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## Judging The Judges (ABA Journal)

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BY BRIAN L. WEAKLAND

**Y**ou have gathered the evidence, tried the case and won the judgment in federal court—what are the chances the ruling will stick? According to a new survey, the odds are nearly six out of 10 it will be affirmed.

The Federal Reporter, in which federal appellate decisions are published, tells its own story of judges themselves being judged—of their decisions being affirmed or reversed, vacated or remanded.

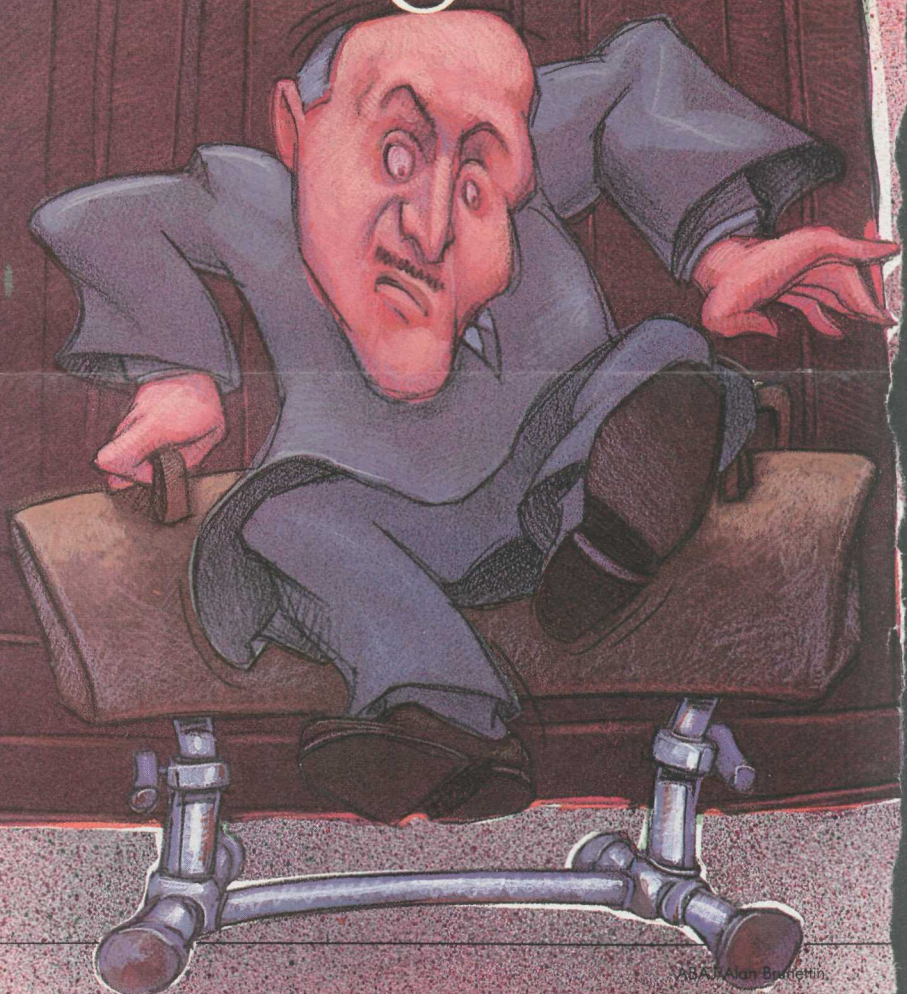
My study of all 3,988 published court of appeals opinions issued in civil cases in 1986 reveals that 59.4 percent of district court opinions were affirmed. But that percentage varies widely from judge to judge.

The study excluded criminal cases and habeas appeals because district court decisions in those cases are almost always affirmed. It considered a district court decision reversed if the court of appeals reversed, remanded, or vacated the decision, unless the judgment was affirmed on the merits and remanded simply for reassessment of attorney fees or costs.

