

“Meet Your PJ:” Hon. Rolando T. Acosta, Appellate Division, First Department

John Caher: Welcome to Meet Your PJ, a production of the New York State Judicial Institute. I'm John Caher, Senior Advisor for Strategic and Technical Communications.

In this series, we'll introduce you to the four judges who run the Appellate Divisions in New York State; the First, the Second, the Third, and the Fourth Departments. Today, we'll start with the First Department in Manhattan and the Honorable Rolando T. Acosta.

Justice Acosta immigrated from the Dominican Republic at the age of 14 and graduated from Columbia College, where his exploits as a pitcher on the baseball team earned him a spot in the Columbia University Athletics Hall of Fame. He then went on to Columbia Law School.

Justice Acosta held a number of positions with the Legal Aid Society and the New York City Commission on Human Rights before his election to the New York County Civil Court Judgeship in 1987. He was elected to the Supreme Court in 2002 and promoted to the Appellate Division in 2008 by Governor Eliot Spitzer. He was named Presiding Justice in May 2017 by Governor Andrew M. Cuomo.

Judge, thank you for joining us today. Let's first discuss, if we could, your background, and then, chat about the court. Why did you immigrate? How did you end up in the United States?

Justice Acosta: Well, thank you, for having me, John. I immigrated with my family for the same reasons that all immigrants do, an opportunity to advance in a way that basically we could not advance in the Dominican Republic, my native country. My parents did not think that, frankly, that they could provide sufficiently, whether educationally or financially, for us to have a better life than they did. So, they immigrated to this wonderful land of milk and honey, where basically an immigrant, willing to work hard, at least got a shot at success of making their life better.

John Caher: Did you or your family encounter any particular racial difficulties or hostility when you were growing up in the Bronx?

Justice Acosta: Not really. We encountered the same issues most immigrants have encountered throughout history. You always, if you're the new kid in the block, you get picked on. That's universal, right? But the process of acculturation, basically acculturating to New York, was made easier by so many people that were part of that tough, urban environment in the

South Bronx in 1969 when I arrived. So, it was rough, but it was filled with folks willing to help and share with the newcomers the basics of living in an urban environment with very little financial wherewithal.

John Caher: Who were your early role models or mentors?

Justice Acosta: My father and mother always mentored to me, particularly my father. Although they had a rough life, mostly in poverty, they invested significantly in their six children and sacrificed so much in a way that, frankly, not many would have, putting their needs and wants second to all of the wishes and needs of their children.

In high school, my influential figure was my English as a Second Language teacher. His name was Mr. Palace. Although I didn't quite appreciate it then, he was one of those who pushed me very, very hard to bear down and complete the arduous work of not just learning a language, but learning the culture and creating the foundation for an immigrant to be successful in New York.

He is now retired in Florida. When I was appointed Presiding Justice, he was one of the first people that I called to thank. Like most great teachers, Mr. Palace was somewhat surprised that forcing me to complete my work before releasing me to play baseball was, in fact, appreciated by me. Of course, I let him know that I didn't appreciate it then. Because as a youngster, all you want to do is play ball. Who wants to do English homework, right? And learn that tough language? But I certainly appreciate it now. I know the impact that he had in my life.

John Caher: Well, you clearly did more than play ball at DeWitt Clinton. You graduated fourth in a class of 1,000. So obviously, you were able to master English as a second language!

Justice Acosta: I did. I was in the college-bound program at Clinton. I had Mr. Palace. But I also had others that invested a great deal of time on my success. You take one Mr. Kintisch who, aside from being the Vice Principal at Clinton, was also the track coach at Columbia. Those were tough years at Clinton because doing well academically for someone with very little knowledge of English and the culture required a great deal of work and sacrifice. It meant working in a supermarket while studying and playing baseball and soccer and learning a new language and a new culture.

John Caher: Now, DeWitt Clinton, at that point, was still an all-boy's school, wasn't it?

Justice Acosta: It was. My class alone was 1,006 kids. All boys at that time. So, there were about 4,000 in the entire four years or four classes at Clinton.

John Caher: Now, with your academic and athletic prowess, you were courted by a number of schools, including Harvard and Princeton, and turned them down to go to Columbia. Why?

