexity of the case, the type of issues involved in the appeal and the area of law). Mason used data first reported in Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977). The Kagan study, based on a sample of 5904 cases decided by 16 state supreme courts between 1870 and 1970, outlined major trends in the type and number of state supreme court cases during this period. It did not analyze reversals.

[4] For the two years studied, 15 authorized district judgeships were unfilled. Second Circuit Annual Report 72 (1991).

peals from rulings of district courts; review of administrative agency matters brought directly to the Second Circuit were not considered (though social security matters, considered first by the Social Security Administration and then by a district court, were included). Also, appeals from district court judgments dismissed for lack of appellate jurisdiction were not included.

The study covered appellate decisions whether rendered in published opinions or unpublished summary orders.[5] The aggregate results are set forth in Table 1.

Table 1
Aggregate Reversal (Including Remand) Data
July 1, 1989-June 30, 1991

Total dispositions (opinions and orders)	2025	
Affirmances	1534	(76%)
Reversals in whole	300	(15%)
Reversals in part	191	(9%)
Reversals in whole or in part	491	(24%)
Total published opinions	1002	
Reversals by published opinion	459	(46%)
Total summary orders	1023	
Reversals by summary order	32	(3%)
Total dispositions in civil cases	1336	
Reversals in civil cases	362	(27%)
Total dispositions in criminal cases	689	
Reversals in criminal cases	129	(19%)

For the two-year period there were 2025 appellate decisions and 491 reversals (in whole or in part), for an overall reversal rate of 24%. Of the total of 491 reversals, 191 were reversals in part. Thus, the overall reversal rate can be restated to reflect that of 2025 appellate decisions, 300 (15%) were reversed in whole, and 191 (9%) were reversed in part. I should emphasize that my definition of "reversal" includes any alteration of a district court judgment, whether to reverse or remand, in whole or in part.

As one would expect, the reversal rate was higher for decisions rendered by published opinion than by summary order. Of 1002 published opinions, 459 (46%) were reversals; of 1023 summary orders, 32 (3%) were reversals.

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[5] *See* 2d Cir. Rule § 0.23.

The reversal rate was higher for civil cases than for criminal cases. Of 1336 civil cases, 362 (27%) were reversed; of 689 criminal cases, 129 (19%) were reversed.

Far more significant, in my opinion, are the figures for categories of reversals. Before setting forth the data, I should acknowledge the imperfections of my categories. Categories of reversals can be formed in various ways. One way would be primarily on a functional basis, for example, a category for interpretations of the Constitution and another category for remands for more findings of fact. But categories can also be formed to indicate the type of result required, for instance, a category for reversals of judgments granting habeas corpus and another for reversals of judgments denying habeas corpus. Obviously, every ruling in a habeas corpus case could be said to involve an interpretation of the Constitution. Yet I thought it more informative to group together certain types of results, such as those involving habeas corpus judgments, even though those reversals could have been placed in the category involving interpretations of the Constitution. Similarly, I have a category of reversals that reinstate dismissed complaints, although these cases could be considered interpretations of federal statutes (as are most of them). But, again, it seemed more informative to show the group of reinstated complaints; these reversals usually mean the court of appeals thought the complaint deserved some discovery, not that there was a basic disagreement with a district court as to the meaning of the statute on which the complaint was based. Finally, reversals because of a jury charge often could be considered interpretations of a statute. Again, I have grouped them separately, however, because these reversals rarely involve a fundamental disagreement about the meaning of a statute, but usually concern the need for a more correctly worded charge.

The categories of reversals, with the number for each category, are set forth in Table 2.

