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# The 2021 Appellate Year in Review

Now's the time for all those year-end retrospectives, so why not an appellate annual review?



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## **EXCEPTIONALLY APPEALING**

Now's the time for all those year-end retrospectives, so why not an appellate annual review? It was, after all, an exceptional year, on both the federal and state sides. Here's a quick fly-by of noteworthy items from the appellate world. By definition, none of this is news, but if you missed any of these last year, more info is just an internet search away.

Federal. 2021 began with the inauguration of President Joe Biden, who took office with just 46 open seats (only two appellate) for the nation's 870 federal judgeships. This was the fewest for a new president since Bush 41 in 1989. In contrast, Donald Trump inherited 108 vacancies (18 appellate) and in a single term made 234 Article III judicial appointments (over 27% of the federal judiciary): over 50 appellate judges ("flipping" three circuits), including three Supreme Court justices (cf. Barack Obama also appointed about the same number, but over two terms and only two Supreme Court justices).

Within hours of Biden's inauguration, one district court judge took senior status, and in the following week another 16 federal judges announced retirement plans (including three in California). Three months into Biden's administration, that number reached nearly 50, and by mid-spring there were over a hundred current or scheduled vacancies (13 appellate). Keep in mind that over a third of the federal appellate bench is eligible for senior status. By year's end, 40 Biden nominees (11 appellate) had been confirmed. Based on existing retirement announcements, Biden still has over 20 open appellate seats to fill.

**SCOTUS.** In D.C., the Supreme Court saw the formal investiture of Justice Amy Coney Barrett and the appointment of Elizabeth Prelogar as solicitor general (after an unusual 10-month delay). The Supreme Court also appointed a new Reporter of Decisions (Rebecca Anne Womeldorf), a new marshal (Gail Curley), and a new public information officer (Patricia McCabe).

The justices also returned to the courtroom in person after conducting completely remote arguments. In COVID times, the Supreme Court instituted a new oral argument format. Instead of the pre-COVID free-for-all, the advocates were given time for a brief opening statement, and then the justices took turns asking questions in order of seniority (to finish out the prior term). For the current October Term, this was modified, to allow the justices to question at will, followed by orderly questions by seniority. These new approaches have seen Justice Clarence Thomas participating more than ever. In one case, however, *U.S. v. Gary*, four justices had no questions for the SG -- something that hadn't happened in 30 years. Finally, 2021 saw the creation of the Presidential Commission on the Supreme Court of the United States, which issued a draft final report in December. That report outlined various issues, but did not take any actual positions on the most controversial suggestions for changing the court.

**9th Circuit.** Focusing on the 9th Circuit, 2021 brought a new chief judge, [Mary Murguia](#); a new circuit executive, former N.D. Cal. Clerk Susan Soong; and two new judges, [Lucy Koh](#) and Jennifer Sung. (Arguably three if you count that Judge Danielle Hunsaker changed her name to Danielle Forrest.) In late December the Senate held procedural votes on two more nominees, 1st District Justice [Gabriel Sanchez](#) and L.A. Superior Court Judge [Holly Thomas](#), positioning their confirmations for early this year. Four judges took senior status: [Richard Paez](#), [Marsha Berzon](#), [Susan Graber](#), and [William Fletcher](#). The year ended with no vacancies (but two impending vacancies) and a tally of 16 judges appointed by Democratic presidents and 13 by Republicans. During the year, the 9th Circuit held oral argument remotely, but expects to resume in-person hearings in January 2022 (whether Omicron affects these plans remains to be seen).

**California.** In California, 2021 saw the continuation of (mostly) remote appellate arguments, though some advocates had to argue in court wearing masks. The Supreme Court denied review of former Justice Jeff Johnson's petition for review of his removal from the Court of Appeal. The Supreme Court also denied review of *Eisenberg v. Court of Appeal*, a writ petition charging the 3rd District Court of Appeal with systematically failing to timely resolve criminal appeals, but did ask for the Judicial Council to investigate the alleged delay.

At the Supreme Court, Justice [Mariano-Florentino Cuéllar](#) left the court in October, leaving a vacancy that remains unfilled. Court of Appeal retirements (or announcements thereof) were Justices [Eugene Premo](#), [Peter Siggins](#), [Tricia Bigelow](#), [Richard Aronson](#), [Raymond Ikola](#), [Patricia Benke](#), [David Thompson](#) and [Anthony Kline](#). New justices were [Truc Do](#) (4/1), Cynthia Lie (6), [Charles Wilson](#) (6), [Victor Rodriguez](#) (1/3), and [Maurice Sanchez](#) (4/3). In the 1st District, Justices [Alison Tucher](#) and [Teri Jackson](#) became presiding justices of Divisions 3 and 5, respectively. Notable deaths included retired Justices Cruz Reynoso, Premo (who died shortly after he retired in January), and Harry Low; retired 2nd District Clerk Joseph Lane; and appellate legend [Charlie Bird](#), who left a written legacy in the form of a newly published book, "[Advanced Topics in Appellate Practice: The Path of Mastery](#)."