Justice Acosta: I get asked that question often. My father always emphasized education. He knew that, given the career longevity of baseball players, I mean, remember, in the old days, you were 30 years old you were already over the hill. You were not a youngster. So, my father knew that. And I wasn't quite convinced in those days, because, as a kid, you always want to play baseball. But he turned out to be right. And I made the right choice to follow his advice that getting an Ivy League degree or two would be really helpful. Of course, again, he was right. It doesn't seem, however, that... It doesn't mean that there aren't those days when I see a pitcher with a subpar record and I don't think, "I can do better than that for the \$10 or \$20 million that they're getting paid!"

John Caher: Now, were you always thinking law school as an undergraduate? Was that always the plan?

Justice Acosta: Not really. We had already moved to Washington Heights. I always wanted to make an impact in people's lives. Frankly, after getting burned out of two separate apartments in the South Bronx, I wanted to be a psychologist.

I realized this while I was doing community empowerment work in Washington Heights. I derived value and meaning from helping and working with my community in Washington Heights, an immigrant community that was immigrating in the early '70s and really did not have an infrastructure of service, English as a second language or citizenship class, really had no mechanism to integrate itself to the main society. So, I thought, "I can do this."

And there were a group of young folks like Congressman Espaillat, who was not Congressman, he was just a kid like me, just a bunch of young kids who decided to create organizations to serve the community, build that social service infrastructure that was so badly needed in our community.

John Caher: I want to follow up on that in a second. But first, did you say you were burned out of two apartments?

Justice Acosta: I was. In those days, the South Bronx was a tough place. Remember Jimmy Carter was brought to the Bronx. And everybody talked about the South Bronx burning. Well, they meant it literally. So, we got burned out of one apartment. And, we got burned out of another. That's when we realized... I had already applied, decided to go to Columbia College, so we decided to move to Washington Heights in '74, '75.

John Caher: You understood the plight of the underdog. And is that why, getting out of law school with a prestigious degree, rather than going to work for one of the silk stocking firms in Midtown, you went to the Legal Aid Society, where you were probably not making as much money as you would've made?

Justice Acosta: Yeah. Because I was so heavily involved in community empowerment. At least during my college days, I realized the important role that lawyers play in our society under the rule of law. I realized early that lawyers, not psychologists, play a key role in making people's lives better. Not that I have anything against psychologists. Obviously, they do, too. But there was something that just appealed to me. And I wanted to become a lawyer.

Frankly, I decided to be a public interest lawyer because, during those tough times in the South Bronx. I not only wanted to be a public interest lawyer, I wanted to work in the South Bronx office of the Legal Aid Society's Civil Division. That is the office that helped my family during one of those tough times when we got burned out of an apartment, my father lost his job, we were having difficulty paying the rent. And it was that office who helped us.

It was actually a lawyer, who later became a Supreme Court Justice, Robert Litman, Bob Litman, represented us in Housing Court. And it was then that I decided, "This is something that I really want to do. This is how I want to pay it forward." And it's something that appealed to me, to be able to impact people's lives the same way that Bob and the Legal Aid Society impacted my life. So, I chose to work in that particular office.

John Caher: So, you had a personal experience, as well as an immigrant experience, that you brought to the profession and the bench. What does that experience bring to the profession and the bench?

Justice Acosta: That's a great question. I think my immigrant experience informs who I am and my world view, which I think is what I bring to the bench. When I talk about diversity, that's one of the things that I find appealing about diversity, the fact that so many different views are at the table. I think

that your experience and your world view act as a lens through which you view the world, through which you examine the facts that I brought to you in the context of litigation. And frankly, that allows you to dispense justice.

Of course, my experience and a judge's experience should be constrained by precedent and reason. Any judge who tells you — and I know this question always gets asked of me — but any judge who tells you that they can leave behind what brought them to the bench in the first place is not really self-examining or simply just doesn't understand that who we are and our world view is impacted by our experiences and what we do. We're no different than any other human being, in that sense.

John Caher: Well, isn't that something we want? I mean, otherwise, basically, you could take the law and the facts and plug them into a computer and come out with a result, right?

