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Areas of Practice

Appellate & Supreme Court

Commercial Litigation,
Insolvency & Creditors'
Rights

ERISA, Labor &
Employment

Litigation

Rail Transportation

Education

Harvard Law School, J.D.,
magna cum laude, 1976,
Senior Note Editor, *Harvard
Law Review*

Yale University, B.A.,
summa cum laude, 1973

Judicial Clerkships

Hon. Byron R. White, US
Supreme Court, 1977-1978

Hon. Harold Leventhal, US
Court of Appeals for the
District of Columbia
Circuit, 1976-1977

Bar & Court Admissions

District of Columbia

US Supreme Court

US Court of Appeals for
the District of Columbia,
First, Second, Third,
Fourth, Fifth, Seventh,
Eighth, Ninth, Tenth, and

Charles G. Cole

Charles G. Cole is a partner in the Washington office of Steptoe & Johnson LLP, where he is a member of the Litigation Department and the Chair of the firm's Appellate Group. He is also a member of its Regulatory and Industry Affairs Department. Mr. Cole has extensive experience with all aspects of the appellate process and in a number of fields of substantive law.

US Supreme Court

A former clerk to the late Justice Byron R. White, Mr. Cole has an active Supreme Court practice. In its 2000 Term, Mr. Cole argued *Atkinson Trading Company v. Shirley* and won a 9-0 decision. In the next Term, he served as counsel to Respondent Edison Electric Institute in *New York v. FERC*, where he successfully defended the preemptive scope of a federal regulation. In 2008, he represented petitioner USEC in *USEC v Eurodif*, a case concerning the scope of the international trade laws that the Supreme Court heard in late 2008. Other Supreme Court cases in which Mr. Cole has participated have involved federal preemption, constitutional law, administrative law, criminal law, and railroad regulation. Mr. Cole has also filed amicus briefs in the US Supreme Court on behalf of the American Bar Association, the Association of American Railroads, the Edison Electric Institute, and the Aerospace Industries Association.

Mr. Cole currently serves as a judge in the moot court programs for Supreme Court advocates sponsored by the Georgetown Supreme Court Institute and the National Association of Attorneys General. Mr. Cole regularly advises clients seeking or opposing certiorari.

Federal and State Appeals

Mr. Cole, who clerked for Judge Harold Leventhal on the District of Columbia Circuit, has handled appeals in virtually every federal circuit. His federal appeals have concerned issues of preemption, administrative law, insurance law, tribal law, punitive damages, bankruptcy, and constitutional law. He has also argued or briefed appeals in a wide variety of state courts, including California, New York, Texas, Connecticut, Arizona, Utah, Nebraska, Missouri, Montana, West Virginia and Oregon. These cases have dealt with such issues as personal jurisdiction, contracts, negligence, evidence, and federal preemption. He has advised on various types of interlocutory appeals, such as appeals of preliminary injunctions and certified orders. He has also obtained and opposed extraordinary writs, such as mandamus.

Federal Regulation

Over the course of his career, Mr. Cole has dealt with many of the most difficult federal regulatory schemes. These have included regulatory statutes applicable to the railroad, energy, banking, and communications industries, as well as statutes, such as the environmental laws, that apply across the board. Mr. Cole has also advised on some of the most intricate requirements of the Employee Retirement Income Security Act of 1974 (ERISA). He has been

Eleventh Circuits
 US District Court for the
 District of Columbia
 US Tax Court

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active in cases involving ERISA claims against plan fiduciaries, investment managers, accountants, lawyers, and trustee banks. Mr. Cole also serves as outside counsel to the Pension Benefit Guaranty Corporation in a range of matters arising under ERISA Title IV.

Teaching on Appellate Practice

Mr. Cole has spoken frequently on various aspects of the appellate process, including the preservation of error, the preparation of appellate briefs, obtaining discretionary review through the certiorari process, and oral argument. His article on certiorari has been reprinted by the ABA in its manual for litigators. A recording of his talk on Preparing for Oral Argument has been published by the ABA Litigation Section for CLE purposes on its website. Mr. Cole has served as Chair of the 600-member ABA Council of Appellate Lawyers and appeared on its programs.

Trial Court Advice

Based on his appellate experience, Mr. Cole has been asked to provide assistance on legal issues at the trial level. He has advised on motions practice, jury instructions, evidentiary questions, and civil procedure. He has provided help to trial counsel on issues such as punitive damages, federal preemption, expert selection, and venue. In this context, his objective is to make the job of trial counsel easier, not more difficult, by adding the resources, knowledge, and perspective of an appellate lawyer.