Table 2
Categories of Reversals

Interpretation of Constitution	18
Interpretation of federal statute	94
Interpretation of Sentencing Guidelines	15
Interpretation of contract	22
Interpretation of consent judgment	4
Interpretation of state law	17
Remand for findings	59
Summary judgment disallowed	58
Complaint reinstated	18
Error in jury charge	14
Error in admitting evidence	6
Error in excluding evidence	3
Evidence insufficient	16
Rejection of directed verdict or j.n.o.v.	6
Finding of fact clearly erroneous	7
Revision of damages	7
Habeas corpus rejected	14
Habeas corpus required	7
Sanctions disallowed	10
Qualified immunity upheld	9
Qualified immunity disallowed	1
Miscellaneous	103

The largest category of reversals consists of interpretations of a written document, usually a federal statute. There were 153 instances of such reversals; 18 involved the Constitution, 94 involved a federal statute, 15 involved the sentencing guidelines, 22 involved a contract and 4 involved a consent judgment. Similar to these disputes about legal interpretation were the 17 instances where a ruling on a point of state law was deemed erroneous.

Two major categories involved remands for further proceedings, either to make additional findings or to permit the case to advance beyond summary judgment. There were 59 instances where a case was remanded for further findings. In 58 instances a grant of summary judgment was set aside and the case remanded because of a triable issue of fact. In a similar vein, there were 18 instances where a complaint was reinstated or the plaintiff was granted leave to amend the complaint.

There were comparatively few disagreements as to trial

courts' assessment of facts, whether individual or in the aggregate: in 16 instances, a verdict or finding was rejected for insufficiency of the evidence; in 6 instances, a directed verdict or judgment n.o.v. was set aside; and in 7 instances, a finding of fact was considered clearly erroneous. In 7 instances, damage computations were revised.

Conduct of a trial rarely precipitated a reversal. In 14 instances, a charge was held to be erroneous. Verdicts were set aside in 6 instances because evidence was held to have been improperly admitted and in 3 instances because evidence was held to have been improperly excluded.

The remaining categories that can be conveniently identified concern substantive outcomes. Reversals occurred in 14 habeas corpus cases; in 7 instances the denial of habeas corpus was reversed (in whole or in part), and in 7 instances the grant of habeas corpus was reversed (in whole or in part).

Sanctions decisions were reversed in 10 instances: 6 to vacate the imposition of Rule 11 sanctions, 2 to vacate dismissal as a sanction, 1 to require the imposition of Rule 11 sanctions and 1 to require a contempt adjudication.

Qualified immunity rulings were reversed in 10 instances, 9 to uphold a defendant's claim of qualified immunity and 1 to reject such a claim.

Regrettably, that leaves 103 "miscellaneous" reversals that cannot usefully be placed in any identifiable category. These instances involved disagreements about a wide range of legal issues, for example, the application of *res judicata* or the exercise of pendent jurisdiction.

Some further explanation should be made with respect to the 129 instances of reversals in criminal cases. Many involved sentencing appeals and a few involved successful appeals by the prosecution of sentences or orders granting motions to suppress. In 51 instances, a conviction on at least 1 count was vacated. Thus, the reversal "rate" in criminal cases is more accurately reported, not as the 19% of all 689 opinions in which some aspect of a criminal judgment was altered, but as the 7% in which at least 1 count of a conviction was vacated. In 10 instances, the Government prevailed on a criminal appeal, usually from a ruling granting a motion to suppress. Other criminal reversals involved remands for hearings.

Since sentencing appeals are primarily sentencing guidelines

cases, the outcomes of those cases were separately examined. There were 243 challenges to guideline sentences: 194 were affirmed and 49 were reversed or remanded. Of the 49 reversed or remanded, 20 involved an absolute rejection of at least one aspect of the sentence and 29 involved a remand for further findings, clarification, or observance of procedures, such as notice of departures. Thus, of the total of 243 appealed sentences, 194 (80%) were affirmed, 223 (92%) were permitted (by affirmance or remand for findings), and 20 (8%) were not permitted (in whole or in part).

Of the 41 departures that were appealed, 20 were affirmed, 11 were rejected and 10 were remanded for further findings. Of the 32 upward departures, 17 were affirmed, 6 were rejected and 9 were remanded. Of the 9 downward departures, 3 were affirmed, 5 were rejected and 1 was remanded.