Justice Acosta: Exactly right. Exactly right. And frankly, I think that the best work product is a work product that is the outcome of a diverse bench. Not just diverse in terms of race and gender, although that does give you a lens through which to examine what's in front of you, but your geographic diversity. I mean, I know now, as a PJ in the First Department, I have experiences at the Administrative Board and discussing issues with Jerry Whalen and Beth [Garry]. And sometimes, you don't realize the impact that a rural environment, for example, will have in how you view the issue. Certainly how I will view the issue in Midtown Manhattan ...

John Caher: Certainly. Justice Garry grew up on a dairy farm, I believe.

Justice Acosta: Exactly, exactly.

John Caher: A considerably different experience than yours.

Justice Acosta: Yeah. Absolutely right. Absolutely right.

John Caher: Let's pivot to the court, if we could. The First Department, just a bird's eye view. What is it? Where is it? And what does it do?

Justice Acosta: Well, it's a great court. We are located in Midtown Manhattan, 25th Street and Madison. It was created by the New York State Constitution back in 1894. It is one of the four intermediate appellate courts. And we hold jurisdiction over the Bronx, the counties of the Bronx and the County of New York or Manhattan. So, appeals, to us, are as of right in civil and criminal matters. And of course, as a branch of the Supreme

Court, the Appellate Division has very broad powers to review questions of law and fact and to make new findings of fact, even. So very powerful entity.

John Caher: There's, of course, only one Appellate Division but four Departments. How is yours, do you think, unique from the other three?

Justice Acosta: That's a great question, John. I mean, I think it is unique, the First Department is unique in that it really is a residential court, handling unique number of cases. So complex, commercial cases is one of our unique aspect of our inventory. And I think it's equal, superior to a lot of other courts in London, Delaware. There are now more commercial cases filed, for example, in the Commercial Division in Manhattan Supreme Court, and then appealed to us in the First Department, than any other court, including the Southern District of New York and any other appellate court in the country. So, the Appellate Division, First Department, is the forum of choice in most commercial matters these days.

John Caher: How many judges do you have assigned to the court?

Justice Acosta: Well, currently we have 20 justices certified to the Appellate Division, First Department. But we currently have two vacancies.

John Caher: So, you're a little shorthanded. Now last year, your judges heard about 1,400 oral arguments, decided 5,500 motions, adjudicated 3,776 cases, admitted nearly 2,700 attorneys to the practice of law, decided 275 attorney discipline matters. With that volume of cases, is it possible to have a hot bench, a bench where the judges know what the issues are in a given case *before* they hear the arguments and to really have a spirited give-and-take with the attorneys?

Justice Acosta: The answer is, absolutely! In fact, that is our reputation in the First Department, which I think is really a testament to the industriousness of Appellate Division, First Department justices. We decided almost 3,200 cases last year in 2019. We currently, as of today, as of this interview, we have two pending appeals, which we should be able to get done in short time.

So, we average, in the First Department, about 29.7 days from oral argument to publication. So we are, our tradition is to be well-prepared for oral argument. Again, that is-

John Caher: Let me cut you off a second. How many days from argument to...

Justice Acosta: 29.7 days.

John Caher: That's incredible!

Justice Acosta: One of the beauties of having spent my first three years as PJ to bring the court into the 21st century is that we now have a case management system that allows me to generate pretty much any kind of report that I want. How many cases? Criminal, civil, family, surrogate, within civil. How many of them are commercial cases? How many of them are other type of cases? So, I'm able to generate that. Of course, I keep track of how long the cases take through our process. And I'm proud to say that not very many, if any, appellate courts can boast about a turnaround timeframe of 29 days, as we have.

John Caher: That is impressive. Now with the volume of cases that you have, is it practical for the court to have what you might call teaching moments? Or is it primarily, resolve a dispute so people can get on with their lives? Or is it a mix of both?

Justice Acosta: It's a mixture of both. I mean, our primary goal for this is to address and resolve the dispute that's before us. But we also have other responsibilities beyond correcting errors and providing guidance to trial courts. We understand that an overwhelming majority of our decisions are final and they don't get appealed or heard by the Court of Appeals. So, I think that that gives us an obligation to dispense justice and often make legal policy choices until matters are clarified by the Court of Appeals.

