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Appellate Lawyers' Roundtable

In September, the Daily Journal hosted two roundtable discussions with leading appellate lawyers — one in Los Angeles and one in San Francisco — to discuss the coming U.S. Supreme Court term and the recent appointment of Justice Sonia Sotomayor.

Participant: Curt Cutting joined Horvitz & Levy in 1997 and became a partner in 2005. He has been lead appellate counsel in cases involving products and premises liability; toxic torts; insurance coverage and bad faith; contract disputes and inverse condemnation.

Daily Journal: How will the arrival of Justice Sonia Sotomayor as a replacement for Justice David H. Souter change the dynamic of the court?

Arulanantham: The fact that she has trial experience [as a U.S. district judge in New York] could potentially change the way she influences the court's view on certain issues. If you are actually in a trial, you see the dynamics of how a jury works and how instructions work for a whole variety of criminal procedure issues. It's hard to know in advance whether that will cut in favor of the government or in favor of the defense.

Watford: I have reviewed a number of her criminal opinions and I would tend to agree with the commentators who said that she may well turn out to be more conservative than Justice Souter on criminal law issues.

Lifland: This court really needs someone who knows what goes on in trial courts.

Brill: I would think that someone with trial judge experience would tend to have a degree of deference to what trial courts do, not to be inclined to reverse at every misstep.

Sullivan: There's a lot of thought that she may be more conservative on criminal decisions, given her background as a prosecutor.

SeLegue: It's possible to me that she could be more influential on the court because she seems to be more social than Justice Souter is. If she can bring around a colleague now and then to her point of view, that may affect how the court comes out.

Daily Journal: Will she differ from the moderate Souter when it comes to business issues?

Dettmer: What I've read indicates that she won't be far from the mainstream or where Souter was. I don't think there's any alarm.

Sullivan: A lot of business cases are value neutral unless they relate to state regulation or the power of the federal government

Dettmer: What most businesses like ... are clear rules. It's nice to have a clear rule to follow and have some predictability. To the extent that that's going to be the type of justice [Sotomayor is, that] would be something that most litigants would welcome.

DeJesus: It will be interesting [to see] exactly what her temperament is, in those initial years ... whether she's going to strike out on her own [or] stay within the clear majority of the minority.

Leyton: She's an active questioner from the bench and she may strike out and have a larger influence than a lot of individuals would as a junior justice. I don't get the sense that she will be a follower as a justice.

Daily Journal: Let's turn to the cases granted for this term and begin with a 9th U.S. Circuit Court of Appeals ruling that's on appeal, *Hertz v. Friend*, 08-1107, in which the court will decide how to define the "principle place of business" for defendants facing class action suits. It has big implications because it affects whether the case is heard in federal or state courts.

Liflin: The Hertz case ... which is a case my partner Sri Srinivasan is going to argue, is potentially huge from the standpoint of business litigation depending on which standard the court adopts. The 9th Circuit has ... a very bizarre standard which makes California your principle place of business because California has more people than any other state. The position Hertz is trying to get the court to adopt is the 7th Circuit standard ... which is where your headquarters are [the so-called "nerve-center test"]. Most of the other circuits apply a more amorphous standard.

The court's got an opportunity to change the law there. It could make a lot of difference in cases, particularly class actions.

Cutting: If they adopted that nerve center test then a lot of those cases could be removed to federal court and subjected to the Class Action Fairness Act [the law that sets standards for when class actions have to be removed to federal court]. That would be a sea-change for class actions in California. It's not just a question of jurisdiction.

Dettmer: It's one of those questions where you can come up with a whole range of rules. It seems to me that ... in this case they can save a lot of people a lot of heartache and litigation expense.

Sullivan: I think it will be interesting to see whether it gives any indication of how important the Supreme Court thinks it is to have run-of-the-mill civil litigation in federal courts. From my perspective, having the opportunity to go into federal courts on civil cases is very important, but the idea of diversity jurisdiction is seen as a hangover of way back when. If the court is disinclined to fill the federal courts' docket with civil litigation, it could have a major impact.

In employment cases, the federal courts often have a stronger track record of stepping in against business. In state courts, it's much more unpredictable and it varies by judge a lot more.

SeLegue: The Hertz case is the most important one for business litigation on a daily basis.

Daily Journal: Another big business-related case is *Bilski v. Kappos*, 08-964, in which the court is expected to clarify the definition of what is "patentable subject matter".

Brill: The Bilski case ... is potentially going to be very far-reaching. The case is potentially very significant for business method patents, as well as software patents and biotech patents, which often aren't naturally linked to a machine or the transformation of an article. There are different types of tension in the Supreme Court's recent patent cases. On the one hand, they don't like rigid rules that the Federal Circuit seems to be coming up with frequently. On the other hand, the Supreme Court also seems generally more wary of expanding patents and expanding patent law. This is an example of a case where

there seems to be a rigid rule that may rub some of the justices the wrong way and yet it's cutting back on patent protection. My gut is that they think the rule is too rigid because it doesn't reflect what's in the statute.