II. Reflections

My first reaction to the data is that they reveal an overall reversal rate significantly higher than the rate reported by the Administrative Office of the United States Courts ("AO"). Some reasons for the difference between the AO and my study are readily apparent. First, the AO counts cases and I have counted opinions, both published and unpublished. I was more interested in counting and categorizing the opinions that accomplished a reversal than the number of appellants who benefitted thereby. One opinion may affirm or reverse the outcome of several appellate "cases," as occurs in an appeal from the joint trial of several defendants. Second, the AO counts all cases, whether coming to a court of appeals from district courts or administrative agencies. I have counted only cases coming from district courts, since I was more interested in what the Second Circuit was doing with respect to judgments of district courts.

For the statistical years 1990 and 1991 the AO reports that a total of 2812 appeals in the Second Circuit terminated on the merits, of which 346 were reversed or remanded, for a reversal rate of 12%.[6] The AO's report of more appeals than my total of opinions is readily understandable, as just explained. However,

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[6] *AO Annual Report* 177, *supra* note 2, at tbl. B-5; *id.* at 121, tbl. B-5 (1990) (using figures supplied by the courts).

the AO's lower number and lower percentage of reversals are less clear. Two possibilities occur to me. First, the AO figures include a category called "other," which may include some of the reversals I have counted. The AO's "other" category for the two years totals 83. Second, the AO reports 255 cases as "dismissed." I would have thought that these cases are really dismissed for lack of appellate jurisdiction, and hence excluded them from my count as well, although it is possible that some AO "dismissals" are included in my count of reversals. The AO reports a Second Circuit reversal rate of 10.5% in 1990 and 4.5% in 1991; these rates reflect only terminations categorized as "reversed" and do not include those categorized as "remanded" or "other." If the "reversed" and "remanded" categories are combined, the AO reversal rate for 1990 and 1991 is 12%, and if the "other" category is included, the rate rises to 15%. That is still significantly below the aggregate 24% reversal rate I have calculated. Part of the difference is explained by the higher base the AO is using, counting cases and not opinions. But part is not explainable; even if all cases categorized by the AO as "reversed," "remanded," or "other" are combined, that total of 429 cases for the two years is less than the 491 opinions I have counted in which a judgment was reversed or remanded, in whole or in part.

So the reversal rate is higher than had been thought. The related questions remain: Is it too high and does the rate reflect that something is wrong with the performance of either the district courts or the Second Circuit, or both? I readily concede that I am not an unbiased witness on either question, but I will venture my conclusions nevertheless, confident that the reader can make whatever discount is appropriate for my institutional vantage (or disadvantage) point.

I am satisfied that the reversal rate is not too high. I form that conclusion from a combination of two factors. The first is a comparison of the aggregate reversals to the aggregate number of judgments of the district courts. In the two years covered by this study, the 6 district courts of the Second Circuit terminated 38,681 cases.[7] Thus, of all the judgments rendered by the district

[7] In 1990 the six district courts terminated 18,105 civil cases, *AO Annual Report* 135, tbl. C-1 (1990), and 2611 criminal cases, *id.* at 177, tbl. D-1. In 1991, 15,349 civil cases, *id.* at 188, tbl. C-1 (1991), and 2616 criminal cases, *id.* at 230, tbl. D-1 (1991) were terminated.

courts, the reversals that occurred in 491 instances constituted only 1%.[8] As one would expect, at least in civil cases, some sort of a market is working. Litigants and lawyers are accepting the judgments of district courts in the overwhelming percentage of cases, and are appealing only the group of cases for which there appears to be some reasonable prospect of reversal. That the Second Circuit rendered 2025 opinions and altered, in some way, the judgment of a district court in 491 instances out of the nearly 40,000 judgments available for challenge does not strike me as an undue degree of oversight.

My second basis for considering the reversal rate reasonable derives from my admittedly subjective assessment of the reversal opinions themselves (including the nearly one-quarter in which I participated). I was impressed that the overwhelming proportion of the reversals arose from disagreements between the Second Circuit and a district court on a reasonably debatable point of law. Arguably, the number of reversals of that sort indicates that the law is less determinate than one would wish, but it does not indicate to me that either the district courts or the Second Circuit are performing deficiently. I do not consider the law unduly indeterminate when I notice that the Second Circuit altered in any way only 1% of all judgments rendered by the district courts.

