

CASELOAD CHARACTERISTICS

Understanding the Workload of the West Virginia Supreme Court

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APPEAL BY RIGHT IS GUARANTEED

Under the West Virginia Constitution, court rules “shall have the force and effect of law.” The right of appeal was guaranteed by law in 2011, following a comprehensive modernization of the court rules that govern appeals. Appeal by right means that each properly prepared appeal is required to be reviewed on the merits.

Before 2011, all appeals were discretionary; they were reviewed, but about three-fourths were refused with no explanation and no decision on the merits. As a result of perceived flaws in this process, the Supreme Court undertook a study of how the appeal process could be improved. After conducting education seminars in ten locations around the state, and reviewing lengthy public comments by dozens of interested lawyers and groups, the Court thoroughly modernized the rules for consideration of appeals.

Cases are now fully briefed before being considered. Litigants agree on the record and prepare it for the Court to review. Specific criteria are established for cases to be argued. Most importantly, in all properly prepared appeals, the Court *must* issue a decision on the merits. To see one effect of this change on the way appeals are considered, compare these two five-year periods in the last decade:

2006 - 2010	2011-2015
Appeals Refused 12,050	Appeals Refused 0

DECISIONS ON THE MERITS HAVE GREATLY INCREASED

As a direct result of implementing appeal by right, the number of decisions on the merits has expanded dramatically. Such decisions provide more information to litigants about the outcome of the case, because the decisions address all assignments of error that are properly

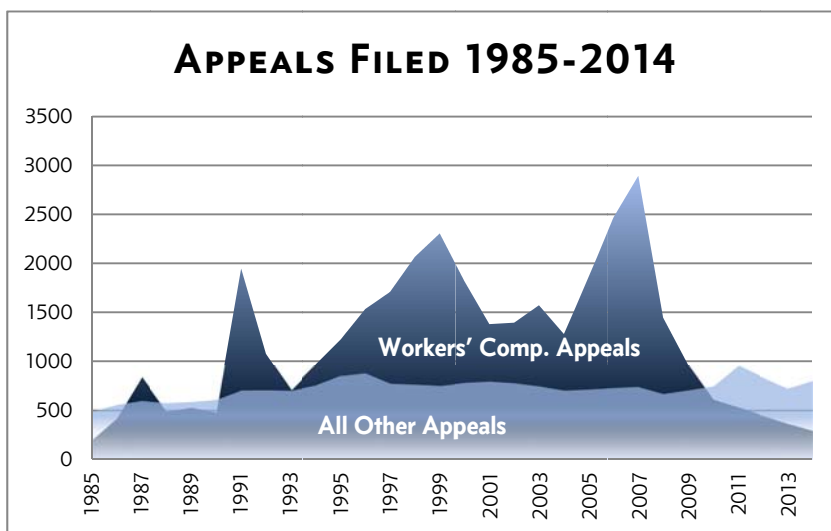
developed. Once again, compare the number of decisions on the merits in the same two periods over the last decade:

2006 - 2010	2011-2015
Decisions on Merits 670	Decisions on Merits 5,003

All of the decisions on the merits issued by the Court establish legal precedent. Signed opinions that establish or review important points of law are eventually published and distributed in bound volumes throughout the State. Memorandum decisions are issued in cases that address no new point of law. From a cost and a practical standpoint, memorandum decisions are not published in the bound volumes but are available for free in a searchable format on the Court’s website. Opinions and memorandum decisions on the website are viewed over 100,000 times in an average year. In addition, legal research firms such as Westlaw and LexisNexis make published opinions and memorandum decisions available in their online databases for lawyers and judges to cite as precedent. Memorandum decisions address all properly developed assignments of error, and are not an indicator that the Court has given short shrift to an appeal. In fact, in many routine cases, the litigants themselves request that the Court issue a memorandum decision rather than a signed opinion.