Again, with few exceptions, appeals to the Court of Appeals are by permission only. You need leave in order to go to the Court of Appeals. People can appeal, litigants can appeal to us [as a matter of right] So, there is reason why we have been vested with the broad powers that I pointed out before, to review questions of law and fact, and frankly, to make new findings of fact, if that is what is necessary. As you know, we also have this interest of justice jurisdiction. And we use it sparingly to rule beyond simply correcting errors, to the ultimate goal of achieving justice in that particular case.

John Caher: That segues into another question that I had. Normally, a case can only get to the Court of Appeals with the permission of the Court of Appeals. However, it's also possible for the Appellate Division to refer a case or to grant leave so a case gets there. Basically, the Appellate Division can force the Court of Appeals to take a case. This Chief Judge, and all of them in my memory, have not been particularly fond of that practice.

What are the circumstances when your court will essentially foist a case onto the Court of Appeals, rather than let them decide whether they want it or not?

I'm going to get you in trouble, aren't I?

Justice Acosta: You are getting me in trouble! Let me think about that answer. Every court, including the Court of Appeals, wants the prerogative of controlling their own calendar. Every court wants to be able to control their own calendar. I would love to be able to do that a little more. But as you know, when you get appeal as a right, you get what comes in. But the Court of Appeals, you reach it by permission and only on very limited types of cases, issues of law and all matters that are final. However, statutes and the Constitution have given Appellate Divisions the power to refer a matter to the Court of Appeals when we feel that it needs resolution. And we don't hesitate to do that, understanding that it's something that we need to use sparingly.

When you have two judges at the Appellate Division dissenting and writing a 20-, 30-page dissent, explaining why we should rule, the majority should really rule in the way that the dissent sees it, that is a matter that I think requires some scrutiny by the Court of Appeals. I think that that was the wisdom of the Legislature in giving us the power to do that. Frankly, I think it is the right decision. If you have a panel of five judges that cannot agree on a particular matter because it involves issues of public policy or involves a particular set of issues that requires interpretation by the higher court, we don't hesitate to go ahead and send those up.

John Caher: How is it decided if there's just going to be a terse order, a per curiam opinion, a signed opinion, a written opinion? How is that all decided? With the volume, obviously you cannot write a written opinion in every case. And I'm certain every case doesn't warrant it. But how do you make that determination?

Justice Acosta: Well, that's a decision that really is made by the randomly assigned judge. He or she has the discretion to decide. Sometimes, he's urged by the majority or by the panel for a little more clarification or a little more expansion, or the suggested writing doesn't quite bring forth the kind of clarity that we think is necessary for the trial court. So that judge has the discretion to, what we call, "hold the case," hold the case and come up with a more extensive writing or even a signed opinion, which will then be brought before the panel of judges to ultimately agree or disagree

with it. Obviously, if you disagree, you can respond in the form of a dissent to that writing.

John Caher: I would imagine that, in conference, there are some rather spirited arguments. And so, how do you, as a Presiding Justice, prevent intelligent, principled, probably opinionated people from taking personal offense or allowing professional disagreements to devolve into personal animosities.

Justice Acosta: This is something that I've written about extensively. I believe that dissents are very important. I think that dissents help to sharpen the issues and often improve the quality of the decisions to be issued by the court. You often hear me say that my best writing is usually done when there is an opponent. So dissents, I think, also serve to clarify the issues for the Court of Appeals and for the public. Frankly, I think great dissents sometimes become the majority opinion. They are able to carry the majority. Sometimes it takes a few years for that to take place. But often, a great dissent so moves the majority or so moves the public debate that it ultimately becomes a majority opinion.

Now, you don't dissent every time that you disagree. It's important to understand that. I think it depends on the nature of the disagreement. I think small disagreements can often be accommodated by a good writing. And that happens more often than we like to think. But when it is a significant disagreement, for example, if the majority, as in one of my cases, if the majority is trying to curtail the power of the Chief Administrative Judge and the Chief Judge to create problem solving courts, then all bets are off. And in that case, I was the sole dissent. Usually, you want another colleague to come along with you. But I dissented by myself. It was ultimately, my dissent was ultimately adopted by the Court of Appeals. And we were able to preserve problem-solving courts, including a domestic violence court that played such a key role within the State Judiciary.