Notable non-deaths include the continued publication of numerous appellate blogs: [At the Lectern](#), [California Appellate Report](#), [Southern California](#)

[Appellate News](#), [California Supreme Court Review](#), [Appellate Insight](#), and [Left Coast Appeals](#). In addition to the enduring and endearing appellate blogs [How Appealing](#) and [SCOTUSblog](#), 2021 saw the launch of Tony Mauro's [The Marble Palace Blog](#).

**Amended Rules.** The past year did not see any major changes to federal or state appellate rules. Federal Rule of Appellate Procedure 3 was amended to clarify that notices of appeal encompass all orders merged into the judgment, and faulty notices of appeal that fail to designate the judgment will not be dismissed if they are filed after the judgment and purport to appeal from an order merged into the judgment.

The 9th Circuit's local rules changed nomenclature so that a responsive filing to a motion, petition for rehearing, and petition for en banc is now called a "response" rather than an "answer." See 9th Cir. Rules 27, 35, 40.

For the California appellate rules, minor changes were made to Rules 8.70 and 8.78 regarding electronic signatures and electronic service, essentially to make it easier for lawyers to operate in an electronic-filing world. Also Rule 8.1115 was revised by language added to the rule's comment, making clear that superior courts may choose to be bound by parts of a published court of appeal opinion under review by the supreme court, even when in conflict with another opinion. Moreover, lawyers may still cite opinions after review is granted for persuasive value or to show a conflict (to allow superior courts to choose to follow that opinion).

**Appellate precedent.** Every year brings a new crop of exciting opinions addressing the minutiae of appellate practice. (2021 also ushered in the start of Federal Reporter 4th edition!) A survey like this can only briefly reference some of 2021's must-reads: [City of San Antonio v. Hotels.com](#), 141 S. Ct. 1628 (2021) (district court may not alter court of appeals' discretionary allocation of taxable costs on appeal); [BP PLC v. Mayor of Baltimore](#), 141 S. Ct. 1532 (2021) (appeal from remand order may encompass entire order for federal officer or civil rights removal; see [Dietrich v. Boeing](#), 14 F.4th 1089 (9th Cir. 2021)); [Daly v. San Bernardino County Board of Supervisors](#), 11 Cal. 5th 1030 (2021) (stays of injunctions on appeal); [In re A.R.](#), 11 Cal. 5th 234 (2021) (when attorney fails to timely appeal per client's instructions, parent may seek relief based on the attorney's failure to provide competent representation). For interesting appealability issues, see [Manhan v. Gallagher](#), 62 Cal. App. 5th 504 (2021); [City of Calexico v. Bergeson](#), 64 Cal. App. 5th. 180 (2021); [Aghaian v. Minassian](#), 64

Cal. App. 5th 603 (2021); and [Dr. V. Productions v. Rey](#), 68 Cal. App. 5th 793 (2021).

**Appellate ethics.** An annual favorite is a review of appellate ethics cases. This year's contenders for best-in-show (or best-of-the-worst, really) are: [In re Mahoney](#), 65 Cal. App. 5th 376 (contempt for language impugning the court's integrity in a rehearing petition); *Mayorga v. Mountview Properties*, 2021 WL 1326695 (respondent violates civility rules on appeal); and *Pacific Modesto LLC v. Superior Court*, 2021 WL 4519720 (sanctions for a frivolous writ petition). Outside California, see *Oasis Legal Fin. Operating Co. v. Gary Chodes & Oasis Disability LLC* (7th Cir. Dec. 3, 2021) (failure to appear at oral argument); *Conboy v. U.S. SBA*, 992 F.3d 153 (3d Cir. 2021) (copying and pasting trial briefs to create appellate brief); and *Ottgen v. Katranji* (Mich. App. May 20, 2021) from the Michigan Court of Appeals, regarding a lawyer who "raised his middle finger toward the camera while opposing counsel was arguing," and when called out by the panel for making an "obscene gesture," "he denied doing so, although the record plainly reflects that he did so." Also of note on this front is a joint project of the California Judges Association and the California Lawyers Association chaired by Justice Brian Currey, "Beyond the Oath: Recommendations for Improving Civility."

**"I am not a cat."** While not strictly an appellate event, given that most appellate arguments were conducted remotely, mention must be made of the most enjoyable mishap of 2021, the viral cat filter hearing. With any luck, something equally amusing will happen in the coming year.