Daily Journal: One of the highest-profile cases granted so far is a dispute over a cross that stands in the Mojave Desert, which raises both Establishment Clause and standing issues. The court will weigh in *Salazar v. Buono*, 08-472, whether the federal government is barred from transferring to the Veterans of Foreign Wars a parcel of land on which the cross sits in exchange for another parcel of equal value.

Arulanantham: I actually do think it's meaningful and important. Peter [Eliasberg], the attorney in our office who is litigating it, he is Jewish. His dad fought in World War II, and it's a war memorial, and it's a cross. Many Jews don't find crosses to be appropriate memorials to the dead, for a whole variety of reasons, which are legitimate reasons.

When you've got this naked an attempt to circumvent the Establishment Clause, there's a bunch of arguments why it doesn't cure the Establishment Clause violation. The case is now about whether when someone sees the cross ... whether they will perceive that as belonging to the private owner or the federal owner.

Cutting: There's a standing issue in the case too. There's some thought that the court might not even reach the Establishment Clause issue on the merits because they might find a lack of standing. There's a question about whether a person who sees the cross, who otherwise has no connection to this, is that enough standing. It just jumped out at me as a Roberts court sort-of-thing to do.

Sullivan: It does seem like a pretty convenient way around the Establishment Clause to just transfer this one tiny parcel of land in the middle of this huge national park and say it's value neutral.

Dettmer: To me the really interesting part of that is the standing question. Maybe only lawyers can really love that question.

Daily Journal: In the criminal law area, the court has granted two petitions to explore how to define "honest services" fraud as it applies to public officials and private figures. The private figure in question is media tycoon Conrad Black. *Weyhrauch v. U.S.*, 08-1196 and *Black v U.S.*, 08-876.

Watford: I certainly have an interest in it. There's been a lot of uncertainty about the scope of what crimes can be prosecuted under the honest services statute. I don't think I ever even had a case where that statute came up. But I know the lower courts have been in disarray on this issue and hopefully the Supreme Court will provide some definitive guidance.

Cutting: It reminds me of the California Business and Professions Code that allows suits for unfair business practices. It was on the books for a long time before people started realizing, "Look what we have here." Almost anything falls under this statute. I wonder if that's the same sort of thing that's going on here. It's so poorly defined it seems like a very powerful weapon for prosecutors.

Watford: It had been well established in the context of public officials who had taken bribes. I think the Conrad Black case is interesting because it's in a purely private context. It's certainly a timely opportunity for the court to step in.

SeLegue: Believe it or not, I have seen one, maybe two RICO cases brought against law firms and one of the predicate acts was based on honest services fraud. It's a very unusual statute, very abstract, and the circuits are all over the place. That's a tough case for them. Everyone seems to agree ... that the statute is problematic.

Daily Journal: Prosecutorial abuse is the subject up for discussion in *Pottawattamie County v. McGhee*, 08-1065. The question is whether prosecutors have absolute immunity for conduct that occurred outside the courtroom. In this instance, a prosecutor obtained false testimony during the investigation and then presented it at trial.

Watford: The entire conviction was based on this coerced testimony. It's very clear that the prosecutors are absolutely immune for anything they did in court. But there's a big question about what about everything that occurs before you get into the courtroom, which is the key twist in this case. I find the issue fascinating as a former prosecutor.

Arulanantham: Usually, a prosecutor being more involved in the investigation side probably has a moderating influence that probably both sides are happy with. I would think that if you'd be liable for doing more of that, as a prosecutor you would want to do less of those things and just do more of the things that are closer to the courtroom stage.

Daily Journal: A case of particular interest to lawyers is *Mohawk Industries v. Carpenter,* 08-678. At issue is whether a party can immediately appeal a district court's decision to waive attorney-client privilege.

Dettmer: Obviously if the court is going to find that a finding adverse to the company on that kind of issue is immediately appealable, [that] would be of enormous value. The concern now is that if there's a finding of waiver, you are stuck. If that goes the way I think it should, it would certainly help companies investigating problems they might have in feeling more secure that they can hold onto their privilege. If you can't go to the appellate courts automatically to protect that, it really does destroy the attorney-client privilege.

DeJesus: However it plays out, it's going to be an interesting shift in the way that we analyze cases in terms of their potential success in getting an appellate court to listen.

Daily Journal: Also of interest to attorneys is *Perdue v. Kenny*, 08-970, which focuses on whether a judge can award enhanced attorney's fees based purely on the quality of the representation.

Leyton: This is not a court that's been very friendly to attorneys' fees in public interest cases or in general. I suspect you may see some effort to cut back the size of attorneys' fee awards.

DeJesus: And from a practical perspective, sometimes you get cases on appeal where the fee issue is the tail wagging the dog.

SeLegue: It's a very hot-button case because it affects corporate interests, and it affects how much litigation there is in the courts.