John Caher: Sometimes, when I read U.S. Supreme Court decisions, I think, "Yikes! These people hate each other!" And I do not get that sense reading your opinions. I get the sense your court, your judges, can disagree without being disagreeable, as Judge Lipman used to like to put it.

Justice Acosta: I encourage my judges to express themselves clearly on cases but never make it personal. I do remind them, and I think that they understand, that the personal, the other side of your position this week will be your ally the following week on a different case. So, while I encourage them to

be clear and disagree when they need to, it is important to understand that these are colleagues. You do your best not to make it personal.

There are a lot of systems that we have at the Appellate Division to make sure that the tension that sometimes is created by the voluminous work that we do gets dissipated somewhat. We generally eat together. I mean, one of the advantages of being a residential court, as I've mentioned to you before, is that my judges have only one chamber. And the chambers are in the courthouse at 25th Street. The other Departments—Second, Third, and Fourth—where the judges are more geographically disbursed, don't have the ability that we have to break bread together and socialize and find out how children and grandchildren are doing. It's an important thing. Sometimes people underestimate it. But it's really important, because it is difficult to be disagreeable, let's say, with a judge's opposing view when you just finished breaking bread with that judge. So those social gatherings are really an important tool for us to continue to work together in that number of cases.

John Caher: How are the panels created? And is there a conscious effort to ensure that the judges get a chance to work with the other judges? You could assign the same four-judge panels all the time. Then you'd have groups of four all over the place, doing things. But is there an effort for them to rotate that?

Justice Acosta: There is. The calendar itself, before we assign the cases to each panel, the panels are created a month and a half before. And one of the things that we do, the clerk usually prepares the panel. One of the goals is to make sure that every judge gets an opportunity to sit with all of their colleagues. So, we have 18 judges. By the end of the calendar year, and as you know, we have a 10-month calendar year, each judge has already sat with every one of his or her colleagues. And I think that is important. I think it's one of the great parts of being involved in that, in a court like the Appellate Division, First Department.

John Caher: I would imagine otherwise, there'd be a danger of creating cliques.

Justice Acosta: That's right. That's right. And you don't get to see and interact with other judges and how they view particular cases. And you're right. It does have negative consequences too, for you, as a judge, to only see a portion of your colleagues. That's not good for them, it's not good for the court, it's not good for the litigants that come before the court.

John Caher: And the Court of Appeals, of course, does not have that problem. There's seven judges who sit on every case.

Justice Acosta: They don't. That's right. That's right. But remember, the Court of Appeals, they're making really difficult, tough policy choices on a much smaller number of cases.

John Caher: Sure.

Justice Acosta: I mean, in the past, we had 3,200 appeals to the First Department. We have a couple hundred to the Court of Appeals. So it's not... Sort of a different way of approaching the work.

John Caher: Your job is half, or maybe more than half, administrative. And as the Presiding Justice, you're a member of the Administrative Board, which includes the four PJs and the Chief Judge. What does that work entail? And then, how much time does that take, doing your work with the Administrative Board?

Justice Acosta: It takes more time than I thought when I was an associate and I applied to be the PJ!

John Caher: Be careful what you wish for, right?

Justice Acosta: The Board meets monthly, as you pointed out. The Administrative Board establishes statewide standards and policies. They range from minor changes to the rules of, say, the Commercial Division, to changes on the rules of ethics that apply or govern the conduct of lawyers. So, it's a lot.

I mean, for example, just recently, we enacted what has been characterized as the "humanitarian exception," which importantly now allows lawyers, in certain circumstances, to provide financial assistance to litigation clients. As you know, there were ethical impediments to a lawyer giving food or transportation or a coat to a client if they see that that coat is really not protecting him or her. Sometimes, you know this is something close to my heart, as a former Legal Aid lawyer, a poverty lawyer for a long time. Sometimes you see clients coming in. You can see that they have a need in a couple of days. You see that their child that they brought with them is wearing a flimsy coat in 20-degree weather. So very little that we can do ethically, under those circumstances.

Now, this humanitarian exception allows that lawyer to use resources that... not resources that have been allocated to do the legal work but resources that have been obtained precisely to address those issues. Maybe a client cannot come into the office when you want him to. It's okay to give him a MetroCard. You see they're hungry, it's okay to get

them a meal. That kind of thing. Really not controversial, as far as I'm concerned.

