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THE APPELLATE HOT LIST

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Gibson Dunn keeps its eye on the horizon

The firm shapes the law by helping to shape the Supreme Court.

By Emily Heller
SPECIAL TO THE NATIONAL LAW JOURNAL

GIBSON, DUNN & Crutcher's appellate team is on a streak.

With warhorse Theodore B. Olson in the lead, the appellate group has won eight of the 11 U.S. Supreme Court cases it has argued during the past three terms. Overall, the firm claimed victory in 75% of its high court cases.

"Getting 11 cases to the Supreme Court—then winning eight of them—in a given stretch is an incredible success," said Paul Watford, co-chair of the American Bar Association Section of Litigation's appellate practice committee and partner in the appellate practice group at Munger, Tolles & Olson in Los Angeles.

In 2007 and early 2008, Gibson Dunn had four Supreme Court victories and a solid collection of wins in other federal and state appellate courts.

What's behind the record?

Firepower: Olson is a highly regarded Washington insider, whose 40-plus years in practice and solid conservative credentials have given him a deep understanding of the philosophies of the Supreme Court justices—two of whom he helped get appointed to the high court as a Bush administration confidant.

Helping to shape the court and having a deep affinity for its appointees is one way to get insight into the minds of the justices. "We work hard to give the court our best analysis to find the way that at least five justices will agree with our approach to the case," Olson said. "You can't win every case, but we try to win as many as we can."

Another tactic is to look for as yet-unexplored or underdeveloped weaknesses in cases, particularly when seeking to overturn jury verdicts.

"When we come to a case we try to take a fresh look at what's happened," said Theodore J. Boutrous Jr., who with Olson is one of four co-chairmen of the appellate group. The others are Miguel Estrada

in Washington and Daniel Kolkey in San Francisco.

"We try to say, 'What else is there? What else might there be that would take this verdict down? What's the Achilles' heel of this verdict in addition to the things that might be most obvious?'"

The lawyers take a long view of the law, he said, actively looking for ways to shape it in their clients' favor—even if it takes years to do it.

The practice maintains an open-door policy: Anyone in the firm can come over. That flexibility brings new ideas and energy to maintain the "never-say-die" attitude, said Boutrous, who from Gibson's Los Angeles office also co-chairs the firm's media and entertainment group.

The firm's nonhierarchical organization means that lawyers can follow their interests, crossing over into multiple practice areas at will. In the appellate and constitutional law group, eight partners and 15 to 20 associates are team regulars, but others throughout the firm continually come and go on cases, Boutrous said.

"I think that has given us a huge advantage."

'A lot of fun'

Richard J. Doren, a Gibson Dunn partner in Los Angeles, brought his national class action defense experience to an appeal involving insurance policyholders and the floods that followed Hurricane Katrina. Doren convinced the 5th U.S. Circuit Court of Appeals to reverse a trial court ruling that insurance covered the flood caused by the breach of New Orleans' levees.

With more than 200,000 policyholders, the stakes were very high and the challenge intense. Still, "putting together a good argument—that's a lot of fun professionally," Doren said.

Opposing counsel in the Katrina insurance case, John Ellison, a Reed Smith partner in Philadelphia, said the insurance coverage issues are still being litigated before the Louisiana Supreme Court. He praised Doren's job, then added: "I am still surprised with the result."

Opposing counsel praise Gibson Dunn's appellate performance as solid and highly professional. Yet those who have won cases against the firm discuss their victories with detectable notes of glee.

Erwin Chemerinsky, a Duke Law School professor and appellate practitioner, said that in three punitive damages cases

against Gibson Dunn, he's won one and lost one; the third is still on appeal.

"I think they did a superb job of litigating," Chemerinsky said of Gibson Dunn's reversal of a \$3.5 million punitive damages award in the California Court of Appeal. The case involved a United Parcel Service Inc. whistleblower who won \$20 million in punitive damages from a jury, but the trial judge reduced the award.

The firm's courtroom opponents emphasize that winning on appeal is not just a matter of who the lawyers are.

"At the appellate level, good lawyering is important, but judges make a real effort to get beyond the lawyers and decide the case based on the facts and the law," said Michael R. Levinson, litigation practice chairman at Seyfarth Shaw in Chicago, who lost a baseball bat patent case against Gibson Dunn at the U.S. Court of Appeals for the Federal Circuit.

Olson has worked at the firm since 1965, with two notable intervals: Between 2001 and 2004 he was U.S. solicitor general, and from 1981 to 1984 he was a key presidential adviser in the Department of Justice's Office of Legal Counsel.

