

Appellate Group Of The Year: Gibson Dunn

By **Nick Brown**

Law360, New York (January 21, 2011) -- Where some firms' appellate groups swoop in for appeals only, the team at Gibson Dunn & Crutcher LLP is there for clients from the beginning, defending same-sex couples' rights to marry, overturning a fraud conviction for a former media magnate and affixing itself as one of Law360's Appellate Groups of the Year.

Gibson Dunn appellate lawyers represented a pair of same-sex couples right from the initial complaint in *Perry v. Schwarzenegger*, a suit challenging the constitutionality of a California referendum banning gay marriage.

A district court deemed the law unconstitutional in August, and Gibson Dunn partners Theodore Boutrous and Ted Olson defended the victory in arguments before the U.S. Court of Appeals for the Ninth Circuit in December.

The firm also successfully defended ex-Hollinger International Inc. CEO Conrad Black when prosecutors charged him with fraud for allegedly crafting sham noncompete agreements and depriving Hollinger of his honest services.

While Black was initially convicted, the U.S. Supreme Court vacated the ruling and remanded the matter in June, declaring parts of the honest services provision unconstitutional.

For Gibson Dunn, appellate law is more than just arguing appeals, said Boutrous, co-chair of the firm's appellate and constitutional law practice group.

"Our appellate group, we feel, differs from some others," Boutrous said. "We've got a broader mission. In cases where we know there are significant constitutional issues, we try to get involved at the trial court level and see it all the way through."

In *Perry*, Boutrous and Olson filed the complaint for the plaintiffs, alleging California's Proposition 8 denied gays and lesbians the chance to enter the same "officially sanctioned" relationships their straight loved ones could enjoy. They won the case after a 12-day trial. A Ninth Circuit panel has not indicated

when it will rule on the appeal.

“We knew there were constitutional issues that were going to be decisive or incredibly important, so we got the appellate team involved at the outset for those reasons,” Boutrous said.

When attorneys had an inkling the honest services provision of the federal mail fraud statute would become a key constitutional turning point in Black's appeal, they brought in appellate partner Miguel Estrada right away.

The high court's ruling found that jury instructions on the provision had been incorrect and that the lower court had wrongly ruled that Black had forfeited his right to challenge the instructions. Black is now free on bail as the matter returns to the lower courts.

Gibson's appellate practice group — comprised of about 30 mainstay attorneys in offices throughout the U.S. — has expanded in the past three years and will continue to do so, but more in terms of subject matter than number, Boutrous said.

“We've seen a significant expansion in terms of the types of cases, the numbers of cases, the significance of cases,” he said. “We'll continue to grow in terms of expanding the breadth and scope of the practice.”

Not that breadth is a problem for the appellate team now. The group will argue five Supreme Court cases in the 2010 term alone, in areas as diverse as intellectual property, securities and employment law. Overall, the firm has won eight of its past 10 Supreme Court matters.

Perhaps its highest-profile coup in 2010 was *Citizens United v. Federal Election Commission*, a landmark ruling that gave corporations the right to make independent political expenditures during elections.

Gibson Dunn's team represented the petitioner, who argued that the McCain-Feingold campaign finance law unfairly barred it from advertising its documentary about then-presidential candidate Hillary Clinton.

While pundits expected the court to rule narrowly, Olson convinced the justices in a 5-4 decision to strike down a portion of McCain-Feingold and extend First Amendment protection to corporations.

“People are worried about what it will mean, good or bad,” said Mark A. Perry, an appellate partner in Gibson Dunn's Washington office. “But the importance of the decision was really establishing not just that corporations have legal rights, but that attempts to restrict those rights are subject to First Amendment constraints.”

Gibson Dunn also won impressive victories at the federal circuit court level, including multiple successful challenges to rules put in place by the U.S. Securities and Exchange Commission.

Partner Eugene Scalia in July convinced the U.S. Court of Appeals for the District of Columbia Circuit to void a proposed SEC rule to regulate fixed indexed annuities.

The \$100 billion industry for FIAs, which tie interest payments to the performance of an equity index, cannot be regulated by the SEC because it deals with annuities rather than securities, Scalia argued.

