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Q&A With Gibson Dunn's Thomas Hungar

Law360, New York (September 30, 2009, 4:44 PM ET) -- Thomas G. Hungar is a partner in the Washington, D.C., office of Gibson Dunn & Crutcher LLP and co-chair of the firm's appellate and constitutional law practice group. His practice focuses on appellate litigation and he assists clients with complex trial court litigation matters as well.

Hungar has presented oral argument before the Supreme Court of the United States in 24 cases, including some of the most important patent, antitrust, securities and environmental law decisions issued by the court in recent years, and he has also appeared before numerous lower federal and state appellate courts. He was was nationally ranked as a top appellate attorney by Chambers USA: America's Leading Business Lawyers for 2009, and formerly served as Deputy Solicitor General of the United States from 2003 until 2008.

Q: What is the most challenging case you've worked on, and why?

A: I'd have to say that the most challenging case I've ever worked on was the Bush v. Gore litigation over the 2000 presidential election. That case has never been matched in my experience in terms of the sheer volume of high-profile appeals over an incredibly short time frame (two U.S. Supreme Court decisions, two Florida Supreme Court rulings and an en banc Eleventh Circuit appeal in a span of 35 days) and the overwhelming public interest in and importance of the litigation.

I don't think any of us who worked intensively on the appellate proceedings will ever forget the round-the-clock work and pressure and excitement, or the amazing privilege of participating in litigation of such national significance. And I doubt that any of us (including the justices) would want to do it again!

Q: What do you do to prepare for oral argument?

A: The Deputy Solicitor General who supervised my first Supreme Court argument back in 1992 was John G. Roberts Jr. (he's since gone on to somewhat greater fame). That experience has played a foundational role in my oral argument preparation ever since, because I've always tried to prepare the way he taught me.

First, I read all the briefs and all the relevant cases and record materials, and as I do that I try to think of, and write down, every plausible or even not-so-plausible question that a judge or law clerk reading through those same materials might be provoked to ask.

I then work on developing, prioritizing and memorizing the key themes and points I want to get across in the limited oral argument time available, and on identifying and remembering the strongest answers to all the questions I've come up with (which includes a careful assessment of the relative strength and ideal order of multipart answers and how best to sharpen each answer so I can convey the most effective response in the fewest possible words).

As part of that process I also plan out how to use my answers to the more likely questions as a means of getting across my affirmative points and/or steering the direction of the argument onto favorable terrain.

And once I've done all that, I find it absolutely essential to test and sharpen my preparation by participating in rigorous moot courts with panels of highly experienced and knowledgeable lawyers serving as judges. Even the best-thought out answers can sometimes lead the questioning in directions you don't want to go, and the moot court process is the ideal way to discover and avoid those pitfalls.

Q: What are some of the biggest problems with the U.S. appeals process?

A: I think the biggest problem with the appellate process is that judges on many (although certainly not all) appellate courts are overworked and overburdened with excessive caseloads. That's the number one complaint I hear from appellate judges, and it's a matter of serious concern to appellate lawyers and their clients alike, because the process can't work well if judges don't have ample time to devote to each significant appeal.

I don't think we're at a crisis stage by any means, but the appellate process would be strengthened if appellate caseloads were reduced. The Supreme Court has managed to achieve that result over the past 15-20 years, and my sense is that the justices feel they are able to do a better and more careful job as a result, but of course the Supreme Court has the advantage of having a largely discretionary docket.

Q: Aside from your own cases, which cases currently on appeal are you following closely, and why?

A: The Bilski case at the Supreme Court, which involves the scope of patentable subject matter, is a fascinating and hugely important patent case that I've been following with interest. Many patent lawyers are hopeful that the court will be more liberal than the Federal Circuit in defining the subject-matter scope of patentable methods, but I suspect those hopes are going to be dashed.

The pace of the Supreme Court's consideration of major antitrust law issues seems to have slowed a bit recently, but it will be interesting to see how the court handles the American Needle case, which involves a challenge to the joint licensing of logos and trademarks by NFL teams, and is the first successful petition for certiorari in more than a decade by a plaintiff presenting an

antitrust-law question.

Q: Outside your own firm, name one lawyer who's impressed you and tell us why.

A: I've always been very impressed with the skills and abilities of Richard Taranto of Farr & Taranto; in my view he is one of the top appellate practitioners around.

When I served as Deputy Solicitor General I had opportunities to meet repeatedly with many of the nation's top appellate lawyers as they sought to persuade the Solicitor General's office to support their client's positions, and I found Richard's presentations to be among the very best — precisely reasoned, exhaustively researched, unfailingly accurate, and presented with grace and good humor. His oral argument style is low-key and effective, honing in on the crucial strengths of his case and the weaknesses of his opponent's.

Q: What advice would you give to a young lawyer interested in getting into your practice area?

A: An appellate clerkship is not an absolute prerequisite to success as an appellate lawyer, but there's no doubt it helps to have done one (or two), especially for young lawyers seeking to break into this increasingly competitive specialty. The experience, writing skills and insights into judicial decision-making that law clerks gain from their appellate clerkships are invaluable to lawyers starting out in appellate practice.

More generally, top-notch legal research and writing ability, rigorous analytical skills, creative outside-the-box legal thinking and clear, concise and persuasive oral advocacy are all important attributes for success as an appellate lawyer, so young lawyers should seize every opportunity to work at developing those skills and abilities by being exposed to challenging legal matters and to contact with more experienced lawyers who model those attributes.