

Appellate Group Of The Year: Jones Day

By **Richard Vanderford**

Law360, New York (January 25, 2011) -- Jones Day's appellate team last year helped a headwear manufacturer win a U.S. Supreme Court antitrust fight against the National Football League and had the setup of a Sarbanes-Oxley Act government entity declared unconstitutional, helping the firm win a spot among Law360's Appellate Groups of 2010.

Attorneys from the 67-lawyer group were the legal muscle behind several headline-grabbing Supreme Court cases in 2010, not the least of which were American Needle Inc.'s game-changing case against the NFL and the important separation-of-powers ruling that changed the way the Public Company Accounting Oversight Board is made up.

Representing headwear maker American Needle, Jones Day took on the NFL and the solicitor general to win a high court ruling that the NFL can be scrutinized under antitrust laws, a ruling that overturned the U.S. Court of Appeals for the Seventh Circuit's decision in the case.

American Needle, which previously made NFL-themed gear, sued when the league's intellectual property licensing division gave Reebok International Ltd. the exclusive right to make headwear sporting the NFL logo.

After American Needle sued, the league argued that it was a single entity exempt from antitrust scrutiny under the Sherman Act, a rationale the Seventh Circuit accepted.

The high court appeal attracted widespread scrutiny from fans, players associations worried about the status of their unions and even the solicitor general, who recommended that the court leave the case dead by refusing to grant a writ of certiorari.

Jones Day entered the case after the solicitor general became involved, to push for cert, recalled Glen Nager, head of the firm's appellate group.

“American Needle is a small family company, so it was a real David-and-Goliath, because they were not only taking on all the teams of the NFL, they were also taking on the United States government at the same time,” Nager said.

Nager argued the case before the Supreme Court and convinced the justices in June to give American Needle another shot at litigation. The outcome kept antitrust attorneys talking about its implications for the rest of the year.

The trajectory of that case, with American Needle coming to Jones Day only when it needed to litigate before the Supreme Court, is not the standard for the firm's appellate practice group.

The group does not actually even call itself the appellate group — it is known as the issues and appeals practice, because it often enters cases well before they go before an appellate judge, getting involved early in high-profile disputes.

Rather than get a phone call from attorneys in other practice groups once a case goes up for appeal, Jones Day appeals attorneys often begin work on high-stakes cases at the same time as the trial attorneys, Nager explained.

“Our practice is not centered on appellate work per se. It's centered on legal issues and legal strategy,” he said.

“The raison d'être for the practice is to be available to work on important legal issues on the important cases the firm is handling for its most important clients,” he said.

Though more than half of the firm's 67 appellate lawyers are concentrated in appellate hotbeds Washington and New York, many others work out of the firm's offices in smaller cities and coordinate with counsel there, Nager said.

In any appeal, some success depends on how well the case was litigated before the appeal, Nager said, so attorneys from his group get involved early in big cases to steer them toward appeals wins.

Using this strategy, appeals-focused attorneys weighed in from the start to help the firm win a June victory in a Supreme Court case invalidating a key provision of the Sarbanes-Oxley Act.

In that case, libertarian group the Free Enterprise Fund and auditing firm Beckstead and Watts LLP took on the Public Company Accounting Oversight Board, a government entity created by SOX to oversee auditors.

The plaintiffs argued that the PCAOB violates the separation-of-powers and appointments clauses in the U.S. Constitution because its members are appointed by commissioners of the SEC instead of the chairman. That leaves too much room for abuse among members of the board and robs the executive branch of power because the president doesn't have authority over its members, they said.

In a 5-4 decision the high court declined to scrap PCAOB entirely but ruled that the executive branch must be given the authority to remove board members. Other appeals courts and observers widely regarded the decision as one of the most important separation-of-powers rulings in decades.

"I teach administrative law at Georgetown Law Center, and that case went right into my teaching materials," Nager said.

Nager expressed reluctance to attribute the firm's big wins on any one thing, though it's clear that the firm does consistently win.

Apart from the American Needle and PCAOB wins, Jones Day's appeals attorneys have had several other prominent appellate court wins.

The firm successfully defended Chevron Corp.'s win in the Bowoto case, brought by Nigerian villagers who blamed the oil company for its role in the 1998 retaking of an offshore oil platform seized by demonstrators.

Nigerian police shot and killed two of the protesters, deaths that the plaintiffs blamed on Chevron, saying a Chevron subsidiary collaborated with the Nigerian security forces during the incident.

After a jury ruled in Chevron's favor, Jones Day appeals lawyers convinced the Ninth Circuit to uphold the verdict, beating out the plaintiffs' arguments that jury instructions and evidentiary rulings were erroneous.

Jones Day represented former Alaska state Rep. Bruce Weyhrauch, accused of honest services fraud for failing to disclose that he was looking for a job from a company interested in a tax bill before the state Legislature.

Following up on its ruling overturning the honest services statute in the government's case against former Enron Corp. President Jeffrey Skilling, the Supreme Court found for Weyhrauch, ruling that the statute as it applied to the former politician was unconstitutionally vague. The ruling blocked the prosecution from going after Weyhrauch under its proposed theory.

In another case, Jones Day appeals attorneys arguing before the U.S. Court of Appeals for Federal Circuit saved a \$356 million win for client JPMorgan Chase Bank NA.

The bank, which sued the U.S. government over fallout from the savings and loan crisis of the 1980s, had won a bench trial in that case. One of the so-called Winstar cases, it pitted JPMorgan acquisition Anchor Savings Bank against the federal government over its alleged failure to honor commitments to banks that bailed out struggling S&L firms.

The award could potentially be increased by another \$100 million on remand.

Those cases illustrate more about Jones Day's appeals attorneys than the fact that they can win. Each was argued by a different partner, the result of a deliberate Jones Day policy to avoid creating so-called magnet advocates.

“What makes us the most proud is that if you look at our practice year after year after year, our cases are handled at the highest levels by multiple different partners within our practice,” Nager said. “We work very hard to make sure there's not just one person who's perceived as one of the leading lawyers in the practice.”

Though some clients balk at steering high-profile work away from a known star attorney, Nager's team frequently tries, and succeeds, to spread work around and avoid creating a single star advocate.

The system makes sense — after all, one person can only do so much — and has won the appeals group recognition from industry observers.

“We believe that allows us to fulfill our function better and attract more business,” Nager said.

--Additional reporting by Erin Fuchs and Shannon Henson

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.

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