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Q&A With Hogan & Hartson's Cate Stetson

Law360, New York (October 12, 2009) -- Catherine E. Stetson is a partner with Hogan & Hartson LLP in the firm's Washington, D.C., office and a leader in the firm's appellate and supreme court practice group. She has been recognized as one of the "Fab Fifty" up-and-coming litigators in the nation by The American Lawyer magazine and has been named to the National Law Journal's prestigious "40 Under 40" list.

Stetson began her career at Hogan & Hartson, working alongside then-Hogan & Hartson partner and now Chief Justice John Roberts in the firm's appellate practice section. She has argued in the Supreme Court and has presented more than two dozen appellate arguments in most of the federal circuit courts and many state appellate courts.

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

A: It's a tie. Our team's work last Term in Taylor v. Sturgell was the classic uphill battle. Cert was granted over our opposition in a federal circuit court case that expressly identified, and then deepened, a multi-circuit split on a federal common-law issue: When is a subsequent litigant barred from pursuing a claim because of his connection with a losing litigant in a prior case presenting the same issue?

The opinion we were defending had logic and simple justice in its favor – but very scant precedential support. We put together a strong brief and oral argument, but fell short of success: nine votes short, to be exact. The day the decision issued, some colleagues reminded me of a comment our former partner, Chief Justice John Roberts, once made after being asked why he'd come out on the 9-0 losing end of a case he'd argued: "Because there are only nine Justices."

The second case presented substantive and personal challenges. We handled a Federal Circuit patent appeal involving microprocessor architecture; there were many issues in play, all technically complex. We accordingly had to translate the language of patent law and computer architecture into accessible and compelling rhetoric for the

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judges and their clerks. The personal challenge: oral argument was set for while I was newly on maternity leave after the birth of my younger daughter. I prepared for argument with my newborn by my side, suited up to present argument when she was several weeks old – and then returned to my daughters, and a few months' more leave, with a light heart.

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

A: I have a pretty serious ritual in the days leading up to an argument. I start by removing myself from the phone and e-mail and decamping to a conference room in my building where only my secretary knows how to find me. (I bring my own lamp. Everyone knows I'm prepping for an argument when I'm walking down the hall with a lamp.) Once in my cave, I read through each of the briefs and the appeal record very deliberately and make detailed pages of notes on all. I keep a separate, second tablet alongside, on which I write factual or legal questions that occur to me as I work through the materials; no question is too tangential ("How does a geothermal plant work?") or too basic ("STANDING?"). I add to this running "moot list" throughout my prep.

After I cut through the briefs and record, I read and make notations on every case the briefs cite, and I don't cut corners and only read the pin-cited bits; it's not uncommon to find a helpful discussion lurking in a case cited by your opponent for some entirely separate proposition. I also handwrite all my notes; writing notations by hand helps me learn and make connections more than if I were simply to type in data like a glorified stenographer. (You law students with your omnipresent classroom laptops, heed my words.) In the last days leading up to an argument, I prevail on a few colleagues in and outside the appellate group to participate as "judges" in one or two grueling moot courts, which can last anywhere from an hour and a half to four hours at a time.

On Argument Eve, I try to visit the courtroom if I haven't argued there before. And finally, the most important element of my argument prep: The night before an argument, I always have a cheeseburger, French fries and a Diet Coke.

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

A: I don't think there are many problems with the "appeals process" generally. Thanks to the good offices of the federal circuits' chief judges and administrators, the appeals process in general runs like a top. Docket overload is a problem among some, but not all, circuits; the glut of cases in some circuits can put immense pressure on judges and their staffs and sometimes delay argument for months.

The more pervasive problems with the appellate process arguably are created by the lawyers themselves; I am too often surprised and disappointed by the low quality of written or oral appellate advocacy, not to mention the occasional stunning lack of courtesy displayed to judges or among counsel.

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

A: I'm paying attention to one Supreme Court case that the entire patent and commercial appellate bar will be watching: Bilski v. Doll. It involves the Federal Circuit's so-called "machine or transformation" test for patentability — the test the court of appeals articulated to cull out attempts to claim intellectual proprietorship over a law of nature, natural phenomena, mental processes or abstract intellectual ideas. Dozens of commercial and academic amici have weighed in on the debate whether the test is appropriately sized to fit the task; this will be a real prizefight.

The Merck case out of the Third Circuit, presenting a question of inquiry notice and how it relates to scienter in the securities fraud context, will get a lot of attention from the commercial bar when it's argued in the Supreme Court this fall. Finally, I have a weakness for esoteric FERC appeals, so I tend to follow the D.C. Circuit's work there closely.

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

A: It's a tie (again): Maureen Mahoney, [a partner] of Latham & Watkins LLP, and Roy Englert, [a partner] of Robbins Russell Englert Orseck Untereiner and Sauber LLP. Maureen is so smooth in arguments – impeccably prepared, unflappable, firm but never strident. And Roy is a marvelous appellate advocate; he can write the lights out, and his oral presentations are equally well-crafted. I admire them both immensely.

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

A: Read a lot, write a lot and find your mentors in uncommon places. When I say "read a lot," I mean read a lot of everything – not just briefs and opinions. Read good fiction, music criticism, sports-writing – things with different tones, voices and cadences.

When I say "write a lot," I mean write a lot of everything – not just briefs and motions. Write an academic piece. Write a poem. Write long letters to your aunt. Keep a journal. Trying your hand at different types of writing will keep your legal writing fresh and interesting. There is little writing more boring than a bad legal brief; and there is little writing more exciting than a good legal brief. (Perhaps this is just me.)

Finally, by "find your mentors in uncommon places," I mean what I say. Find every opportunity to observe and learn from many different lawyers in action, from something as mundane as a conference call with co-counsel to something as heady as a Supreme Court argument. Decide what you like and don't like about a particular lawyer's style, and develop your own style from among the many different approaches you see. Gather a whole team of mentors; it's always good to have a team.

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