Each district judge was given an initial score of 50 points. Five points were added for each affirmation, while 8 points were deducted for each reversal. Reversals are more costly because they are less common.

A disposition was considered to be a reversal if the judgment below was reversed, vacated or remanded to the trial court for further proceedings, unless the bulk of the judgment

# Judging the Judges



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## Appellate Record of Judges District of Columbia Circuit

Published civil cases for 1986 (Five decisions or more)

Judge	Total Affirmance		
	Cases	Record	Rating
Total Circuit	129	70-59	37
1. Gasch	10	9-1	87
2. Richey	14	11-3	84
3. Harris	7	6-1	72
4. Green, J.	10	7-3	59
5. Hogan	5	3-2	49
6. Oberdorfer	10	5-5	45
7. Greene, H.	10	5-5	35
8. Johnson	15	8-7	34
9. Parker	7	3-4	33
10. Gesell	7	3-4	31
11. Flannery	6	2-4	26
12. Jackson	6	1-5	15
13. Pratt	10	3-7	14

below was affirmed and remand was based on miscalculation of fees or costs. To evaluate an individual judge's ability to decide issues of law (or to predict accurately how the circuit court would find the law), each judge's record in published cases was determined.

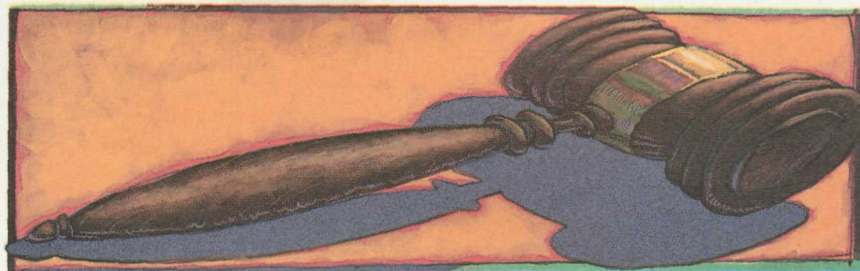
A few disclaimers are in order. The number of cases reviewed for each judge was small. As David Gentry of the Administrative Office of the United States Courts said, "When you're only talking about a couple of hundred cases, a swing of 10 or 15

cases could make a big difference."

The survey does not consider the circuit courts' varying policies on when to publish opinions—the Third Circuit, for instance, publishes nearly all reversals and often affirms with unpublished judgment orders, while the Fifth Circuit publishes nearly two and a half times as many opinions and three times as many affirmances.

### A PERFECT RECORD

District Judge Barbara B. Crabb of the Western District of Wisconsin had the highest affirmance-reversal



## Appellate Record of Judges First Circuit

Published civil cases for 1986 (Five decisions or more)

Judge	Total Affirmance		
	Cases	Record	Rating
Total Circuit	216	146-70	67
Maine			
1. Carter	8	5-3	51
Massachusetts			
1. McNaught	16	13-3	91
2. Garrity	12	10-2	84
3. Caffrey	10	8-2	72
4. Keeton	12	9-3	71
Zobel	12	9-3	71
5. Freedman	6	5-1	67
6. Mazzone	10	7-3	66
7. Skinner	11	7-4	53
New Hampshire			
1. Loughlin	10	9-1	85
2. Devine	9	7-2	74
Puerto Rico			
1. Acosta	12	8-4	56
2. Gierbolini	11	7-4	53
3. Laffite	8	5-3	51
4. Cerezo	7	4-3	46
5. Perez-Gimenez	6	3-3	41
Rhode Island			
1. Pettine	8	4-4	36
2. Boyle	10	5-5	31

## Appellate Record of Judges Second Circuit

Published civil cases for 1986 (Five decisions or more)

