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Areas of Practice

Appellate & Supreme Court

Insurance & Reinsurance

Insurance Coverage & Bad Faith

Tax

State & Local Tax

IRS Controversy & Tax Litigation

Intellectual Property

IP Litigation

Trademark Litigation

Patent Litigation

ERISA, Labor & Employment

Environment & Natural Resources

Commercial Litigation, Insolvency & Creditors' Rights

Complex Litigation

Litigation

Professional Liability

Education

Harvard Law School, J.D., *cum laude*, 1986, Executive Editor, *Harvard Journal of Law & Public Policy*,

Bennett Evan Cooper

Ben Cooper is a partner in the Phoenix and Century City offices of Steptoe & Johnson LLP and member of the firm's Appellate Group. Mr. Cooper represents clients as an appellate advocate in federal and state courts across the nation. He also works with trial counsel on major motion practice and trials in anticipation of appeal, including dispositive motions, class action certification proceedings, jury instructions, and post-trial motions. His practice focuses on appeals in a broad range of substantive fields, including insurance coverage and bad faith defense, state and local taxation, intellectual property and e-commerce, labor and employment, environmental law, professional liability, and other complex civil and constitutional litigation.

Mr. Cooper is the Chair of the first group of Appellate Lawyer Representatives to the Ninth Circuit Judicial Conference, and is a past Chair of the American Bar Association's Council of Appellate Lawyers, which is part of the ABA's Appellate Judges Conference. He is the lead author of the *Arizona Trial Handbook* (West 2010-2011), which addresses the law of all aspects of civil and criminal trials in Arizona courts, and is a member of the editorial board of and contributor to the *Arizona Appellate Handbook* (State Bar of Arizona 2011). In addition, Mr. Cooper is Secretary of the Civil Jury Instructions Committee and of the Appellate Practice Section of the State Bar of Arizona.

Noteworthy

- *Best Lawyers in America*, Appellate Law, 2011-2012
- "Top 50 Attorneys in Arizona," *Southwest Super Lawyers*, 2011-2012
- *Southwest Super Lawyers*, Appellate Law, 2011-2012
- *Arizona's Finest Lawyers*, 2011
- *Martindale-Hubbell* "Preeminent AV" Peer Review Rating (5.0/5)
- Member, Commission on Technology of the Arizona Judicial Council, 2011-2012
- Chair, Appellate Lawyer Representatives to the Ninth Circuit Judicial Conference, 2009-2012
- Secretary, Appellate Practice Section of the State Bar of Arizona, 2011-2012
- Secretary, Civil Jury Instructions Committee of the State Bar of Arizona, 2011-2012
- Co-Director, Arizona Appellate Practice Institute of the State Bar of Arizona, 2010-2012

Bennett Evan Cooper

President, Harvard Society for Law and Public Policy, Winner, Ames Moot Court Competition

Harvard University, A.B., *magna cum laude* in Government, 1983

Judicial Clerkships

Hon. Alex Kozinski, US Court of Appeals, Ninth Circuit, 1987-1988

Bar & Court Admissions

Arizona

California

US Supreme Court

US Court of Appeals for the Second Circuit

US Court of Appeals for the Ninth Circuit

US Court of Appeals for the Tenth Circuit

US Court of Appeals for the District of Columbia Circuit

- Faculty, 14th National Appellate Practice Institute at Northwestern University Law School (ABA), 2009
- Member, Board of Directors, Phoenix Center Arts Association
- President, Beth El Congregation, Phoenix, Arizona, 2010-2012
- Past President and Co-founder, Jewish Tuition Organization (one of Arizona's largest school tuition organizations)

Representative Matters

Insurance and Punitive Damages

Mr. Cooper defends claims against insurers and reinsurers for coverage, breach of contract, bad faith, and abuse of process. In 2003, he successfully represented the four largest trade associations of property and casualty insurers as *amici curiae* in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), in which the US Supreme Court overturned a \$145-million punitive damages award and established new constitutional guidelines for punitive damages. *The American Prospect* magazine noted that the High Court's "decision ... took language right from the American Insurance Association's amicus curiae ('friend of the court') brief." Building on *Campbell*, in 2009, Mr. Cooper persuaded a trial court to reduce a \$55-million punitive damages verdict against one insurer to \$620,000—a 99% reduction—and convinced an appellate court to vacate or reduce punitive damages verdicts of \$740,000 against another insurer to \$40,000. Arguing before the Pennsylvania Supreme Court on behalf of an insurer that appeared as an *amicus curiae* in an insurance-liquidation dispute in place of the nominal party, Mr. Cooper was commended by the Court in its opinion for "exceptionally well-crafted, well-researched, and persuasive briefs and arguments." *Ario v. Reliance Ins. Co.*, 980 A.2d 588, 597 n.6 (Pa. 2009).