CASELOAD HAS DECLINED

Over the past fifteen years, case filings have fallen by more than half. Workers’ compensation cases were the most important variable affecting the Court’s caseload over the past three decades. Compensation appeals began to rise in the 1990s, eventually making up two-thirds of all filings. This disproportionate number was due to a temporary administrative transition. Legislative reforms and privatization have resulted in a substantial reduction in

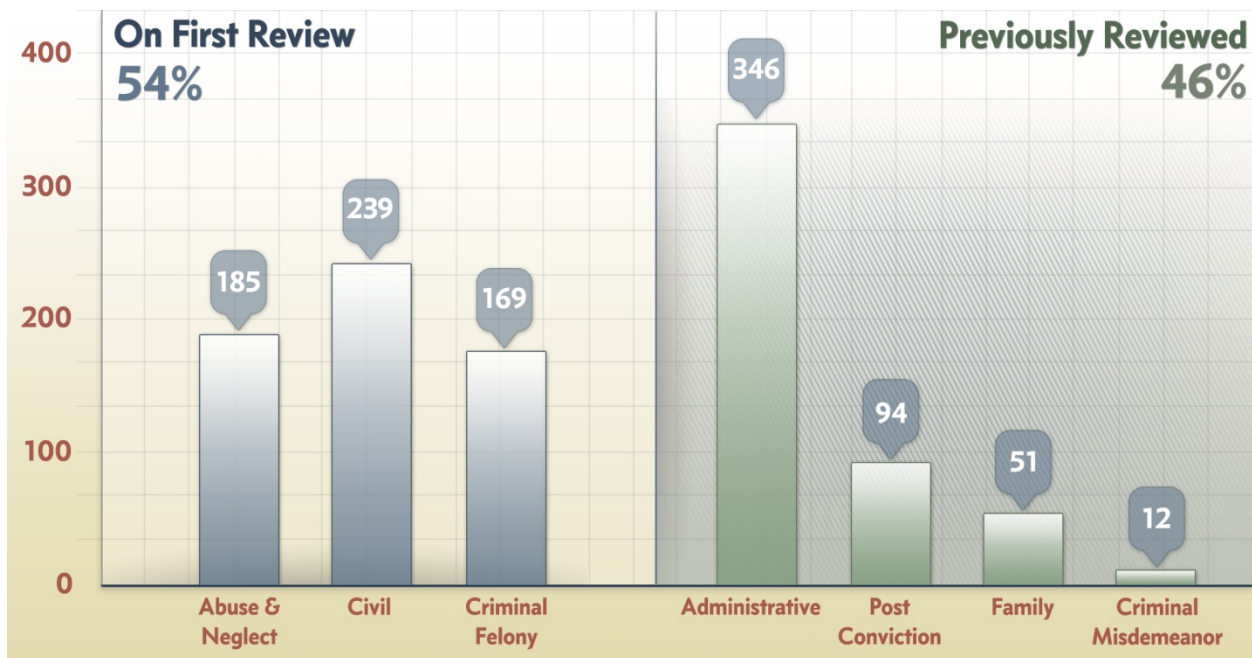


workers' compensation appeals, which now make up just over twenty percent of all filings. Overall filings in 2015 are estimated to fall below 1,300 cases for the first time in over thirty years.

The drop in appellate filings is also seen at the national level. According to the National Center for State Courts, total incoming filings in state courts of last resort have declined by eleven percent since 2004.

NEARLY HALF OF APPEALS HAVE ALREADY BEEN REVIEWED

Four categories of appeals have been previously reviewed by another tribunal *before* being appealed to the Supreme Court. Together, these four categories of previously reviewed cases made up forty-six percent of all appeals filed in 2014. Only three categories of appeals involve issues that are examined on first review by the Supreme Court.



Appeals from cases initially decided by a state agency make up the majority of cases that have been previously reviewed. The largest segment of these are workers' compensation appeals. By statute, a protest in a workers' compensation claim is first decided by the Office of Judges. That decision can be appealed to the Board of Review, which issues a written decision in the appeal. The Board of Review decision may then be appealed a second time to the Supreme Court. The other segment of administrative appeals includes cases involving driver's license revocation, state employee grievances, and taxation. By statute, these matters are first decided by an administrative hearing examiner and may then be appealed to a circuit court

judge, who then issues a decision on the appeal based on the administrative record. The circuit judge’s decision may then be appealed a second time to the Supreme Court, which reviews the case based upon the same administrative record.