Judge	Total Affirmance		
	Cases	Record	Rating
Total Circuit	291	158-133	23
Connecticut			
1. Cabranes	9	7-2	69
New York			
1. Miner	5	5-0	75
2. Haight	7	6-1	72
3. Weinstein	14	10-4	68
4. Lasker	6	5-1	67
Motley	6	5-1	67
5. Nickerson	5	4-1	62
6. Knapp	7	5-2	59
7. Sweet	13	8-5	50
8. Bramwell	7	4-3	46
Goettel	7	4-3	46
9. Munson	6	3-3	41
Sprizzo	6	3-3	41
10. Carter	11	6-5	40
11. Broderick	8	4-4	36
Duffy	5	2-3	36
12. Curfin	10	5-5	35
13. Kram	7	2-5	25
14. Costantino	5	1-4	23
15. Wexler	7	2-5	20
Briant	7	2-5	20
16. Telesca	12	4-8	6
Vermont			
1. Holden	5	0-5	10

## Appellate Record of Judges Third Circuit

Published civil cases for 1986 (Five decisions or more)

Judge	Total Affirmance		
	Cases	Record	Rating
Total Circuit	240	107-133	-3
New Jersey			
1. Stern	5	4-1	67
2. Thompson	5	4-1	62
3. Lacey*	7	5-2	59
4. Ackerman	8	5-3	51
5. Barry	6	2-4	33
6. Brotman	9	4-5	30
7. Debevoise	11	5-6	27
8. Sarokin	6	1-5	15
Pennsylvania			
1. Giles	6	3-3	46
2. Bechtle	6	3-3	41
Fullam	6	3-3	41
3. Van			
Artsdalen	10	4-6	32
4. Weiner	8	3-5	30
5. McGlynn	6	2-4	28
6. Kelly	5	1-4	23
7. Conaboy	6	1-5	15
Huyett	6	1-5	15
8. Mencer	8	1-7	-1
Virgin Islands			
1. Christian	5	1-4	23
2. O'Brien	9	3-6	17

\*Retired; now in private practice

record. Judge Crabb, a 1962 graduate of University of Wisconsin Law School and a 1979 appointee, had a record of 10 affirmances and no reversals.

Judge John M. Duhe Jr. of the Western District of Louisiana was second with an 11-1 record, and Judge John J. McNaught of the District of Massachusetts was third at 13-3. Judge Wilbur D. Owens Jr. of the Middle District of Georgia, with a 7-16 record, had the lowest affirmance-reversal record.

Judge Crabb was affirmed on appeal in four summary judgments, two Rule 12 dismissals, a directed verdict, a default judgment, a bankruptcy order and a jury verdict. (She also was affirmed in three published opinions in criminal cases in 1986, although a fourth criminal case was remanded for further testimony.) She attributed her record on appeal to "a lot of luck."

"I certainly don't try to guess

what the court of appeals [for the Seventh Circuit] is going to say," she said, after being told of the survey results. "I try to think the issues through and I write almost everything I do."

Judge Crabb said the large number of published opinions in her circuit lends more certainty to the law. She said the court of appeals, especially with the addition of Judge Richard A. Posner, performs an educational function for the district judges. "They take time to explain a lot of areas of law and provide a lot of guidance," Judge Crabb said. "There is a more unified voice from our circuit."

While she sometimes disagrees with the appellate court's rulings, Judge Crabb said a judge must follow the law and, where the law is unclear, write an opinion in such a way as to persuade the court of appeals. "Some of the district judges I have the most respect for are reversed fairly often," she added.