Noteworthy

- Recognition of Excellence Award from National Association of Railroad Trial Counsel, Dec. 2008
- Burton Award for Achievement in Legal Writing, 2000
- Chair, ABA Council of Appellate Lawyers, 2004-2005
- "Honorable Mention" in Exemplary Legal Writing from the 2007 *Green Bag Almanac* for amicus brief on behalf of 18 former chief justices in *Dimick v. Republican Party of Minnesota*, 126 S.Ct. 1165 (2006)

Representative Matters

- *United States v. Eurodif*, (US Jan. 26, 2009) — Obtained unanimous decision on applicability of US antidumping laws to uranium enrichment contracts.

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- *New York v. FERC*, 535 US 1 (2002) — Represented Edison Electric Institute as respondent and obtained affirmance of FERC order delineating federal preemption of state jurisdiction over retail transmission.
- *Atkinson Trading Co. v. Shirley*, 532 US 645 (2001) — Represented hotel on private land within reservation, obtained 9-0 decision invalidating tribal tax (argued).
- *State of Arizona v. Western Union Financial Services*, 2008 WL 2583853 (Ariz. Ct. App. July 1, 2008) — Represented financial services company in constitutional challenge to seizure of wire transfers (argued).
- *Esso Standard Oil Co. v. Lopez-Fretes*, 522 F.3d 136 (1st Cir. 2008) — Obtained decision holding that local environmental agency violated due process in proposing large fine against Exxon subsidiary (argued).
- *Johnston v. Multidata*, 523 F.3d 602 (5th Cir. 2008) — In mass tort action, obtained dismissal of dozens of wrongful death claims by foreign nationals on the basis of lack of personal jurisdiction.
- *United States v. Burlington Northern & Santa Fe Railway*, 520 F.3d 918 (9th Cir. 2008), *cert granted* (US October 1, 2008) — In appeal on apportionment of liability under CERCLA, filed petition for rehearing en banc that generated 8 dissenting votes and grant of certiorari.
- *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007) — Represented railroad challenging tribal tax, obtained decision on interlocutory appeal that tribal official responsible for collection of tax was not immune from suit (argued).
- *Hudson v. AEP Texas North*, 128 S. Ct. 59 (Oct. 1, 2007) — Represented electric utility, obtained denial of state's petition for certiorari challenging federal preemption of state regulatory jurisdiction.
- *Mitsubishi Power Systems, Inc. v. Texas Wind Power Co.*, No. B192071, 2007 WL 1429586 (Cal. Ct. App. May 16, 2007) — On behalf of plaintiff corporation, obtained reversal of trial court's dismissal of two defendants for lack of personal jurisdiction (argued).
- *State ex rel. Goddard v. Western Union Financial Services, Inc.*, 166 P.3d 916 (Ariz. Ct. App. 2007) — Represented financial services company; obtained decision vacating the superior court's enforcement of subpoena calling for international wire transfer data (argued).

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- *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 338 Mont. 259, 165 P.3d 1079 (Mont. 2007) — Represented refiner on appeal in water contamination case, obtained decision reversing award of \$25 million in punitive damages and remanding for a new trial (argued).
- *Gaslow v. QA Investments LLC*, 36 A.D.3d 286 (2006) — Represented defendant financial advisor, obtained court ruling that investor's breach of contract claim was barred by statute of limitations (argued).
- *Maine Public Utilities Comm'n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006) — Represented utility in challenge to FERC authority over rate-filing provisions of tariff (argued).
- *Southern California Edison Co. v. FERC*, No. 05-1125 (D.C. Cir. March 7, 2006) — Represented utility in dispute over allocation of costs; shortly after Steptoe filed its opening brief, FERC voluntarily asked the Court for a remand, so that it could rethink its position. FERC subsequently ruled in favor of our client.
- *In re Derailment Cases*, 416 F.3d 787 (8th Cir. 2005) — Represented railroad in case sustaining federal preemption of state tort claims based on failure to inspect cars.
- *Early v. Burlington Northern Santa Fe*, 168 S.W.3d 684 (Mo. E.D. 2005) — Represented railroad in appeal of FELA trial predicated on spoliation of evidence.
- *Dorn v. Burlington Northern Santa Fe*, 397 F.3d 1183 (9th Cir. 2005) — On behalf of defendant railroad, obtained reversal of compensatory and punitive damages award of more than \$7 million (argued).
- *Old Dominion Elec. Co-op., Inc. v. FERC*, 171 Fed.Appx. 862 (D.C. Cir. 2005) — Represented mid-Atlantic utilities, obtained dismissal of challenge to a favorable FERC order based on lack of standing of dissident utility (argued).
- *Pension Benefit Guaranty Corp. v. Republic Technologies International, LLC*, 386 F.3d 659 (6th Cir. 2004) — On behalf of federal agency, obtained decision upholding agency's date of termination of pension plan.
- *Ford v. American Express Financial Advisors*, 98 P.3d 15 (Utah 2004) — Represented financial services firm in employment class action (argued).