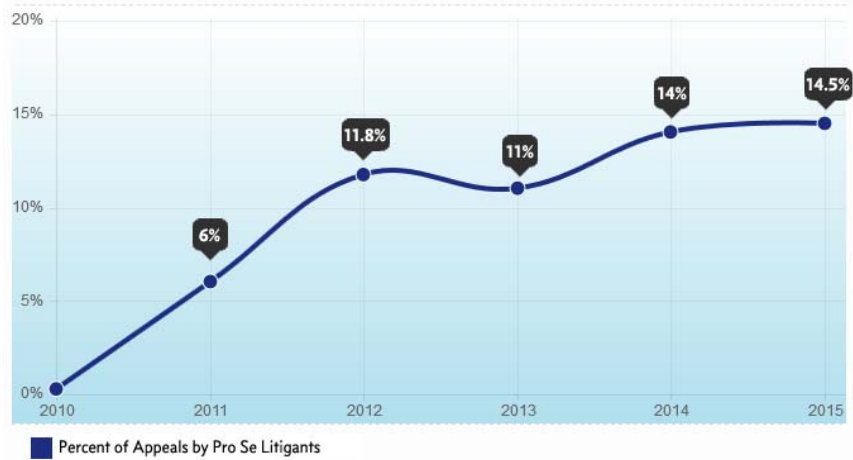
The second-largest category are post-conviction appeals. In these cases, a convicted person has already had the right to file one direct appeal that reviews the merits of the criminal conviction, whether it was the result of a jury trial or a guilty plea. Under state law, once the direct appeal process is concluded, an incarcerated person in state custody has the right to file a post-conviction *habeas corpus* petition that makes a collateral attack on the conviction based on constitutional violations. Circuit court judges must review the trial court record and conduct additional hearings if necessary, then issue a decision on the post-conviction *habeas corpus* petition. That decision may then be appealed to the Supreme Court, based upon the record prior to conviction and any other record that is made in the post-conviction proceeding.

The third-largest category are family court appeals—cases that have been decided in the first instance by a family court judge. The family court judge’s order may then be appealed to a circuit court judge, who then issues a decision on the appeal based upon the record before the family court. That decision may then be appealed a second time to the Supreme Court, which reviews the case based upon the same family court record.

The fourth and smallest category are appeals from misdemeanor criminal convictions, which are cases that involve a conviction in magistrate court that have already been appealed to the circuit court. The circuit court’s decision may then be appealed a second time to the Supreme Court.

APPEALS BY SELF-REPRESENTED LITIGANTS HAVE INCREASED

Appeals brought by self-represented (*pro se*) litigants have increased since the appeal by right was instituted in 2011. In 2010, less than one



percent of all appeals were brought by *pro se* litigants. Since that time, the percentage has grown to over fourteen percent.

Appeals by *pro se* litigants involve more work for court staff to make sure that filings comply with the rules to the greatest extent possible. The cases also require more exacting review by the Court, because the arguments are not always carefully prepared.