The court found FIAs within the SEC's authority, but nonetheless voided the proposed regulatory mechanism, deeming it arbitrary and capricious. The victory came on the heels of two prior appellate wins by Scalia blocking key elements of the SEC's controversial mutual fund governance regulations.

Gibson Dunn has also used the federal appeals courts to compel plaintiffs in Ecuadorean court proceedings to turn over key documents in ongoing \$113 billion environmental contamination litigation against Chevron Corp.

The U.S. Court of Appeals for the Fifth Circuit in September upheld Chevron's right to obtain otherwise-protected communications that may include evidence showing that the special master in the Ecuadorean court is partial to the plaintiffs.

That ruling followed a decision by the U.S. Court of Appeals for the Second Circuit generally affirming a district court's order requiring makers of the documentary "Crude" to turn over video outtakes.

In March, the firm helped Chevron defeat a petition by the state of Ecuador to stay an international treaty arbitration that Chevron had filed to have its claims decided in a neutral forum.

"These cases raise important issues concerning U.S.-based plaintiffs' lawyers going to foreign countries and seeking to litigate claims in those countries against U.S. companies," Boutros said. "We think the whole process has been really tainted by fraud in Ecuador."

Such victories are not automatic — Gibson Dunn, like every firm, has taken its share of losses, too. But unlike other firms, Gibson Dunn has a particular knack for convincing the U.S. Supreme Court to hear it out on cases that don't go its way on the circuit level.

The high court grants less than 1 percent of all petitions for certiorari, but accepts about 30 percent of those submitted by Gibson Dunn lawyers, the firm said.

One such successful petition, granted by the court in December, is Wal-Mart Stores Inc. v. Dukes, in which the superstore is challenging a court's certification of the largest gender discrimination class in history.

In its decision, the Ninth Circuit affirmed certification under Federal Rule of Civil Procedure 23(b)(2) — which is designed for cases seeking injunctive or declaratory relief — rather than the more rigorous Rule 23(b)(3), which requires a showing that common issues predominate.

If upheld, the ruling could open the door to massive employment class actions involving large numbers of employees working in different facilities under different managers.

In Wal-Mart's cert petition, Boutros argued that the Ninth Circuit's en banc ruling — which was sharply divided — conflicted with Supreme Court and other circuit case law.

In Janus Capital Group Inc. v. First Derivative Traders, argued before the Supreme Court in December, Perry defended the petitioner, an investment adviser in long-running market-timing litigation, contending that service providers should not be made liable for statements in their clients' prospectuses.

“What's at stake is the extent to which securities laws can reach beyond the issuing company,” Perry said.

Another instance in which the Gibson Dunn team handled the case from its origin, the matter is one of only two remaining market-timing suits against Janus. The litigation at one time included 60 civil matters, but 58 have been dismissed, according to the firm.

In November, the Gibson Dunn team won cert for Microsoft Corp. in challenging a nearly \$300 million patent infringement judgment in a suit brought by i4i LP. Partner Thomas Hungar will contest the appropriateness of the clear-and-convincing evidence standard used by courts in determining the validity of a patent.

Also in November, Olson argued for petitioner Cigna Corp. in an appeal of a class action in which plaintiffs were deemed entitled to relief for being given inadequate notice of pension plan changes.

Olson questioned whether a showing of “likely harm” is sufficient to entitle participants in an Employee Retirement Income Security Act plan to recover benefits based on an alleged inconsistency between the explanation of benefits and the terms of the plan itself.

As dissimilar as many of these cases appear to be, they suggest versatility on the part of the firm, Perry said — a trait that makes Gibson Dunn an attractive option for clients seeking appellate counsel.

“These cases are all important to different people,” Perry said. “But between all of them, they cover pretty much every industry.”

Methodology: In mid-November Law360 solicited submissions from more than 300 law firms for its practice group of the year series. The more than 400 submissions received were reviewed by a committee of four editors. Winners were selected based on the number of significant wins the group had in litigation or the size, number and complexity of deals the group worked on in 2010.