

The New Pre-Argument Conference at The Appellate Division, First Department

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Body

Over approximately the last 10 years, the Appellate Division, First Department, under the guidance and direction of Presiding Justice Rolando T. Acosta has developed a unique and forward-looking procedure the pre-argument conference, that has had the effect of not only improving productivity at the court but at the same time has empowered and prepared judges to be even more laser-focused participants in the upcoming oral arguments at the Appellate Division, First Department. It is a procedure that any appellate court especially an intermediate appellate court with a huge inventory of appeals might want to consider.

Most appellate lawyers especially those that are familiar with the procedures and practices at the Appellate Division, First Department know that when their appeal is argued before the court, and oral arguments are concluded for that day, the panels comprised of five justices, gather in conference to vote on the appeals that come before the court that afternoon.

A description of the conference process at the First Department along with a detailed description of the internal operations of the court can be found in Saxe, "How We Operate," NYLJ (May 13, 2009), but will not be discussed in this article.

At the principal conference held after arguments are concluded many appeals are finalized with the panel in unanimous agreement as to the result and as to the language contained in the order. These appeals are voted out that afternoon at the principal conference.

But, for other appeals, even where the panel is in unanimous agreement as to the result, the panel members do not always agree on the language of the memorandum. In such instances, one of the panel members will "hold" an appeal. These "held" appeals become part of the appellate inventory and will continue to appear on the Weekly Agenda Conference until the panel is in unanimous agreement as to the language of the memorandum.

Sometimes, weeks will have gone by and the entire panel still awaits the action of, say, one colleague who was going to offer some revisions or modifications to the originally proposed memorandum. The panel must then wait for the justice "holding" the appeal to furnish revisions or clarifications. When it arrives, the panel then examines the original briefs and record to re-familiarize themselves with the matter before ultimately accepting those revisions or, in some instances, proposing their own additional revisions. Delay is woven into this system.

The pre-argument conference or "Conference before the Conference" (CBC) helps remedy this problem.

Neither the rules of the court system nor the rules of the First Department mandate the CBC. It developed organically at the First Department over the last 10 years or so, championed by Presiding Justice Rolando T. Acosta and members of the court. What began as an innovative approach to calendar management slowly became part of the fabric of the First Department. Now the CBC is commonplace.

Here is how the process operates. The day before oral argument, the "JP" panel member (justice presiding or most senior member of the panel) will invite the four other panel members to chambers for the CBC. Either the day before or on the

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morning of the CBC, members of the panel will circulate memoranda to one another containing revisions, modifications, or suggestions to memorandum decisions under consideration. At roughly noon on the day of oral argument, the five-member panel meets for an informal gathering, which usually lasts about an hour, to discuss the calendar, appeal by appeal.

Many appeals, especially an appeal where the justices are in unanimous agreement as to the result and language of the memorandum decision, are not discussed at length. However, when the panel recognizes that it may not necessarily agree on the language of a memorandum decision, they will spend time revising the memorandum, as a group, to ensure that all panel members are in agreement.

The benefits of the CBC should not be underestimated and this process serves several important purposes. First and foremost, the CBC allows judges to work together as a team and to ensure that appeals are swiftly decided. Rather than wait for a panel member to provide comments or suggested changes to proposed memorandum decisions after oral argument, the panel members are given the opportunity to reconcile their differences and disagreements prior to oral argument. In this regard, the CBC gives members of the Panel an opportunity to work out differences on a variety of issues that would otherwise cause appeals to be "held" at the principal conference which takes place after oral argument.

As described briefly above, when a panel member "holds" an appeal at the principal conference, as they often do, it causes delays in the release of appellate decisions; such delays, as indicated, keep cases on the Week Agenda Conference, requiring justices to maintain familiarity with these matters. In such "Hold" situations, when the assigned justice finally gets around to circulating a change, all the other justices will have to expend time pulling together the original papers to re-familiarize themselves with the appeal and the necessity for the modification.

The CBC enhances the productivity of the entire court and has been important in making the First Department the most up-to-date appellate court in the state by providing an opportunity and incentive to accelerate these revisions and to maintain the level of appellate inventory at an acceptable level.

Similarly, the CBC provides not only opportunities to work out differences among the justices but it also provides an opportunity for the correction of errors or misapprehensions existing with respect to certain appeals. A candid discussion at the CBC works to clear up these issues and encourages an earlier final product.

Second, the CBC allows the panel members to share their knowledge and expertise with one another. By discussing the complex legal issues that arise in many appeals, the panel members can learn from one another and sharpen their own understanding of the law. This helps to ensure that appeals are decided with the benefit of a wide range of legal knowledge and experiences.

Third, while it may seem from an outsider perspective that the CBC negates the importance of oral argument quite to the contrary; by crystalizing the truly salient legal issues during the CBC, the panel members can be laser-focused on those issues with counsel during argument. It gives the panel advance information on how their colleagues view the cases set down for appeal and it gives the panel an opportunity to discuss the important legal principles of the appeals.

While many practitioners come before the panel expecting to argue every aspect of their case, the panel, on most occasions, primarily uses oral argument to hone in on the one or two important legal issues of each appeal. Thus, the CBC allows the panel members to weed out legal issues that they agree on, and focus on those issues that are more complicated or those issues that the panel members may not agree on. In short, oral argument is invigorated through a "hotter bench."

Finally, the CBC encourages the panel to work collegially, as a unit. Among other things, the CBC may give a colleague who is on the fence a better opportunity to consider another colleague's position on an appeal.

The CBC or more formally, the pre-argument conference has become a forward-looking part of the Appellate Division, First Department's approach to decision making.

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