DESPITE THE COURT’S VIGILANCE, MANY APPEALS ARE POORLY DEVELOPED

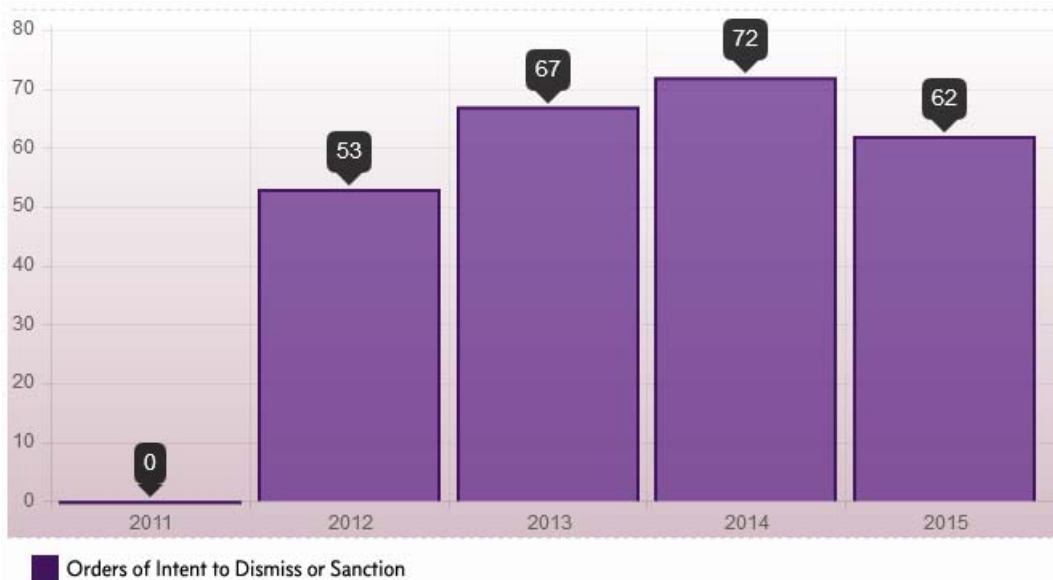
Under the system of appeal by right, every case is fully briefed by the parties and includes a record of the lower court proceedings before it is mature to be considered by the Court. After a nearly two-year period to allow litigants to adjust to the new requirements of the rules, the Court issued an Administrative Order in December 2012 that pointed to numerous deficiencies in the quality of appeals, including

- Briefs that appear to be pieced together in a hurried manner by cutting and pasting memoranda previously submitted to a circuit court, the Workers’ Compensation Board of Review, or some other tribunal that does not have the same briefing requirements as this Court;
- Briefs that lack citation of authority, fail to structure an argument applying applicable law, fail to raise any meaningful argument that there is error, or present only a skeletal argument;
- Appendices that are disorganized, fail to contain a table of contents, and are not “clearly numbered in a sequential fashion to permit each page to be located by reference to a single page number” as required by Rule 7(b);
- Briefs that do not include a table of contents or a table of authorities as required by Rules 10(c)(1) and (2);
- Briefs that do not contain a summary of argument as required by Rule 10(c)(5), or, in those instances where a summary of argument is included, the brief does not adhere to the requirement that the summary “should be a concise, accurate, and clear condensation of the argument made in the body of the brief”;
- Briefs that set forth rambling assignments of error that are essentially statements of facts with a conclusion that the lower tribunal was “clearly wrong” rather than “a list of the assignments of error that are presented for review, expressed in the terms and circumstances of the case but without unnecessary detail” as required by Rule 10(c)(3);

- Briefs with arguments that do not contain a citation to legal authority to support the argument presented and do not “contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal” as required by rule 10(c)(7);
- Briefs by respondents that do not “specifically respond to each assignment of error, to the fullest extent possible” as required by Rule 10(d)[.]

These deficiencies are not mere procedural niceties; they run to the very core of the Court’s ability to review an appeal. The Administrative Order cautioned that deficient appeals would be subject to sanctions and possible dismissal.

Although the deadlines for each appeal are laid down by a scheduling order early in the case, many litigants do not meet deadlines. In 2014, for example, there were 299 motions for extension of time filed. If there is good cause shown, the Court will often grant an extension, which requires issuing an amended scheduling order. This process can occur multiple times, particularly in cases involving termination of parental rights or review of a criminal conviction. In some cases, despite extensions being granted, litigants still miss deadlines or submit non-compliant filings. In those cases, the Court issues formal orders giving notice of intent to dismiss the case and/or sanction the attorney. The number of those orders has increased over the past four years.