As significant as the large number of reversals on reasonably debatable points of law was the extremely small number of reversals on what might be thought of as avoidable trial errors. There were very few reversals for errors in the charge (14) or errors in admitting (6) or excluding (3) evidence, and most that occurred generally involved a fair dispute concerning unsettled law. Also, there were very few reversals where the Second Circuit disagreed with the trial court's assessment of the facts in the aggregate, as in reversing a count for insufficiency of the evidence (16) or in rejecting a directed verdict or a judgment n.o.v. (6), or with regard to a particular finding, as in a reversal because of a finding deemed clearly erroneous (7). Though district

[8] The time-frame for Second Circuit opinions is the same time-frame as district court judgments, but obviously the lag time in perfecting appeals means that the judgments that were reviewed by the Second Circuit during 1990 and 1991 were not all rendered by the district courts in those years. That fact does not alter the significance of the reversal rate when related to the total of all district court judgments.

judges sometimes voice criticism of appellate judges for engaging in "appellate fact-finding,"[9] this study indicates how infrequently a district judge's finding of fact is deemed clearly erroneous.

A significant number of reversals resulted from remands for further findings (59), but I do not think the size of this group reflects adversely on either the district courts or the Second Circuit. District courts are endeavoring to dispose of an oppressive volume of cases. It is inevitable that in some instances they will omit one or more findings that a reviewing court believes it requires in order to undertake proper review.

Two categories of reversals might be slightly higher than warranted. In 58 instances, the Second Circuit reversed a grant of summary judgment. Some of these involved a reasonable dispute about a close issue of law, but many occurred because the Second Circuit concluded that a genuine issue of material fact remained to be resolved, even though the governing legal principles were undisputed. Some cases of the latter sort can fairly be called avoidable errors, but I do not fault the district courts for precipitating this number of summary judgment reversals. I have long believed, both as a district judge and as an appellate judge, that district judges ought to grant summary judgment in a few cases that are just a bit short of the traditional standards. Often when they do so and write a persuasive opinion, the losing side becomes convinced that its prospects of ultimate success are too slight to justify an appeal and accepts its defeat. In such cases, the district court is spared a trial and the court of appeals is spared an appeal.

To know whether district courts are making excessive use of this "leeway," one would have to know how many summary judgments were being entered and *not* appealed and how many of these were a bit short of traditional summary judgment standards. Then one would need to see if the few "extra" grants of summary judgment that were being reversed were more than justified by the number of "extra" grants of summary judgment that were never appealed. Without the benefit of such knowledge, my intuition is that district judges are venturing to grant "extra" summary judgments in an acceptable number of cases,

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[9] *See* Gerard L. Goettel, *Appellate Factfinding*, 13 LITIG. 1, 7 (Fall 1986).

precipitating a few extra appeals, but sparing their courts and ours a considerably larger volume of business.

Similarly, with the 18 instances in which the dismissal of a complaint was reversed (in whole or in part), though some cases involved a reasonable dispute on an issue of law, only a few involved the reversal of a dismissal that should not have occurred. This typically occurred with a *pro se* complaint that was dismissed too precipitously. As with grants of summary judgments, I understand why busy district judges will occasionally act too quickly. In the main, I think they spare themselves and the Second Circuit considerable business that ultimately will prove futile for plaintiffs by erring just a bit on the side of precipitous dismissals of a complaint. Of course, they must be careful, but the relatively few precipitous dismissals that occurred seem to justify what must be the large volume of "extra" dismissals that were accepted and never pursued on appeal.

Conclusion

My overall assessment of the "reversal rate" is favorable both to the district courts and the Second Circuit. Having examined all the opinions of two years that altered in any way the judgment of a district court, I am satisfied that the 491 instances of "reversal" are an appropriately low percentage of the nearly 40,000 judgments entered and an entirely acceptable percentage of the 2025 opinions rendered by the Second Circuit. I admit that I had that feeling before I began, but I am far more confident of that view after analyzing the various categories of reversals and remands. I hope that my colleagues on the district courts agree.