Olson ranks among lawyers with high court insider status. He represented George W. Bush in the two cases that settled the disputed 2000 presidential election. After helping Bush take office, he advised

the president on his two Supreme Court nominees, fellow conservatives John G. Roberts Jr. and Samuel A. Alito Jr., both of whom Olson has known since the 1980s, when all three were Reagan administration legal advisers.

"Those have been exciting places to put my foot in the stream," Olson said. "These are really outstanding people. I'm glad I was able to participate in a very small way in their preparation in their confirmation hearings."

Insiders don't necessarily get a pass, said Wendy Lascher, a 35-year appellate lawyer at Lascher & Lascher in Ventura, Calif., and a board member of the American Academy of Appellate Lawyers. As with any experienced practitioner, having Olson on a case means the court will pay attention, but it won't "bend over backwards" for him, she said.

Appellate lawyers win or lose based on the strength of their cases, said Steven L. Mayer, director of the litigation department in the home office of San Francisco-based Howard Rice Nemerovski Canady Falk & Rabkin. Mayer has been Gibson Dunn co-counsel and opposing counsel, and won and lost cases with the firm.

Gibson Dunn "can't pull rabbits out of their hats" any more than other appellate lawyers, Mayer said.

WHEN IT COMES to appellate practice, giving credit where it's due can be complicated.

It's the nature of the practice. World-changing precedents rarely are the work of a single law firm. As we scrutinized the achievements of the dozens of firms nominated for this, our first Appellate Hot List, that quickly became clear. Cases important enough to land before the U.S. Supreme Court or other appellate venues tend to attract lots of interested parties—ones either directly interested or with broader concerns about how the outcome will shape the law. Great firms work in concert to achieve their goals.

We asked our readers to nominate firms that scored at least one significant appellate win since January 2007, plus

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an impressive track record overall. A “significant win” meant prevailing before the U.S. Supreme Court, a U.S. circuit court of appeals or a state court of last resort when the financial stakes were high or an important legal principle was at stake. Government attorneys were not eligible (so the California attorney general's office, for example, unfortunately gets no credit here for its role in sustaining the big tobacco settlement against an

antitrust claim). We also examined the records of dozens of cases.

The firms on this list all played roles in the most important appeals of the year, drafting the main briefs or offering the main oral arguments, or else chiming in as friends of the court. We looked for evidence that amicus briefs contributed to an outcome (by offering arguments referenced in the ruling, for example). For each firm, we list a number of cases that we felt illustrated the skills the organization had to offer. Unfortunately, space did not allow us to list each firm that contributed to a specific outcome. Also unfortunately, some fine appellate firms did not make this list. The ones that did get credit for unqualified excellence. **NLJ**

—MICHAEL MOLINE

Gibson, Dunn & Crutcher

The presence of Theodore B. Olson alone would be enough to cement Los Angeles-based Gibson, Dunn & Crutcher among the elite of appellate practices. In fact, the firm's 31 appellate specialists represent an embarrassment of riches: Miguel A. Estrada, Daniel M. Kolkey, Theodore Boutrous and more. During the past three terms, Gibson Dunn argued 11 cases before the U.S. Supreme Court and prevailed in eight of them. The firm's advocacy of the Republican side in *Bush v. Gore* changed American history in ways still unfolding.

NOTEWORTHY CASES:

■ ***Riegel v. Medtronic Inc.***, 128 S. Ct. 999 (2008). Lead counsel Theodore B. Olson. The U.S. Supreme Court ruled that federal law pre-empts state products liability claims involving the design and labeling of medical devices declared safe and effective by the U.S. Food and Drug Administration, keeping such claims out of the hands of state court juries.

■ ***In re Katrina Canal Breaches Litigation***, No. 07-30119 (5th Cir. 2007). Lead attorneys Rich Doren and Daniel Nelson. The 5th Circuit reversed the trial court, ruling that, notwithstanding any contribution by human negligence to the flooding in New Orleans following Hurricane Katrina, flood exclusions in property insurance policies “unambiguously preclude” recovery by policyholders.

■ ***Kirkendall v. Department of the Army***, 479 F.3d 830 (Fed. Cir.) (en banc), cert. denied, 128 S. Ct. 375 (2007). Lead attorney Theodore B. Olson. The Federal Circuit appointed Olson as pro bono counsel for a disabled veteran who felt he had been unfairly denied administrative review of his rejection for a civilian Army job. In the rare en banc appeal, the court ruled, 7-6, that veterans are entitled to preferential treatment or waivers on filing deadlines under the Veterans Employment Opportunities Act.