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- *E.I. DuPont de Nemours and Co. v. Hill*, 591 S.E.2d 318 (W. Va. 2003) — Represented chemical company in water contamination case, obtained decision reversing preliminary injunction requiring blood testing of all local residents.
- *Burlington Northern Santa Fe Railroad v. Assiniboine and Sioux Tribes*, 323 F.3d 767 (9th Cir. 2003) — Represented railroad in dispute over tribal taxation of railroad right-of-way, obtained overruling of prior Ninth Circuit precedent (argued).
- *Idaho Power Co v. FERC*, 312 F.3d 454 (D.C. Cir. 2002) — Obtained reversal of FERC order regarding transmission service (argued).
- *Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71 (1st Cir. 2002) — Represented utility in appeal of FERC order setting rates based on ICAP reserves.
- *Atlantic City Electric Co. v. FERC*, 329 F.3d 856 (D.C. Cir. 2003) & 295 F.3d 1 (D.C. Cir. 2002) — As lead counsel for electrical utilities in Mid-Atlantic region, won mandamus to enforce court order that FERC lacked authority to deprive utilities of certain statutory and contractual rights.
- *Echostar v. FCC*, 292 F.3d 749 (D.C. Cir. 2002) — Represented direct broadcast satellite firm in challenge to FCC programming decision.
- *Public Utility District No. 1. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) — Represented Edison Electric Institute and other utilities in challenges to landmark FERC rulemaking proceeding.
- *Burlington Northern Santa Fe Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999) — On behalf of defendant railroad, obtained decision invalidating tribal court jury award of \$250 million.

Select Seminars & Events

Chuck Cole and Alice Loughran Speak at National Association of Railroad Trial Counsel (NARTC) Annual Meeting, July 28, 2010

National Association of Railroad Trial Lawyers Annual Meeting: 2008
Preemption Update: How the West Was Won (Banff, Alberta, Canada, August 7, 2008)

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National Association of Railroad Trial Lawyers Fall Meeting: *The Empire Strikes Back: The Tort Lawyers' New Attack on Federal Preemption and How to Defend Against It* (Austin, TX, October 12, 2007)

Appellate Judges Education Institute Annual Summit: *Punitive Damages and the Constitution: Where We Go After Philip Morris* (Washington, DC, September 28, 2007)

BNSF Litigation/General Claims Departments Meeting: *Post-Trial Motions and the Preservation of Error for Appeal* (Sacramento, CA, August 25, 2007)

Union Pacific Litigation Department: *Five Evolving Issues of Railroad Law in 60 Minutes* (Roseville, CA, August 22, 2007)

Selected Publications

Judging Federal Regulations That Preempt State Law: The Role of the Presumption Against Preemption
2003, *The Journal of Appellate Practice and Process*

Legal Standards Governing Investment of Pension Assets for Social and Political Goals
128 *U.Pa.L.Rev.* 1340
2000

Moot Courts: Scrimmage for the Appellate Lawyer
1999, *The Litigation Manual*

Petitioning for Certiorari in the Big Case
1999, *The Litigation Manual*

How Your Case Can Catch the Supreme Court's Eye
1987, *The Criminal Justice Magazine*

Professional Affiliations

Chair, ABA Council of Appellate Lawyers, 2004-2005; Board Member, 2000-2006

Co-Chair, Amicus Briefs Committee, ABA Criminal Justice Section, 1983-88

Appellate Practice Committee, ABA Litigation Section, 1998-Present

National Association of Railroad Trial Counsel, Executive Committee, 2007-Present

Charles G. Cole

American Bankruptcy Institute

Edward Coke Appellate Inn of Court, 2002-Present

Project Advisory Board, ABA State of Criminal Justice, 1994-2000