Judge Crabb credited her mentor,

### Appellate Record of Judges Fifth Circuit

Published civil cases for 1986 (Five decisions or more)

Judge	Total Affirmance		
	Cases	Record	Rating
Total Circuit Louisiana	580	350-230	41
1. Duhe	12	11-1	97
2. Polozola	9	8-1	82
3. Duplantier	14	11-3	81
4. Sear	8	7-1	77
5. Staggs	10	8-2	74
6. Arceneaux	7	6-1	72
7. McNamara	12	9-3	71
8. Collins	12	9-3	69
Little	9	7-2	69
9. Beer	13	9-4	68
10. Wicker	7	5-2	59
11. Cassabry*	9	6-3	56
12. Heebe	5	3-2	54
Hunter	6	4-2	54
13. Parker	10	6-4	53
14. Livaudais	5	3-2	49
15. Feldman	7	4-3	46
16. Carr	11	6-5	38
Scott	7	3-4	38
17. Veron	5	2-3	36
18. Schwartz	10	5-5	33
19. Mentz	12	6-6	30
20. Shaw	16	8-8	26
Mississippi			
1. Keady	5	5-0	75
2. Biggers	10	8-2	72
3. Nixon	8	6-2	64
4. Lee	13	8-5	48
5. Senter	6	3-3	41
6. Barbour	13	6-7	24
Texas			
1. Sanders	13	10-3	74
2. Porter	7	6-1	72
Smith	7	6-1	72
3. Sessions	6	5-1	67
4. Black	21	14-7	62
5. Mahon	9	6-3	56
6. Prado	6	4-2	54
7. Nowlin	11	7-4	53
Woodward	11	7-4	53
8. McDonald	10	6-4	48
9. Robinson	10	6-4	46
Steger	7	4-3	46
10. Fisher	9	5-4	43
11. Gibson	11	6-5	40
12. Bue	12	6-6	37
13. DeAnda	18	10-8	36
14. Buchmeyer	7	3-4	33
15. Garcia	9	4-5	30
16. Belew	5	1-4	23
17. Parker	10	4-6	22
Head	9	3-6	22
18. Sterling	8	2-6	12
19. Bunton	19	9-10	5
20. Fish	20	8-12	-1

\*Retired; now in private practice

### Appellate Record of Judges Fourth Circuit

Published civil cases for 1986 (Five decisions or more)

Judge	Total Affirmance		
	Cases	Record	Rating
Total Circuit Maryland	245	143-102	40
1. Ramsey	8	5-3	51
2. Young	5	3-2	49
3. Harvey	6	3-3	41
4. Miller	5	2-3	36
North Carolina			
1. Potter	5	4-1	67
2. Ward	5	4-1	62
3. Dupree	7	5-2	59
4. Bullock	5	3-2	49
5. Boyle	10	6-4	48
6. McMillan	6	3-3	39
South Carolina			
1. Anderson, G. Hamilton	5	4-1	62
5	4-1	62	
Virginia			
1. Clarke	7	6-1	72
2. Bryan	13	9-4	61
3. Turk	9	6-3	56
4. Hilton	5	3-2	49
Merhige	5	3-2	49
5. MacKenzie	7	4-3	46
6. Kiser	8	4-4	43
7. Cacheris	7	4-3	33
Warriner**	7	4-3	33
8. Williams, R.	12	6-6	32
9. Williams, G.	7	2-5	20
West Virginia			
1. Knapp	5	5-0	75
2. Haden	5	4-1	62
3. Maxwell	6	3-3	41

\*\*Deceased

### Appellate Record of Judges Sixth Circuit

Published civil cases for 1986 (Five decisions or more)

Judge	Total Affirmance		
	Cases	Record	Rating
Total Circuit Kentucky	283	165-118	38
1. Ballantine	7	6-1	72
2. Allen	8	6-2	64
3. Unthank	9	6-3	56
4. Wilhoit	6	4-2	54
5. Bertelsman	7	3-4	33
Michigan			
1. Gilmore	10	8-2	74
2. Newblatt	7	6-1	72
3. Harvey	8	5-3	56
4. DeMascio	8	5-3	51
5. Woods	10	6-4	48
6. Taylor	9	5-4	41
7. Joiner	7	3-4	33
8. Miles	6	2-4	28
Ohio			
1. Rice	5	4-1	62
2. Krenzler	6	4-2	54
3. Manos	11	7-4	53
4. Rubin	11	5-6	32
5. White	6	2-4	28
6. Aldrich	8	2-6	12
Tennessee			
1. Jarvis	5	5-0	75
2. McRae	6	4-2	54
3. Wiseman	5	2-3	36
4. Hull	11	5-6	27
5. Nixon	5	1-4	23

Senior Judge James E. Doyle of the Western District of Wisconsin. "In my opinion, Judge Doyle is the model of what a judge should be—compassionate, innovative, imaginative and a very good writer," she said.