Tax

Mr. Cooper handles appeals in a wide variety of state and local tax disputes, including property, transaction privilege, sales and use, and corporate and partnership income tax. He has represented clients in such diverse industries as electric utility distribution, newspaper publishing, commercial printing, automobile sales, rental cars, commercial lending, construction, storage, low-income housing development, and hospitality concessions. He successfully represented Arizona's largest utility in establishing that customers' contributions in aid of construction are not included in the utility's plant-in-service cost for valuation purposes. *Ariz. Dep't of Revenue v. Ariz. Pub. Serv. Co.*, 126 P.3d 1063 (Ariz. App. 2006). Resolving a long-running dispute between the construction industry and taxing authorities, he persuaded the Arizona Court of Appeals to reverse the Arizona Tax Court and hold that construction managers are not taxable on payments they make as the owners' agents to trade contractors. *Ariz. Dep't of Revenue v. Ormond Builders, Inc.*, 166 P.3d 934 (Ariz. App. 2008). Mr.

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Cooper recently represented a major national commercial printer in establishing that its investment and accounts-receivable factoring subsidiaries were not part of the parent's unitary business for purposes of multistate apportionment. *R.R. Donnelley & Sons Co. v. Ariz. Dep't of Revenue*, 229 P.3d 266 (Ariz. App. 2010).

Intellectual Property & E-Commerce

Mr. Cooper has represented both plaintiffs and defendants in appellate and trial court proceedings involving copyrights, trademarks, trade dress, trade secrets, and patents in a broad range of industries. In 2003, he successfully represented the petitioner in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), in which the US Supreme Court unanimously reversed the Ninth Circuit in holding that "origin" in the Lanham Act refers only to tangible goods, and not to the contents of creative works. Mr. Cooper is a past Chair of both the Intellectual Property Section (1989-1994) and E-Commerce & Technology Section (2005-2006) of the State Bar of Arizona, and in 2011 he was appointed by the Chief Justice of the Arizona Supreme Court to the Arizona Judicial Council's Commission on Technology.

Employment

Mr. Cooper represents employers in a variety of individual and class-action suits for breach of contract, discrimination, wage-and-hour violations, and other employment and labor issues. In 2003, Mr. Cooper successfully argued before the California Supreme Court on behalf of the California Public Employees' Retirement System as to the enrollment requirement for leased employees, resulting in a 4-3 decision for the retirement system. *Metro. Water Dist. v. Superior Court*, 84 P.3d 966 (Cal. 2004). In 2004, he defeated certification of a state-wide class action against the nation's largest retailer for alleged wage-and-hour violations, and later prevailed in obtaining the dismissal of the plaintiffs' appeal. *Osuna v. Wal-Mart Stores, Inc.*, 2004 WL 3255430 (Ariz. Super. 2004), *appeal dismissed*, 151 P.3d 1267 (Ariz. App. 2007). He has also successfully represented an employer in establishing a one-year statute of limitations for all employment contract claims, which had been a subject of hot dispute in Arizona. *Redhair v. Kinerk, Beal, Schmidt, Dyer & Sethi, P.C.*, 183 P.3d 544 (Ariz. App. 2008). He later represented a regional airline under the Railway Labor Act in obtaining reversal of a preliminary injunction prohibiting the airline's intended change in applicable Federal Aviation Administration regulations for the scheduling of flight attendants; the court of appeals concluded that the parties' conflict constituted a "minor dispute" subject to the RLA's exclusive arbitral remedy. *Ass'n of Flight Attendants v. Mesa Air Group, Inc.*, 567 F.3d 1043 (9th Cir. 2009). Mr. Cooper also successfully represented one of the nation's Class I railroads in the landmark case on apportionment of damages to preexisting physical conditions under the Federal Employers' Liability Act. *Sauer v. Burlington Northern R.R. Co.*, 106 F.3d 1490 (10th Cir. 1996).

