

LITIGATION DEPARTMENTS OF THE YEAR

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GROUND BREAKERS



Theodore Boutrous and Marcellus McRae, Gibson, Dunn & Crutcher LLP

Sometimes it takes an aggressive legal strategy to ignite social change that seems blocked by the political process. That's something Gibson Dunn & Crutcher partners Theodore Boutrous and Marcellus McRae know a thing or two about.

Funded by a wealthy Silicon Valley entrepreneur, Boutrous and McRae took on the teachers' union and secured a landmark ruling striking down five California teacher tenure laws on equal-protection grounds. During the two-month bench trial in Los Angeles Super-

ior Court, the lawyers put on evidence that the provisions damn children, especially poor and minority students, to substandard educations.

The ruling, now on appeal, won praise from

The New York Times editorial board and the Obama administration and made enemies of teachers unions everywhere.

And Gibson Dunn is just getting started. In April, the firm sued the unions, alleging that mandatory dues that fund political activities infringe on

teachers' free speech rights.

How did the case come in the door?

Boutrous: We had come off the Proposition 8 case. It was high impact, a significant issue, a constitutional question with a lot of media attention, also part of a broader public policy dialogue go-



Theodore Boutrous, left, Marcellus McRae

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ing on in California and around the country. Dave Welch was looking around trying to find how he and [Students Matter] could fix, what he found to be, horrible problems with the education system and saw we litigated this case that went all the way to the Supreme Court and restored marriage equality in California. And he approached us.

How does Vergara compare to other high-stakes cases in terms of firm resources?

McRae: Of all the case that I've done at the firm, this ranks up there as among the most resource-intensive case we've ever had.

Your opposition was the state of California and the teachers' unions. It would appear Gibson Dunn in a case funded by Welch would have more resources.

Boutros: It really was in some ways highly analogous to straight-on private litigation. We had the state of California's Justice Department and excellent lawyers from their team, then we had Jim Finburg [of Altshuler Berzon], plus another firm or two on behalf of the teachers unions, which are well funded ... [and] one of the most powerful

organizations in California. It was tooth-and-nail litigation. We were really the underdog.

How did you come up with the case assignments?

Boutros: When I got the case going with Dave Welch, I looked around and said we need the perfect team for this case and thought Marcellus would be the perfect person to lead trial strategy. At the trial, I focused principally on the constitutional arguments, the key legal arguments and some of the witnesses who tied into those issues directly. But I view Marcellus as one of the greatest cross-examiners around, so I deployed him on their experts.

Do you relish the role of the bad guy, Marcellus?

McRae: I have to say I do. It's kind of a role I step into a lot.

Biggest mistake you made in the course of this case?

Boutros: I'll start since Marcellus has so many more to choose from [laughs]. My biggest mistake was when the defendants wanted to depose our nine school kids. My view was they don't have anything to hide. I was really surprised at how aggressively they questioned the kids and raised all sorts

of irrelevant issues with them on grades and disciplinary records.

McRae: My big mistake was underestimating the capacity of the defendants to dispute what we thought were pretty common-sense principles. You would think you wouldn't need to put on evidence that teachers matter to academic success. Sure enough, one of the evidentiary arguments was that teachers are not very important to student outcomes.

Keeping your answer as brief as a tweet, what's your best trial tip?

McRae: Assume you're going to trial in every case and prepare accordingly.

Boutros: Know every piece of the factual record even if there's a chance it may not become relevant or be used at trial.

What was it like representing kids?

Boutros: They showed a lot of excellent judgment that adults could learn from. They were so mature. They adjusted to the process so well. It was very inspiring. Putting them on as witnesses was really great experience.

What's next?

Boutros: Several potential new cases in the education area.

—Ginny LaRoe