John Caher: So it sounds like, in the context of this whole conversation, the four Departments are necessary, the four regional Departments are necessary, because they understand the nature of their geography. And as you mentioned before, you have the bulk of the commercial cases. And I bet Justice Garry in the Third Department hears a whole lot more of farm cases.

Justice Acosta: Yeah, that's right.

John Caher: It sounds like the Administrative Board is the one that looks back and says, "Well, what should everybody do consistently? Administratively?"

Justice Acosta: That's right. And the Chief, to her credit, Chief Judge DiFiore has been wonderful about encouraging us to do everything that we can to create uniformity. Because the other side of that is that you don't want a litigant to come into the First Department, and then go to the Third Department and feels like he's in a different country. You want some uniformity, while understanding that there are local customs and local practices that have been carved out of the uniform rules that we've created. So, I think it's a wonderful thing. Uniformity when we need to be uniform but with enough flexibility to allow for some customs in the three other Departments of the Appellate Division.

John Caher: Let's say there is an attorney watching this who's about to argue before the First Department for the first time. What is your advice? What should she do and what should she not do?

Justice Acosta: That's a great question.

If you're going to appear in the First Department, my best advice is to please be prepared. You're going to encounter a hot bench who has read the record, who has read the briefs, who is intimately familiar with the facts of your case. I mean, we work hard in the First Department to know the cases as well as the litigants. And my advice is, do not allow a judge to know more about your case than you. So, if you see the archives of oral arguments in the First Department, you notice the heavy interaction between the judges and the litigants and the intricate questions that are asked in those cases.

A second advice would be, your main job as an advocate is to convince the judge of the merits of your position. So, one primary way to achieve

that is to make sure that you answer the questions that are troubling the judge. I know that sometimes litigants come in, they have their libretto, they have their whole presentation, and they want to address issue one, two and three. But it may be that the judge is already convinced with issue one and two and she wants to focus on that third issue that's a real thorny issue. So, she's asking you questions. Please answer those questions. The great advocate understands the importance of doing that. Because you're basically dealing with any concerns that the judge may have before she rules in your favor.

And my third advice? And this is something that I always tell folks at forums like this, for example, is to please not only be precise but be honest. Don't get cute when you don't know the answer to a question. And I strongly advise you not to misstate or obscure the facts or the law. Frankly, I tell you, it'll never help you. We know already the cases that constrain us, that control that particular case, so for you to not cite cases that oppose your position and explain it and maybe distinguish those cases, I don't think is going to help you. And frankly, what it does, it creates a reputation, not just to the judges, but to the general community, that will carry into the future, and frankly, into all the cases in which you appear before the court. So, have a reputation for straightforwardness and honesty. That's always my advice.

John Caher: That's great advice. Now, what is your advice to the trial judges? What should they know that maybe they don't fully understand and what should they know about the record on appeal and how it is utilized and created?

Justice Acosta: Yeah. That's a tough one. That's tough. I mean, the one advice that I would give them is that getting reversed is not personal, nor is it a reflection of the industriousness of that judge that is being reversed. In fact, my personal belief is that a judge who doesn't get reversed is often a judge who doesn't take chances or go the extra yard to achieve justice.

My advice is work hard. And when you disagree with our precedent, be candid about the nature of the disagreement and tell us why you think that you should be allowed to disregard that precedent. We can sometimes be convinced by trial judges that a particular approach is the best way to proceed in that particular case. Just be straightforward. Be honest about the position. Tell us what you're thinking. The more you give us, the more in a position we are to be convinced by your argument. Don't be cryptic, I guess, is the word. Be generous in your analysis in that particular case.

John Caher: So, it sounds like the message to both the litigators and judges is, be prepared and give you the materials that you need to do what you need to do.

Justice Acosta: Exactly right. Exactly right.

John Caher: Judge, thank you so much for that candid and illuminating discussion. And please stay safe and healthy.

Justice Acosta: Thank you so much, John. Really appreciate this interview. One of the most fun ones I've had in the COVID era!

John Caher: I'm glad to hear that.