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The State of the Appellate Division, First Department

"The Appellate Division, First Department remains open for business, and our judges and staff remain dedicated to serving the public with excellence."

By **Rolando T. Acosta** | August 24, 2021



Appellate Division, First Department at 27 Madison Ave. (Photo by David Handschuh/NYLJ)

As the summer draws to a close, I write to update the Bar and the public on the state of the First Department, including our productivity, and what to expect as the court returns for the September 2021 term. Of course, given the ever-changing landscape of the COVID-19 pandemic, it is difficult to predict what the fall and winter will bring. Although we saw a light at the end of the tunnel last spring and early summer—when the infection rate was plummeting—the Delta variant has complicated our plans to fully reopen for in-person operations. Nevertheless, our transition to a virtual (and later a hybridized virtual/in-person) court model last year has enabled us to adapt quickly as the pandemic evolves.

Regarding our productivity, I am proud to report that, despite the challenges presented by the pandemic and an attrition of judges over the past year, we have been as efficient as ever. For the second consecutive year, we will be starting the September term with *zero pending appeals* (i.e., appeals that have been argued but not yet decided). Readers may recall that we also achieved this goal last year, for the first time in the court's history.

All told, during the 2020 calendar year, our court disposed of more than 4,500 appeals and original proceedings (including 2,306 calendared appeals), decided more than 3,736 motions, had 179 appeals settled or withdrawn via our Pre-argument Conference Program, resolved nearly 280 attorney discipline matters, and admitted more than 2,100 new attorneys to the Bar.

Of course, close observers of our court will notice that the number of appeals decided in 2020 is significantly lower than in recent years; for example, we disposed of more than 6,500 appeals and original proceedings in 2019 (including 2,749 calendared appeals), compared to more than 4,500 in 2020 (2,306 of which were calendared appeals). This is because we experienced a precipitous decline in court filings across the board, which was not unexpected as there was a reduction in trials and new case filings in 2020 due to the pandemic. There has been an even larger-than-average decline in criminal and Family Court appeals as compared to other case types. Our court is, of course, one to which many types of cases are appealed as of right, and it so happens that fewer litigants perfected appeals in the past year. In any event, I am happy to report that we were able to continue our work in a timely fashion and disposed of every appeal that was perfected in 2020, notwithstanding several judicial and other staff vacancies.

We have our work cut out for us in the coming year, as approximately 800 appeals have been perfected for the September term. Calendaring, hearing, and disposing of those appeals and the ones that are perfected in the coming months will be much easier with a full complement of Justices; we started 2021 with only 16 Justices, and thankfully three were appointed in May. We are currently awaiting the Governor's redesignation to the First Department of Justices David Friedman and Ellen Gesmer, both of whom have been certificated by the Administrative Board.

Much of our productivity is thanks to the hard work of our staff and, as I explained last year, the technical advancements we have made in the past few years. Our new, state-of-the-art case-management system continues to provide more detailed reporting than ever before, giving us better insight into trends in court filings and our productivity. The court's average argument-to-publication timeframe (i.e., the time it takes between oral argument of an appeal to a published decision) for cases disposed of in 2020 was 41 days, an increase from the prior year but still a relatively quick turnaround time. Moreover, the continued expansion of e-filing—since July 27, 2020, we have mandated e-filing in all matters before the First Department, except for original special proceedings and attorney matters—has also increased efficiency for the court and, hopefully, for practitioners as well. Because we always endeavor to accommodate the needs of pro se litigants to ensure that no one is prevented from seeking justice in our court, we have exempted self-represented litigants from mandatory e-filing and have made every effort to guide them through virtual oral arguments when needed. Lastly, on the tech front, the First Department, and the court system more broadly, have been shoring up cybersecurity to ensure that we are doing everything possible to protect litigants' and the court's data from ransomware and other attacks.

Concerning what the Bar and public can expect in the coming year, the First Department is moving forward with our plan to hold in-person oral arguments beginning September 7, as we announced on our website on June 25. Of course, while many of us prefer in-person to virtual arguments, we must remain flexible and understand that our plans are subject to change as the situation continues to evolve. The proliferation of the Delta variant and the rise in infections over the summer means that all of us must continue to be vigilant. The Centers for Disease Control and Prevention's guidelines now indicate that even vaccinated individuals should wear masks in public indoor settings in geographical areas with substantial or high transmission, and Manhattan (along with much of the state of New York) is currently labeled a high area of transmission (see COVID Data Tracker, CDC.gov, <https://covid.cdc.gov/covid-data-tracker/#county-view> (<https://covid.cdc.gov/covid-data-tracker/%23county-view>) [select New York and New York County] [last visited Aug. 18, 2021]). Accordingly, the court will continue to require staff, attorneys, litigants, and the public to observe COVID-19 protocols, including the wearing of masks, in court facilities.

As usual, I am keeping a close eye on the virus statistics and CDC guidance, and the court stands ready to swiftly adapt if the situation on the ground changes. We will, for example, return to an all-virtual or a hybrid structure for oral arguments if necessary, and any such changes will be announced on our website (<https://www.nycourts.gov/courts/ad1> (<https://www.nycourts.gov/courts/ad1>)).

The court extends its best wishes to all for a healthy year ahead and encourages members of the Bar and the public to get vaccinated as soon as possible, unless advised otherwise by a doctor. As Chief Judge Janet DiFiore recently announced, the Unified Court System intends to mandate vaccination of employees once at least one of the COVID-19 vaccines is granted full FDA approval; inasmuch as the FDA fully approved the Pfizer-BioNTech vaccine on August 23, the First Department will follow the science and the Chief Judge's lead and require vaccination as a condition of employment. I am hopeful that my report to you at this time next year will be more cheerful and will refer to many of these pandemic-related issues in the past tense. In the meantime, the Appellate Division, First Department remains open for business, and our judges and staff remain dedicated to serving the public with excellence.

Rolando T. Acosta *is Presiding Justice of the Appellate Division, First Department.*