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Appellate & Supreme Court

Appellate

Steptoe's Value on Appeal

Steptoe's appellate lawyers bring value to every appeal. They bring an independent perspective, essential after the fierce battles of the trial court. They bring knowledge of specialized bodies of law that govern particular industries. They bring skill in applying legal principles that cut across multiple fields and inspire judicial review. They bring an ability to translate technical facts into an easily understandable narrative for appellate judges who have not lived with the case. Thus, Steptoe's briefs tell a convincing story, at the same time that they present a forceful legal argument.

Recent Appellate Experience

In the past five years, Steptoe has handled an appeal in every single federal circuit, in the appellate courts of 23 states, and often in the US Supreme Court. Recent appellate representations are listed by year, by jurisdiction (court), by state, and by industry.

During 2009, Steptoe had some of its toughest assignments in cases of national importance: it secured immunity for a federal contractor involved in Abu Ghraib, helped define the limits of the federal government's fiduciary liability to Indian tribes, and obtained apportionment of damages for Superfund defendants. Steptoe briefed the first antidumping case to be decided by the US Supreme Court and won a 9-0 decision. In one federal circuit, Steptoe handled the first credit default swap case to reach a court of appeals since the onset of the current financial crisis. In another, it won a decision allowing unsecured creditors to obtain post-petition attorneys fees in bankruptcy. At the state supreme court level, Steptoe invoked federal due process principles to quash an overreaching state seizure order in Arizona and invoked common law principles to protect convenience store owners from liability for selling alcohol to their customers in South Carolina.

Steptoe's associates have also turned difficult cases around. The firm has an active program of pro bono appeals in which associates can sharpen their appellate skills. In the past year, Steptoe represented a prisoner in a civil rights suit where the governmental defendants had obtained summary judgment based on immunity. The firm also represented a homeless man who claimed he did not receive proper notice of his right to appeal the denial of unemployment compensation. In both appeals – argued by associates – the judgments were reversed and remanded.

Altogether, Steptoe's attorneys obtained more than 80 written decisions from appellate courts in 2009. For the highlights of 2009, [click here](#).

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Step toe's Appellate Talent

Step toe's appellate team has a deep bench, including seven former Supreme Court clerks, 46 former clerks to federal appellate judges, and 16 former clerks to state appellate judges. The core partners leading this group include two former Chairs of the ABA's 500-member Council of Appellate lawyers, one former Assistant Attorney General in the US Department of Justice, and one former Counsel to the Vice President of the United States. Step toe's appellate team also includes a former Assistant to the US Solicitor General and the founder of the State and Local Legal Center. Two of Step toe's appellate lawyers have received the Burton Award for Excellence in Legal Writing. Step toe's lawyers have received other awards for their appellate work from associations representing railroads, news organizations, and civil rights advocates.

The Diversity of Step toe's Appellate Practice

Step toe handles appellate matters of all kinds. Our appeals range from precedent-setting cases in the US Supreme Court to narrow appeals that affect only a single company. We appear in state courts as often as federal courts. We appear in the many parts of the country where we have offices and – with appropriate permission – in other jurisdictions where we do not. Our attorneys include former law clerks from 12 of 13 of the federal circuits and 29 different state appellate courts.

We frequently handle cases with important implications for entire industries, where the rationale for decision is as important as the result. We appear regularly in the US Supreme Court, both at the certiorari stage and on the merits. In any case, regardless of scope, we look for the big picture and seek new ways of approaching matters that will give our clients the best chance of prevailing.

Step toe's experience includes many of the less frequently traveled procedural routes – interlocutory appeals, petitions for extraordinary writs, petitions for rehearing or rehearing en banc, and even petitions to enforce a prior mandate.

In addition, our appellate lawyers are frequently deployed at the trial level, to assure that key legal issues are persuasively presented and fully preserved. Thus, our appellate lawyers have experience in briefing and arguing dispositive motions, framing motions in limine, and addressing jury instructions during trial. They regularly handle motions for a new trial or for judgment notwithstanding a verdict. They are even consulted at the outset of a case on sensitive issues of jurisdiction and abstention. Thus, their involvement in a case often begins long before the notice of appeal is filed.