**GETTING IN TUNE**

Former chief judge of the U.S. Court of Appeals for the Third Circuit, Ruggero J. Aldisert, said he often speculates how a district judge could make a case "reversal-proof" but added that if he were a trial judge he would probably be reversed as well. After nearly two decades on the court

of appeals, Judge Aldisert offered the following tips to district judges:

► Build a record of appeal. Often the appellate court considers an issue on the appeal where the trial court has acted without any explanation. In those situations, the court of appeals has to accept the appellee's explanation or speculate on the reasons behind the ruling. Trial judges should state facts on the record supporting their decision.

**Appellate Record of Judges Seventh Circuit**

Published civil cases for 1986 (Five decisions or more)

Judge	Total Affirmance		
	Cases	Record	Rating
Total Circuit	404	273-131	82
Illinois			
1. Grady	12	10-2	84
2. Aspen	15	11-3	81
3. McGarr	11	9-2	79
4. Foreman	8	7-1	77
5. Decker	5	5-0	75
6. Getzen-			
danner	13	10-3	74
Marshall	9	7-2	74
7. Shadur	11	8-3	71
8. Holderman	9	7-2	67
9. Roszkowski	8	6-2	64
10. Beatty	5	4-1	62
11. McMillan	17	11-6	57
12. Kocoras	21	13-8	56
13. Moran	11	7-4	53
14. Norgle	8	5-3	51
15. Rovner	5	3-2	49
Will	5	3-2	49
16. Bua	8	5-3	41
17. Parsons	10	5-5	40
18. Hart	15	8-7	39
19. Leighton	11	5-6	35
20. Baker	13	6-7	29
21. Mihm	9	3-6	17
Indiana			
1. Steckler	8	7-1	77
2. Barker	5	4-1	62
3. Dillin	10	7-3	61
4. Kanne	7	5-2	59
Noland	7	5-2	59
5. Sharp	25	16-9	56
6. Lee	10	6-4	48
7. Moody	5	3-2	47
Wisconsin			
1. Crabb	10	10-0	100
2. Reynolds	13	11-2	94
3. Warren	9	7-2	69
4. Evans	15	9-6	47
5. Shabaz	15	8-7	34

**Appellate Record of Judges Eighth Circuit**

Published civil cases for 1986 (Five decisions or more)

Judge	Total Affirmance		
	Cases	Record	Rating
Total Circuit	425	281-144	75
Arkansas			
1. Howard	15	12-3	86
2. Eisele	14	10-4	64
3. Harris	10	6-4	48
4. Waters	12	7-5	45
5. Roy	13	7-6	37
6. Overton	15	8-7	32
7. Woods	23	12-11	25
Iowa			
1. Vietor	11	9-2	79
2. McManus	7	5-2	59
3. Stuart	6	3-3	41
4. O'Brien	7	3-4	33
Minnesota			
1. MacLaughlin	9	8-1	82
2. Murphy	10	8-2	74
3. Devitt	6	5-1	67
4. Magnuson	10	7-3	66
5. Alsop	7	5-2	59
6. Renner	13	8-5	50
Missouri			
1. Hungate	16	13-3	89
2. Sachs	10	9-1	87
3. Bartlett	7	7-0	85
4. Gunn	8	7-1	77
5. Nangle	18	13-5	75
6. Regan	11	8-3	71
7. Clark	9	7-2	69
8. Wright	14	9-5	55
9. Cahill	12	7-5	45
10. Filippine	8	4-4	38
11. Limbaugh	19	9-10	15
12. Wangelin	8	2-6	12
Nebraska			
1. Urbom	9	7-2	69
2. Beam	11	4-7	19
North Dakota			
1. Van Sickle	7	5-2	59
2. Benson	7	3-4	33
South Dakota			
1. Bogue	6	5-1	67
2. Porter	5	4-1	62
3. Jones	11	5-6	27

