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Interesting Times: The 2022 Appellate Year in Review

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BENJAMIN G. SHATZ

Partner, Manatt, Phelps & Phillips LLP

The April 1950 issue of Astounding Science Fiction included the short story “U-Turn,” which contained the memorable line “For centuries the Chinese used an ancient curse: ‘May you live in interesting times!’” Last year’s annual recap called 2021 an “exceptional” year (riffing on this column’s title). But “exceptional” just doesn’t cut it for 2022. The past year has been even more astounding than the previous year, and no doubt, the most “interesting” appellate year in modern times. By definition, none of the following is news, but if you missed any of these stories, more info is just an internet search away.

Post-pandemic wind-down? The pandemic once again must take top billing as the single biggest event affecting all appellate courts. But the story now is how courts are returning to past procedures or transitioning to a “new normal.” One trope of the pandemic has been that COVID did not create new trends but merely accelerated existing trends. Maybe. At the very least, it’s clear that the pandemic forced appellate courts to try new ways of operating, like conducting remote oral arguments. With the pandemic receding, California’s courts ended their COVID emergency rules, and many appellate courts (state and federal) have returned to in-person arguments. But many appellate courts are continuing to entertain remote arguments or at least giving counsel the option of arguing remotely. Thus, it seems likely that some courts have recognized the benefits of remote arguments, pandemic notwithstanding, and will continue to allow them. In any event, the past year has seen a gradual transition away from remote arguments that is likely to continue in some form or another into the coming year.

The Great Resignation? Another major theme of the pandemic has been individuals reevaluating their lives at a deeper level and deciding that their current jobs were not satisfying, or at least, not how they wanted to continue spending their time. Whether the pandemic was a factor or not, the personnel turnover in the appellate world in 2022 was remarkable. Starting at the top, the Breyer-Retire movement finally reached fruition with Justice Breyer’s retirement from the Supreme Court and the confirmation of his successor and former law clerk Justice Ketanji Brown Jackson. She also happens to be the first Black woman and the first former federal public defender to serve on the Supreme Court.

A new Supreme Court justice alone makes it a banner year. But the turnover at SCOTUS ran far deeper than this. Others retiring after long SCOTUS careers include the Court’s Chief Librarian (after 34 years), the Director of Information Technology (after 27 years), and the Chief Justice’s top counselor (after 16 years). Recall that last year the Court also got a new Reporter of Decisions, a new Marshal, and a new Public Information Officer.

On the SCOTUS press front, Marcia Coyle retired after 30 years of covering the court, as did courtroom sketch artist Art Lien after 45 years of creating iconic paintings of court proceedings. On the advocate side, 2022 saw the deaths of Harriet Shapiro, the first female in the Solicitor General’s office, and legendary appellate lawyer Walter Dellinger, who was Acting Solicitor General during the Clinton administration.

In the Ninth Circuit, Judges Fletcher, McKeown, Hurwitz, and Thomas took senior status, joining several other judges who have “gone senior” since the inauguration of President Biden. New judges confirmed to the court this year were Gabriel Sanchez (from the First District Court

of Appeal), Holly Thomas (from the L.A. Superior Court), Salvador Mendoza, and Roopali Desai (the circuit's first South Asian judge).

California Changes. Tremendous personnel changes and milestone passings were not limited to the federal courts. Here in California, Chief Justice Tani Cantil-Sakauye announced she would not seek reelection after 32 years of court service, including a dozen years as Chief. Again, that alone would make 2022 a noteworthy appellate year. Taking the helm as the new chief is Justice Patricia Guerrero (the court's first Latina), who had been on the Supreme Court since March (restoring the court's four-female majority) after a stint on the Fourth District Division One. Joining the court in Justice Guerrero's seat is Kelli Evans (from the Alameda Superior Court), the court's first openly lesbian justice. Also retiring from the Chief Justice's orbit were the court's Chief Supervising Attorney Jake Dear (after 40 years at the Supreme Court) and the Judicial Council's Chief Administrative Director, Martin Hoshino (after 35 years of public service).

California's appellate courts saw an unusually high number of transitions as well. In addition to Justice Guerrero and Justice Sanchez leaving the Court of Appeal, other justices who retired include Justices Murray, Blease, Raye, Fybel, Tangeman, Elia, Perren, Haller, Hoch, Needham, and Aaron. The first three on that list all hailed from the Third District, a court that received intense scrutiny and press coverage after formal complaints of extreme delay in the processing of appeals. Were there not so many high-profile retirements, that issue would have qualified as the top California appellate story of the year.

