
Practice Group Overview ...

Appellate Practices Turn Profits, Perform Pro Bono Work and Recruit A Different Breed

With April comes tax time, and it's important to remember that the IRS wields a lot of clout. The tax agency also doesn't lose many battles but a year ago Gregory Garre fought the IRS, and won. In April 2012, the Supreme Court handed down its decision in *United States vs. Home Concrete & Supply*, ruling 5-4 in favor of Garre's client, Home Concrete, in a case centered on the application of statute of limitations.

"It was of great importance to the IRS, which was arguing for a longer statute of limitations," says Garre, the global chair of the Supreme Court and appellate practice group at Latham & Watkins. "We convinced the Supreme Court that the conventional statute of limitations applied and that resulted in the dismissal of many of these cases as being time-barred."

Garre has argued 38 cases before the High Bench, and since he came to Latham in 2009 to run the appellate practice, he's been a busy man—both in serving his own clients and managing the 70-attorney practice group. "Part of the challenge in running the group is overseeing so many cases in courts across the country, both federal and state, at different levels," he says. "But that's also very satisfying because it's such a diverse practice in many different courts and involving a wide variety of areas of the law."

Like the heads of most appellate practices, Garre and his team also assist his firm's clients and other attorneys in the initial stages of litigation. "We get involved in cases before they get to the courts of appeal—helping

with depositive motions, thinking about the architecture of the case before it gets going, and strategizing about how to frame claims and set up issues—especially with important cases that are likely to head to the court of appeals."

Several blocks away from Garre's Washington, DC office, Patricia Ann Millett chairs the Supreme Court practice at Akin Gump Strauss Hauer & Feld and co-chairs the firm's national appellate practice. Millett and her team of 15 appellate attorneys also work closely with the firm's other litigators. "We work hand-in-glove with a lot of people particularly, of course, the litigators," she says. "We advise at the trial stage, helping to brief them and performing a consulting role in trials."

Last year when Millett argued *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, on behalf of tribal sovereignty in a battle over land the federal government took title to for a Native American casino, she made history. It was her 31st argument before the Court, more than any other woman in private practice. And, she won the case.

She was also victorious before the Court in *Filarsky v. Delia*, when the Justices ruled in January 2012 for her client, Filarsky. "The issue," Millett says, "was whether private individuals who are retained to do work with government entities enjoy the same qualified immunity and sometimes absolute immunity protections from suit that government employees do when working with the government."

Producing Profit Centers

While Garre and Millett garner headlines and prestige for their firms, the practices they run also bring significant revenue to their partnerships. And, despite that some legal observers say many appellate practices are loss leaders or at least don't generate much revenue, it's not uncommon for appellate practices at smaller firms to also serve as profit centers. "The appellate work we do earns the firm a good profit," says Brian Whitely, a partner and litigator at Syracuse, NY-based Hiscock & Barclay.

At Houston's litigation boutique Beck Redden, the partnership's seven-attorney appellate practice also turns a healthy profit, says David Gunn, who has performed appellate work exclusively for more than 20 years. "We mostly do hourly work but we also do some alternative fee arrangements," he says. "We've got contingent cases, work for flat fees, and sometimes we use a hybrid [pricing] model. The profitability in this group is as good as it is in the rest of the firm."

In Phoenix, Snell & Wilmer's appellate practice group, which has nine lawyers, generally staffs two-attorney teams on its cases, and financially they hold their own. But sometimes the firm takes appellate cases that require additional staffing and bring in more profit. "We have a small number of larger matters that have very long filings, are particularly complex, or involve novel issues," says Andrew Jacobs, the head of the firm's appellate subgroup. "We need to have multiple associates for these and they're the bigger billing matters."

Pro Bono for Public Good & On-the-Job Training

In addition to handling cases and managing his team, Jacobs also serves as the coordinator of the pro bono programs for the District of Arizona and for the Ninth Circuit in Arizona and Nevada. Because

of this, and because the firm generally encourages pro bono work, Snell & Wilmer's appellate lawyers perform a lot of it. "We're very proud that our partners and associates all do pro bono arguments in the courts of appeal," Jacobs says.

At Akin Gump, Millett and her group are also big on pro bono service. "We do a fair amount of it, in part because I really enjoy it," she says. "I spent so much time in the government that I have a very strong public interest streak in me. And there's such a need for it at the appellate and Supreme Court levels, where interest in pro bono work seems to fall away a little. That's no good because you have to be able to protect people from the beginning to the end of their problems. Of course, you have to pick the right cases and at the right time so you can devote enough time and energy to them."

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Recently, some of Millett's colleagues successfully handled an appellate immigration case, and those attorneys gained a lot of satisfaction from that work, she says. "It's so rewarding to help someone who has come to you and said, 'Someone is going to send me back to this country and I'll be tortured. I need help.' That really puts a human face on the legal problem. It can be so meaningful for a lawyer to have that experience."

Naturally, there are other, more practical reasons that firms take on pro bono projects.

“Part of what I want to do here at Beck Redden is give experience to our younger lawyers, to make sure they get board-certified and get practice in the courts as lead counsel on real cases,” Gunn says. “So the firm is willing to adjust in-take criteria and take cases that might not be a profit-makers to allow our young lawyers the chance to be lead counsel, write the briefs, stand at the podium, and argue.”

Recruits with the Right Stuff

When it comes to recruiting attorneys for appellate practice, the criteria varies from firm to firm, although most partnerships look for young associates who have had appellate clerkship experience. At Beck Redden, the appellate lawyers are also looking for certain personalities in their new hires.

“I think being extroverted is helpful at our place,” Gunn says. “It’s not a deal breaker if you’re not; an appellate practice tends to attract introverts and bookish types. But in a litigation boutique like ours you can only have some many of those. You’ve got to have some type-A’s and go-getters who will get out, run to the courthouse, and be aggressive and intellectually assertive. Extroverts tend to thrive better here.”

Millett has three key criteria when she recruits appellate lawyers. They must be strong writers and extensive researchers, and they must not be cheerleaders. “I want lawyers with incredibly strong advocacy writing skills; they must be very good at organization and articulation of very

complex legal points,” she says. “I also want savvy and sophisticated researchers, who can look at every question from every angle and not simply type something into a computer and decide that whatever the computer says that must be the answer. And, I want people who will push back and debate me on the legal issues, who think independently but collegiately. It takes a village to handle an appeal. I want all hands and all brains on deck and everyone thinking all the time.”

In the Valley of the Sun, Jacobs and his team value both clerkship experience and academic pedigree. “We don’t want to be school snobs but it tends to work out that most of our appellate lawyers either have clerked for the Ninth Circuit or attended a brand-name, top 10 or 25 law school—or both,” he says.

For lateral hiring, Snell & Wilmer looks for attorneys at firms that are identified with appellate practice. “We want demonstrated proficiency and depth and the appearance of being an appellate specialist,” Jacobs says.

It’s becoming increasingly difficult, however, to find attorneys with deep appellate experience. “Given what I perceive as the shrinking nature of the bar that’s practicing at the appellate level,” says Hiscock & Barclay’s Whitely, “especially before the Supreme Court, it’s getting harder and harder to find attorneys with a lot of appellate experience. When it comes to the Supreme Court, you hear the same names time and time again. And they’re all tremendous advocates but it sure makes recruiting tougher.” ■

—Steven T. Taylor

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