**Appellate Record of Judges Ninth Circuit**

Published civil cases for 1986 (Five decisions or more)

Judge	Total Affirmance		
	Cases	Record	Rating
Total Circuit	581	340-241	27
Alaska			
1. von der			
Heydt	8	6-2	69
Arizona			
1. Hardy	10	8-2	74
2. Craig**	9	7-2	69
3. Muecke	10	6-4	48
4. Marquez	5	1-4	23
California			
1. Lynch	7	7-0	85
2. Byrne	8	7-1	75
3. Rymer	14	10-4	68
4. Marshall	5	4-1	62
5. Hatter	5	4-1	60
6. Pfaelzer	12	8-4	58
Schwarzer	12	8-4	58
7. Karlton	9	6-3	56
8. Ramirez	6	4-2	54
Stotler	6	4-2	54
9. Rafeedie	11	7-4	51
Williams, S.	8	5-3	51
10. Aguilar	13	8-5	50
Tashima	13	8-5	50
Vukasin	13	8-5	50
11. Legge	5	3-2	49
Schnacke	5	3-2	49
12. Henderson	13	8-5	48
13. Takasugi	10	6-4	46
Coyle	7	4-3	46
Orrick	7	4-3	46
14. Waters	11	6-5	45
15. Garcia	9	5-4	43
16. Thompson	6	3-3	41
17. Ideman	8	4-4	38
Williams,			
D.	7	3-4	38
18. Hall	5	2-3	36
19. Patel	13	7-6	35
20. Gilliam	7	3-4	33
21. Real	12	6-6	32
22. Weigel	7	3-4	31
23. Gadbois	12	5-7	19
24. Ingram	6	0-6	2
25. Conti	14	4-10	-5
Hawaii			
1. Pence	7	3-4	33
2. Fong	7	2-5	20
Idaho			
1. Taylor	5	3-2	49
Montana			
1. Battin	5	3-2	49
Nevada			
1. Foley	5	4-1	62
Oregon			
1. Panner	5	4-1	62
2. Burns	5	3-2	49
3. Belloni	5	3-2	47
4. Redden	11	6-5	38
5. Frye	8	3-5	25
Washington			
1. McNichols	5	3-2	49
Quacken-			
bush	5	3-2	49
2. Tanner	16	9-7	39

\*\*Deceased



### Appellate Record of Judges Eleventh Circuit

Published civil cases for 1986 (Five decisions or more)

Judge	Total Cases	Affirmance Record	Rating
<b>Total Circuit</b>	<b>419</b>	<b>235-184</b>	<b>20</b>
<b>Alabama</b>			
1. Propst	5	4-1	62
2. Clemon	8	5-3	51
3. Acker	10	6-4	48
4. Haltom	6	3-3	41
5. Thompson	5	2-3	36
6. Hand	10	5-5	35
7. Hancock	9	4-5	30
8. Hobbs	5	1-4	23
9. Varner	13	6-7	22
10. Guin	14	6-8	21
<b>Florida</b>			
1. Moore	7	6-1	72
Stafford	7	6-1	72
2. Roettger	6	5-1	67
3. Kovachevich	11	8-3	66
4. King	7	5-2	59
5. Vinson	9	6-3	56
6. Carr	11	7-4	53
7. Black	8	5-3	51
Castagna	11	7-4	51
8. Hodges	8	5-3	49
9. Hastings	8	4-3	41
10. Spellman	5	2-3	36
11. Paul	10	5-5	35
12. Sharp	12	6-6	32
13. Nesbitt	9	3-6	17
14. Paine	9	2-7	4
<b>Georgia</b>			
1. Forrester	10	9-1	87
2. Alaimo	5	5-0	75
3. Tidwell	6	5-1	67
4. Shoob	8	6-2	64
5. Edenfield	7	5-2	59
6. Freeman	9	6-3	56
7. Hall	10	6-4	48
8. Bowen	12	7-5	45
9. Evans	12	6-6	32
10. Vining	6	2-4	26
11. Elliott	11	3-8	1
12. Owens	23	7-16	-43