This engagement with the trial process gives our appellate lawyers a realistic perspective on what can be achieved in a trial. By tradition, our associates have some of the same experiences, working on trial level matters along with their

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appeals. Thus, Steptoe seeks to integrate some of the practicality of the trial lawyer with the independence and vision of the appellate advocate.

Meeting Client Budget Objectives

We recognize that meeting client budget objectives is important. The costs of an appeal will vary, depending upon whether the firm was involved at the trial level, whether the case was resolved on motion or through a trial, the length of trial, the number and complexity of the issues, and, sometimes, the tactics of the opponent. However, after a hard look at the record, the issues, and the client's goals, we will work with the client to develop a budget estimate for an appeal, and make every effort to remain within it. Steptoe is also prepared to discuss alternative fee arrangements not based on hourly rates. In all cases, Steptoe will deliver a clear-eyed evaluation of the merits of an appeal and the ultimate likelihood of success.

Supreme Court

Experience matters in the US Supreme Court. In view of the thousands of petitions filed annually, the justices have broad discretion in selecting cases for review. They also have considerable freedom in shaping the law. Thus, they are interested in hearing a different form of argument — one that explains why an issue is appropriate for review in the nation's highest court and how new legal doctrine can be fashioned from longstanding precedent. It is a form of argument to which many lawyers are not accustomed.

Steptoe has this experience—both in persuading the Court that an issue is worthy of review and in synthesizing existing precedent to address a previously unsettled issue. Nine current Steptoe attorneys have argued in the Supreme Court. Over the past 20 years, the firm has appeared in a host of cases, in such diverse fields as tribal sovereignty, energy, ERISA, tax, transportation, and constitutional law. In cases since 1985 in which the firm has represented a party on the merits, our client has prevailed in 14 out of 17 decisions. Steptoe's Supreme Court practitioners have gained their experience in different ways. Seven are former clerks to Supreme Court justices. One served in the Office of the Solicitor General of the United States. Another founded the State and Local Legal Center, the premier advocate for local governments in the US Supreme Court. Another has written a prize-winning essay on the Supreme Court's certiorari practice and works with the National Association of Attorneys General in its moot court program. It is this kind of experience that enables the firm to respond to the special challenges of Supreme Court cases.

The firm's Supreme Court practice includes the full range of functions available under the rules: petitions for certiorari, briefs on the merits, amicus curiae briefs,

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oral arguments, and applications for stay.

Petitions for Certiorari. In any given Term, the Supreme Court receives about 8,000 requests for review. Putting aside the roughly 6,000 requests submitted *in forma pauperis*, typically by criminal defendants, the Court receives 2,000 petitions on its "paid" docket from parties with retained counsel. Of these, it typically grants plenary review in fewer than 100 cases.

Hence the pivotal importance of the petition for certiorari. Against a large universe of other contenders, the petitioner must persuade the Court that the particular case is worth hearing. It is not enough to show that the result below is wrong. The petition must show that the decision below raises an issue of national importance and that the case presents the issue in a way that will permit the Court to analyze it fully and resolve it clearly.

Step toe has extensive experience in crafting petitions for certiorari. In fact, the head of the practice has written articles on this subject. Cole, *Petitioning for Certiorari in the Big Case*, *The Litigation Manual (Special Problems and Appeals)* (1999). Clients often come to Step toe after the case has been lost in the court of appeals, seeking both an evaluation of the prospects for certiorari and help with drafting the petition. Our role may also include mobilizing support from *amici curiae*—friends of the court—who can help persuade the Court that the case has the kind of wider impact that warrants review.

In some ways, these petitions are the ultimate expression of the "art" of Supreme Court practice (even more than briefing and arguing the merits of an appeal). While the Court will reach out to decide some kinds of appeals (for example, an appeal that will determine the outcome of a US presidential election or the scope of an important constitutional right), the real challenge comes in convincing the Court to grant review of a complicated issue under ERISA, the federal tax laws, or another complex federal regulatory scheme. Through the years, Step toe has proven its ability to overcome the long odds and persuade the Court to accept cases in a variety of areas of law affecting our clients' interests.