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Environmental

Mr. Cooper has handled appeals in a variety of environmental and land use cases. In 2008 and 2009, he represented two Class I railroads in seeking rehearing and reversal of the Ninth Circuit's adverse decision on the apportionment of cleanup costs under CERCLA; after eight judges dissented from the denial of en banc review, the United States Supreme Court granted certiorari and reversed the Ninth Circuit by an 8-1 vote. *United States v. Burlington Northern & Santa Fe Ry. Co.*, 520 F.3d 918 (9th Cir. 2008), *rev'd*, 129 S. Ct. 1870 (2009). In 2007, he obtained reversal of a jury verdict against property owners who were seeking to recover from the City of Tucson, Arizona, for damage to historic adobe buildings caused by water leaking from municipal water mains. *Rollings v. City of Tucson*, 2007 WL 5556969 (Ariz. App. 2007). He also persuaded the Tenth Circuit to reverse the dismissal of a challenge by neighboring landowners to the construction of an overhead transmission line across unspoiled terrain in northern New Mexico, leading to cancellation of the project. *County of Santa Fe v. Pub. Serv. Co. of N.M.*, 311 F.3d 1031 (10th Cir. 2002).

Professional Liability

Mr. Cooper has handled trial and appellate matters involving the professional liability of lawyers, accountants and auditors, brokers, actuaries, and corporate directors and officers. Such matters have involved claims for common-law malpractice, breach of fiduciary duty, abuse of process, aiding and abetting, tortious interference with contract, securities fraud, and RICO violations, raising issues ranging from loss causation and deepening insolvency to application of the Private Securities Litigation Reform Act's securities-fraud exception. He represented the leading insurance trade associations as *amici curiae* in establishing the scope of liability in the tripartite relationship, *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593 (Ariz. 2001), and successfully litigated the effect of court-approved settlements on subsequent malpractice actions against counsel involved in the settlement process, *Durkin v. Shea & Gould*, 92 F.3d 1510 (9th Cir. 1996).

Complex Civil and Constitutional Litigation

Mr. Cooper has handled appeals and trial court proceedings in a wide variety of complex civil litigation: securities and director and officer liability; antitrust; professional liability of lawyers, accountants, and brokers; coal rail transportation agreements and other contracts; and media defamation and other constitutional issues. Successfully representing on a pro bono basis Jewish, Catholic, and Lutheran school tuition organizations and a non-religious school for students with learning differences, he was the only lawyer to file *amici curiae* briefs in both the Ninth Circuit and the US Supreme Court in support of the constitutionality under the Establishment Clause of Arizona's private-school tuition tax credit; the Supreme Court reversed the Ninth Circuit and dismissed the lawsuit attacking the credit. *Ariz. Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

Bennett Evan Cooper

Select Seminars & Events

“Reflections of a Fifth Wheel: The Appellate Lawyer on the Trial Team,”
Appellate Lawyer as Wingman: The Increasing Use of Appellate Specialists at
Trial, November 20, 2010, *Appellate Judges Education Institute Summit*

Successfully Navigating the Appeals Process, October 16, 2009, *National Business
Institute*

Anatomy of an Appeal: Review and Remand, July 31, 2009, *American Bar
Association Annual Meeting*

Sixth Annual Construction Tax Issues Seminar – Important Issues in a Distressed
Real Estate Market, June 17, 2009, (*A Steptoe Sponsored Event*)

"More Effective Appellate Briefs," Legal Writing for Maximum Impact,
February 27, 2008, *National Business Institute*

"E-Banking? Egads! Balancing Customer Convenience and Security in Online
Transactions," *Arizona Bankers Association's 104th Annual Convention and Meeting*,
November 8, 2007

Selected Publications

Reflections of a Fifth Wheel: The Appellate Lawyer on the Trial Team
August 2011

The Arizona Trial Handbook (West 2010-2011)

Litigating About Litigation: Can Insurers be Liable for too Vigorously
Defending their Insureds?
Spring 2007, *Tort Trial & Insurance Practice Law Journal*

Professional Affiliations

Member, American Bar Association

Member, Federalist Society for Law & Public Policy Studies