### Appellate Record of Judges Tenth Circuit

Published civil cases for 1986 (Five decisions or more)

Judge	Total Cases	Affirmance Record	Rating
<b>Total Circuit</b>	<b>179</b>	<b>106-73</b>	<b>45</b>
<b>Colorado</b>			
1. Finesilver	5	5-0	73
2. Matsch	7	5-2	59
3. Moore***	12	8-4	58
4. Weinshienk	9	4-5	28
5. Kane	10	4-6	27
6. Carrigan	12	4-8	9
<b>Kansas</b>			
1. O'Connor	5	5-0	75
2. Kelly	7	5-2	59
3. Saffels	6	4-2	54
<b>New Mexico</b>			
1. Burciaga	7	4-3	46
2. Campos	8	4-4	36
<b>Oklahoma</b>			
1. Cook	7	6-1	70
2. Eubanks	7	5-2	59
3. Ellison	6	4-2	54
4. West	6	3-3	39
5. Seay	5	1-4	28
<b>Wyoming</b>			
1. Brimmer	5	3-2	47
2. Kerr	6	2-4	28

\*\*\*Elevated to Court of Appeals

► Only grant motions to dismiss for failure to state a claim in the clearest of cases. All inferences are to be resolved against the movant, Judge Aldisert said, and the plaintiff should be given an opportunity to offer facts in support of the claim.

► If a criminal defendant requests a questionable jury instruction, give it. Convicted defendants appeal.

► If an evidentiary question is a close call in a civil trial, rule for the party you think will lose the case.

► If you begin to second-guess a trial ruling later in the trial, correct your ruling on the record beyond the hearing of the jury and permit the evidence or testimony.

► "Never, ever" grant a directed verdict, Judge Aldisert said. If you are in doubt, allow the jury to reach a verdict and grant a judgment notwithstanding the verdict. A directed verdict upset on appeal requires a new trial, but a J.N.O.V. upset on appeal only requires reinstatement of the verdict. ■

### Civil Appeals for 1986

Circuit	Non-Criminal* Dispositions	Published Cases** Affirm - Reverse	Affirm Rate in** Published Cases	Overall Rate* Of Affirmance
D.C.	1,605	70-59	54%	76%
FIRST	892	46 - 70	68%	72%
SECOND	2,374	158 - 133	54%	83%
THIRD	2,282	107 - 133	45%	82%
FOURTH	2,535	143 - 102	58%	84%
FIFTH	3,507	350 - 230	60%	80%
SIXTH	3,203	165 - 118	58%	82%
SEVENTH	1,962	273 - 131	67%	83%
EIGHTH	1,788	281 - 144	66%	77%
NINTH	4,196	340 - 241	59%	78%
TENTH	1,656	106 - 73	59%	78%
ELEVENTH	2,903	235 - 184	56%	75%
<b>TOTALS</b>	<b>28,903</b>	<b>2,370 - 1,618</b>	<b>59.4%</b>	<b>79.3%</b>

\*Source is Administrative Office of the United States Courts Statistical Analysis and Reports Division, statistics for calendar year 1986, released March 9, 1987.

\*\*Source is West Publishing Federal Reporter series, Vols. 778 - 809.