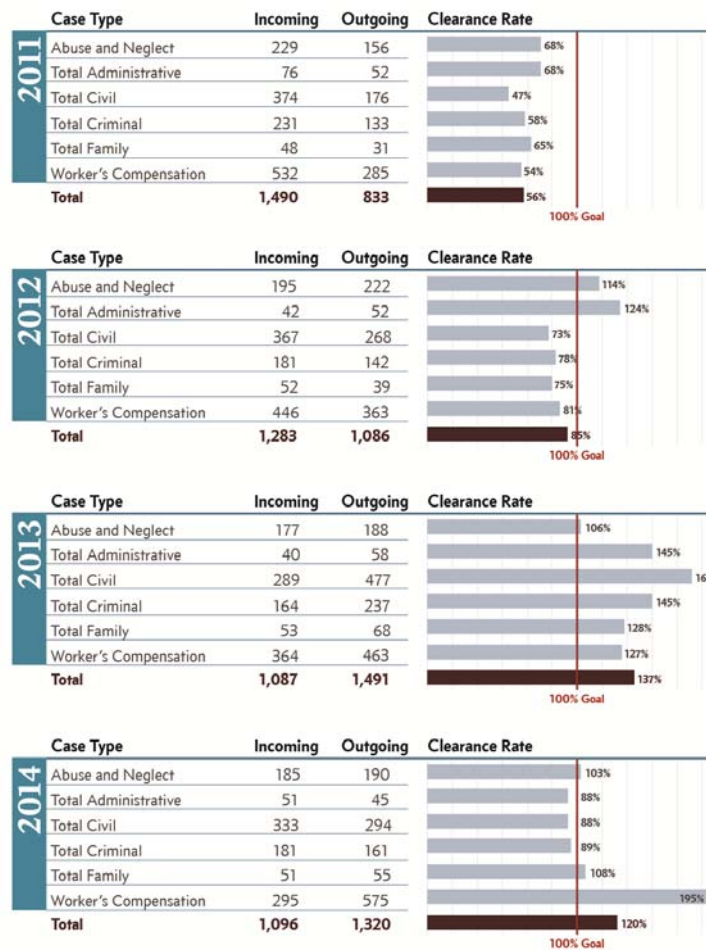


Despite all of this effort, the Court continues to decide cases that are poorly developed. Since the December 2012 Administrative Order, at least eight memorandum decisions and one opinion have referenced the order as a means to identify deficiencies. More broadly, under

Rule 10(c)(7) litigants are required to support assignments of error in an appeal by pointing to specific points in the record where the error was presented to the lower tribunal, and litigants must make specific legal arguments. Errors that are not preserved on the record or not supported by legal arguments are waived. In the past three years, sixty-six decisions of the Court have cited the Rule 10(c)(7) waiver with respect to the quality of a party’s briefing: twenty in 2013; eighteen in 2014; and twenty-eight in 2014.

CASES ARE TIMELY HANDLED

Examining the clearance rate is a good measure of the performance of an appellate court. Clearance rate compares the number of outgoing cases as a percentage of incoming cases, and should ideally be close to one hundred percent. As expected, implementing the appeal by right resulted in an initial slowdown, but the Court quickly adapted.



FORTY PERCENT OF APPEALS ARE HANDLED BY APPOINTED COUNSEL PAID FOR BY THE STATE

In three groups of cases indigent persons are entitled by law to appointed counsel paid for by the State to represent them in an appeal: appeals from criminal convictions; appeals from a termination of parental rights; and appeals from post-conviction *habeas corpus* proceedings. In criminal and post-conviction cases, ninety-five percent of appeals involve appointed counsel. In parental termination cases, all of the appeals involve appointed counsel. In fact, these cases most often have three appointed lawyers: one for mom, one for dad, and a guardian *ad litem* for the child (or children). Using this metric, 445 appeals in 2014 were handled by appointed counsel, while 651 were handled by private counsel. In addition to the cost of appointed counsel in forty percent of appeals, the government also pays the cost for lawyers who represent the State in criminal and parental termination cases.

Government costs for lawyers are not confined to the forty percent of appeals with appointed counsel. Many of the remaining sixty percent of appeals are handled by government-paid lawyers, such as the state attorney general's office, county prosecutors, and in-house counsel for state agencies. Examples include administrative appeals involving license revocation or state employee grievances, tax cases, public service commission cases, civil forfeiture cases, eminent domain cases, attorney general civil enforcement actions, and many other cases involving important issues of state law.