

The Metropolitan Corporate Counsel®

www.metrocorpcounsel.com

Volume 14, No. 3

© 2006 The Metropolitan Corporate Counsel, Inc.

March 2006

An Appellate Practice In New York: Wave Of The Future?

The Editor interviews Meir Feder, Jones Day.

Editor: Would you tell our readers something of your professional experience?

Feder: I graduated from Harvard Law School in 1989, following which I clerked for Judge William Norris on the Ninth Circuit and for Justice David Souter on the U.S. Supreme Court, and after that practiced at Wachtell Lipton. I then spent six years in the criminal division of the U.S. Attorney's Office for the Southern District of New York. In addition to the trial experience all AUSAs get, in my last two years I was Deputy Chief of the Appeals Unit, which is responsible for all of the office's Second Circuit appeals. I've been a member of the Issues & Appeals group at Jones Day since leaving the U.S. Attorney's Office in 2003. And I also teach a course on appellate advocacy at NYU Law School.

Editor: How did you come to Jones Day? Would you share with us the things that attracted you to the firm?

Feder: I had decided I wanted to join a firm with a serious appellate practice, because, as much as I enjoyed trying cases, I've always found appellate work particularly interesting and challenging. Jones Day, in addition to being a great firm, is one of the only firms in New York committed to developing that kind of practice here and was looking for someone like me to help do that. It was also important to me that Jones Day's litigation practice as a whole had such a good reputation. And I was attracted by the firm's internal culture, which is very cooperative and team-work-oriented. To me, that's the right way



Meir Feder

to practice law, and I think it's the approach that produces the best results for clients.

Editor: How does Jones Day's Issues & Appeals group differ from appellate practices at other firms?

Feder: I think one of the most important differences is our recognition that, aside from all the straight appeals we handle, there's a lot of other work that calls for the same appellate-type skills. Cases at the trial level often have significant appellate-type work to be done, particularly on motions and legal strategy, so we'll often have Issues & Appeals lawyers as part of the team handling a case. For example, in one securities class action recently, I was responsible for briefing and arguing the summary judgment motion and for analysis of various legal issues; another Issues & Appeals lawyer handled class certification issues and an interlocutory appeal we

took to the Fifth Circuit on those issues. I currently have another big class action in which I'm responsible for the appellate-type issues, basically motions, briefing, legal analysis. I think there's an obvious advantage to using appellate specialists for this sort of work, but I don't know of other firms that make use of their appellate practices in this way.

Editor: Why do you think there are so few appellate practices in New York, and what can Jones Day offer to clients that a firm without such a practice can't?

Feder: Most good litigators want to believe they can do a great job at anything, and there's a reluctance to accept the idea that the skills that make someone a great trial court litigator aren't necessarily the same ones that make a great appellate lawyer. I think the quicker acceptance of appellate practices in Washington than in New York may have to do with DC being the traditional center of Supreme Court practice. The way Supreme Court cases are litigated is so different from other litigation that maybe it makes the advantage of specialists more obvious. And practices like ours are certainly able to offer expertise in Supreme Court work that most lawyers can't.

But the advantages go far beyond Supreme Court work. First of all, no matter how talented your litigators are – and I've worked with terrific ones at Jones Day – there's a benefit to having a group of lawyers who can focus full-time on developing expertise in the particular subset of advocacy skills that are important in appellate work. Also, our Issues & Appeals lawyers, most of whom were law clerks for appeals courts, are tuned in to the ways appeals courts approach issues,

Please email the interviewee at mfeder@jonesday.com with questions about this interview.

which can be very different from the way a trial court might. And even at the trial level, it's useful to have a group of lawyers who are given the task of taking a step back from the hectic day-to-day nature of litigation to focus solely on coming up with creative approaches to the legal doctrines at issue and how best to present the client's position on them.

The bottom line is I don't think you can underestimate the importance of developing the right legal arguments to present to a particular court and of presenting them in the way that will be most persuasive to that court. And I think the market is increasingly recognizing that people can develop an expertise in that kind of work and that it's worth taking advantage of that.

Editor: Would you tell us something about the services the appellate practice provides?