Although the Courts of Appeal "lost" a dozen justices, many new justices were appointed: Maurice Sanchez and Joanne Motoike (4th Dist. Div. 3); Laurie Earl and Stacy Bouleware Eurie (3d Dist.); Martin Buchanan (4th Dist. Div. 1); Hernaldo Baltodano (2d Dist. Div. 6); Jeremy Goldman (1st Dist. Div. 4); Gregory Weingart (2d Dist. Div. 1); Victor Viramontes (2d Dist. Div. 8); and Dan Bromberg (6th Dist. [confirmation hearing in January]). As for Presiding Justice promotions, Justice Stewart became PJ of Division 2 (1st Dist.). There are still open PJ seats and associate justice seats in many courts so expect more appointments in the coming year. On the administrative side, the Third District saw Colette Bruggman take the Clerk/Executive Officer spot, and in the Second District, Danny Potter retired with Eva McClintock taking the helm.

Finally, 2022 saw a number of significant appellate passings: Supreme Court Justice John Arguelles and Court of Appeal Justices Nat Agliano, Arleigh Woods, Walter Capaccioli, Coleman Blease, and Richard Fybel (aka Justice "Mensch"). On the practitioner side, the entire bench and bar mourned the passing of Ellis Horvitz, whose extensive involvement in civil appellate practice led him to be called the "Dean of the California Appellate bar". Horvitz was honored a few years ago as the inaugural inductee into the California Lawyers Association's Appellate Lawyer Hall of Fame.

But wait, there's more! Phew! That's a lot of names and momentous changes about individuals in the appellate world. And yet that's just the start of 2022. Taking it from the top again, the year began with a mask-flap, in which Justices Sonia Sotomayor and Neil Gorsuch denied reports

about a feud over wearing masks on the bench. Attention then shifted to Justice Thomas, who was briefly hospitalized, and to his wife for her political activities. All of that made for interesting news, but then events took a surprising turn.

First, in May came the leak of Justice Alito's draft opinion in *Dobbs v. Jackson Women's Health Organization*, which the Chief Justice (and other Justices) called an "absolutely appalling" betrayal of trust. Given that the draft opinion would overturn *Roe v. Wade*—an opinion that polls show a majority of Americans supported—protests began within hours of the leak in D.C. at the Court and nationwide. Picketing began outside certain Justices' homes, an 8-foot-tall fence was erected around the Court (and stayed in place for four months), certain Justices began to receive hate mail, and one man from California was arrested for threatening to kill Justice Kavanaugh. (Note that just last week Congress passed the Daniel A. Claitor Judicial Security and Privacy Act.)

Next, when the final opinion was issued in June, it tracked the leaked draft and indeed overturned *Roe v. Wade*. This intensified protests at the Court building and around the country. Protestors disrupted oral argument at the Court (the first such outburst since 2015). Pundits and academics began questioning the Court's "legitimacy" and fidelity to *stare decisis*. Combined with other major opinions regarding the Second Amendment and other issues that significantly impact the average American, the Court as an institution became a focal point for political attention, which will continue into 2023. Polling shows significant numbers of Americans harbor negative views of, or lack confidence in, the High Court.

Were this a more normal year, the big news would have been items like the Supreme Court's new rules doing away with the use of "passim" in tables and obviating the need to file a motion to file an amicus brief—or new Ninth Circuit Rule 32-1(f) about how to count words in visual images used in briefs. Alas, we have come a long way from jocular issues such as "I am not a cat" oral arguments. For better or worse we live in more interesting times where ordinary appellate activities seem even more trivial than usual. For insular and introverted appellate nerds, this can be rather disconcerting.

Uh, what about the law? Each year naturally brings a new batch of opinions detailing tidbits of appellate practice. Space does not permit a detailed analysis of those here, but a good source is the annual article by the CLA Litigation Section's Committee on Appellate Courts published in *California Litigation Review*. It's worth pointing out at least a few cases of particular appellate interest. Two opinions addressing appellate issues published in 2022 are now pending in the Supreme Court: *Pacific Fertility Cases*, S275134 (Is a petition for writ of mandate the exclusive means of challenging a good faith settlement order?) and *Meinhardt v. City of Sunnyvale*, S274147 (What triggers the time to appeal the denial of a writ of administrative mandamus: the order or the subsequent judgment?). Also of note are *Siry Investment v. Farkhondehpour*, 13 Cal. 5th 333 (2022) (new trial motions); *In re Marriage of Deal*, 80 Cal. App. 5th 71 (2002) (vexatious litigants); *Meza v. Pacific Bell*, 79 Cal. App. 5th 1118 (2022) (death knell doctrine); *Chaganti v. Superior Court*, 73 Cal. App. 5th 237 (2022) (*coram vobis*); and *Curtin Maritime v. Pacific Dredge*, 76 Cal. App. 5th 651 (2022) (anti-SLAPP appeals).

Too much “interesting times”? Despite its wide attribution as a Chinese curse, the “interesting times” quip is not actually a Chinese expression. The closest that Sinologists have come is a line from a 1627 short-story anthology, which translates as “Better to be a dog in times of tranquility than a human in times of chaos.” It’s terrifying to envision how things could become even more tumultuous in the coming year, so let’s hope that 2023 is more tranquil for us all.