Needless to say, a firm that knows how to write a good certiorari petition also knows how to defeat one. Step toe has extensive experience in preserving its clients' victories through oppositions to certiorari. It also knows when it is more prudent to waive a response—and save the client some money.

Briefs on the Merits. Because of the Supreme Court's ability to make new law, a merits brief must do more than cite existing precedent. It must give the court a vision of what the law could be and explain why that is the better approach to the field. For cases in which Step toe has appeared in the merits, [click here](#).

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Amicus Curiae Briefs. Amicus curiae briefs can play a pivotal role in some Supreme Court cases. They can be crucial in persuading the Court to accept a petition. And they can offer a solution that will guide the Court on the merits. For cases in which Steptoe has filed amicus briefs on the merits, [click here](#).

Steptoe has experience with amicus briefs from all sides. It has represented parties who needed amicus support and it has worked with potential amici to galvanize their interest. It has also represented many of the major organizations that consistently file amicus briefs. Steptoe is familiar with the process by which these organizations make their decisions on whether to file a brief. It is therefore aware of the practical and financial limitations on their participation. As counsel for amici, we have worked to develop a perspective on the merits that is both helpful to the Court and consistent with our clients' needs.

Our amicus practice has achieved some remarkable successes. For example, in a tax case, one of our partners was given the highly unusual privilege of presenting oral argument as an amicus curiae. The Court ultimately rejected the positions of both the Government and the taxpayer, and accepted the solution proffered by Steptoe's amicus client. *Commissioner of Internal Revenue v. Standard Life & Accident Ins. Co.*, 433 US 148 (1977).

The Supreme Court itself has manifested confidence in Steptoe's ability to present the perspective of an amicus. In a recent case, when neither of the parties would defend the judgment of the court of appeals, the Supreme Court, by order, appointed a Steptoe partner to present that point of view. In the published opinion, the Court made the comment that his "able representation" had permitted the Court "to decide this case satisfied that the relevant issues have been fully aired." *Becker v. Montgomery*, 532 US 757, at 762 n.1 (2001).

In all of our amicus representations, we view it as our obligation to tell our clients when an amicus brief can make a difference in the outcome, and when it would only burden the Court. Sometimes, the most responsible course is to let the parties carry the burden of persuasion themselves. Our amicus clients have ranged from industry associations, to government agencies, to advocacy organizations dedicated to particular ideas. Of course, Steptoe has also filed amicus briefs at the certiorari stage, as well as many amicus briefs in the courts of appeal.

Oral Argument. Argument before the US Supreme Court is a uniquely challenging experience. The lectern stands so close to the curved bench that some of the justices may be glimpsed only through counsel's peripheral vision. Questions come fast and furious, from all quarters. Thus, counsel must be ready to give concise answers to questions from both sides of the bench, as well as both sides of the issue.

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Step toe's lawyers have the skills necessary to meet this challenge. In fact, Step toe's Supreme Court attorneys routinely serve as moot court judges preparing advocates at other organizations for *their* Supreme Court arguments. You can find us performing this function at moot courts sponsored by the National Association of Attorneys General, the Supreme Court Institute of Georgetown Law School, and the State and Local Legal Center. We know that the key to a good oral argument is thorough preparation, and we help others prepare.

Applications for Stay. Often, the first problem confronting a client that has lost in a federal circuit or state appellate court is how to obtain immediate relief from the adverse judgment. Step toe has experience with the preparation of applications for stay, which are presented to a single justice. In light of changes in the Court's filing procedures, it has become even more important to have experienced counsel work with the Clerk's staff to assure that such an application is considered by the Court on a timely basis. Step toe approaches this first step in the Supreme Court's certiorari process with the same intensity as the briefs that follow.

Noteworthy

- Recent Appellate Cases Handled By the Firm