Feder: In addition to briefing and arguing appeals in state and federal appellate courts around the country, and the appellate-type work in trial court cases I've mentioned, we're sometimes retained for advice on particularly difficult legal problems or on some general appellate issues. We're also in a position to handle emergency matters, where a legal argument must be constructed and written in a very short time. And of course we have a lot of experience with United States Supreme Court work, and handle appeals on the merits there as well as *amicus* briefs and petitions for and oppositions to *cert*.

Editor: What kind of a case would you be doing an *amicus* brief for?

Feder: A number of them would be in cases that are of interest to the business community, where we'll file a brief on behalf of a particular client or a business group such as a trade association. We recently filed an *amicus* brief for the U.S. Chamber of Commerce in a Fair Labor Standards Act case in the Supreme Court, and I drafted one in a trademark case last year on behalf of an industry trade association. We also do some *pro bono*, like one I did last year for the American Jewish Committee in support of a trial court decision that refused to permit a school board to require anti-evolution stickers be placed on school books.

Editor: Can you share with us some of the significant matters that you have handled recently?

Feder: I've spent a lot of time recently on a case I'm going to be arguing in the Supreme Court at the end of March. This is a *pro bono* matter I took on at the court of appeals level when I first joined the firm, on behalf of a prisoner bringing a civil rights claim. We were successful in persuading the Ninth Circuit to adopt the minority position on an issue the circuits have split on, and the Supreme Court then granted *cert* to resolve the split. Aside from that, I've just started working a new class action in which we represent IBM. And in the last four months I've handled appeals in four different circuits, including two in the Second Circuit. In one of the appeals, for Experian, one of the major credit rating agencies, we were successful in getting the 11th Circuit to grant interlocutory review of an adverse decision in a class action. In another, in the Seventh Circuit, we successfully opposed interlocutory review of a class certification ruling. I also have a case I briefed that's pending in the California Supreme Court, where we represent Pearle Vision Centers against the California Attorney General, who is trying to prevent them from having optometrists and opticians in the same store. And I've had cases in the New York Appellate Division and Court of Appeals.

Editor: How does something get to your group?

Feder: One of the nice things about our practice is that things get to us in a variety of ways – there's no single source of business. A significant number of appeals come in after the client was disappointed in the result of a trial handled by a different firm. We also handle or contribute to appeals in cases where Jones Day represented the client in the trial court, both in cases we've won at the trial level and those we've lost. And of course, as I've mentioned, Issues & Appeals lawyers are often involved from the very beginning in the trial court. We also often come into a case for the first time at the Supreme Court level, whether representing a party or for an *amicus* brief. And there are times where a client will engage us for advice that's not linked to our handling a particular case.

Editor: Who are the clients here?

Feder: Both new clients and existing Jones Day clients. The firm has an extraordinary roster of clients, but we also get a significant part of our work from clients

who are new to the firm.

Editor: When you are brought in for the appeal of a case that another firm handled at trial, how do you deal with the obvious sensitivities?

Feder: In my experience trial counsel generally handle this very professionally, and they will do what they can to help us try to win the appeal.

Editor: What is the origin of Jones Day's Issues & Appeals practice?

Feder: It goes back to the mid to late 1980's and started with Jones Day lawyers who returned to the firm from stints at the Solicitor General's Office, where they represented the U.S. government in the Supreme Court. This was a time when a few firms in Washington were beginning to think about appellate practice groups. But I think from the very beginning the firm envisioned the practice as different from other appellate practices in that it would do both straight appeals work and trial court appeals-type work as part of larger trial teams.

Editor: Are the members of Issues & Appeals full time members of the group, or do they appear on an as-needed basis from the different litigation departments?

Feder: The majority are full time, including all six of our Issues & Appeals attorneys in New York. That's an important question, actually, because some firm websites will list an "appellate" practice area but the attorneys involved are general litigators who sometimes work on appeals as one area among many.

Editor: What about the future? Where would you like the group to be in, say, five years?

Feder: I would like to see this practice, and the firm as a whole, continue to expand our presence in New York. We have six I & A lawyers here, and that number is growing. As for the firm as a whole, Jones Day has made a major commitment to the New York office, and it's been a real success story. I think we may even have become the largest Jones Day office, and we have outstanding legal talent here in all of our practice areas. And I think the I & A practice can play a big role in helping us build on that success.