

## Identifying **12** Leading Appellate Litigators

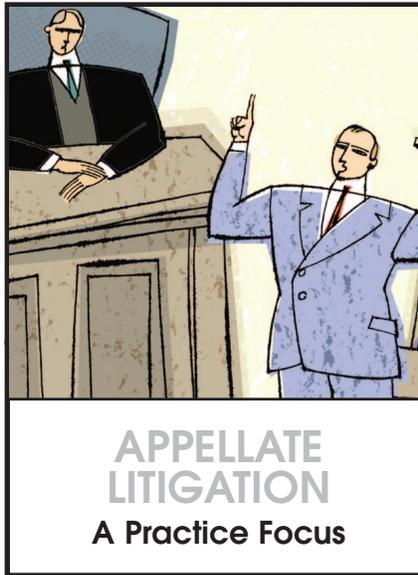
**I**t might be tempting to dub this the “ivory tower edition” of *Legal Times*’ ongoing Leading Lawyers series.

After all, the 12 appellate litigation specialists profiled in this section—which begins on Page 32—practice only in the justice system’s upper echelon. They don’t have to bother with the nasty things that may vex their trial court colleagues—like, say, jurors.

But anyone expecting a collection of cerebral law wonks might be surprised by the healthy dose of street smarts it takes for appellate lawyers to create a thriving practice.

These are courtroom chameleons who have mastered the art of quickly retooling arguments based on questioning from the bench. As one lawyer aptly puts it: “An appellate advocate must be able to engage in good dialogue with the judges. One of the most common failings occurs when advocates don’t want to talk about what the judges want to talk about.”

As with any list purporting to deliver the leaders in



any field, some readers may disagree with our selections. Yet it’s important to note that we attempted to touch all of the bases in reporting this article. Editor at Large Jonathan Groner started with leads provided by readers and sources. He was also informed by the base of knowledge in the *Legal Times* newsroom.

Groner then conducted dozens of interviews with clients, appellate lawyers, and knowledgeable sources in academia. In the end, we chose the lawyers profiled in this Practice Focus based upon our reporting.

This week’s article is the second in a series of four reports appearing in 2004. Our next Leading Lawyers, on Sept. 27, will look at trusts and estates attorneys. This series began in 2003 and has chronicled the best in real estate, trial litigation, intellectual property, securities and corporate governance, and labor and employment.

An archive of those articles, as well as information about our further plans for this year, is available online at [www.legaltimes.com](http://www.legaltimes.com).

—David Brown, *Managing Editor*

# Leading LAWYERS

Legal Times Identifies Twelve of the D.C. Area's  
Top Appellate Litigators

## Seth Waxman

Wilmer Cutler Pickering Hale and Dorr

When Seth Waxman became President Bill Clinton's solicitor general in 1997, he already enjoyed a reputation as one of the city's top litigators. Now, after four years as SG and more than three in private practice, Waxman, 52, has catapulted himself into the very top rank of appellate lawyers in Washington.

Waxman, who now heads the appellate and Supreme Court practice at Wilmer Cutler Pickering Hale and Dorr, has argued 41 cases in the U.S. Supreme Court while in private practice and in government. This term, he argued five cases there—an unusually high number for a private practitioner and clear evidence that Waxman is on the short list for any company that needs a specialist to handle a key appeal.

During the Clinton administration, then-SG Waxman personally argued some of that administration's signature cases in a wide variety of fields of law. These included *Reno v. American Civil Liberties Union* (in which the Court struck down the Communications Decency Act), *Dickerson v. United States* (in which the Court reaffirmed the Miranda doctrine against a concerted challenge by conservatives), and *Browner v. American Trucking Associations* (in which the Court rejected an effort to use the "nondelegation doctrine" to defeat air-quality regulation).

Waxman is perhaps best known for a case that he argued last fall. This was the multipronged challenge to the Bipartisan Campaign Reform Act that the Supreme Court, to the surprise of many observers, turned aside in a landmark opinion on Dec. 10, 2003.

In that case, *McConnell v. Federal Election Commission*, Waxman represented the act's chief Senate proponents, John McCain (R-Ariz.) and Russell Feingold (D-Wis.). He was the only attorney who appeared in both the morning and afternoon sessions of the extended arguments.

Waxman says the right way to handle a multifaceted, complex case is to "look for a theme" that can guide the appellate court.

In the campaign finance case, Waxman notes, the Wilmer Cutler brief began with a quotation, more than a century old, from statesman Elihu Root, denouncing massive "a constantly growing evil in our political affairs." The Supreme Court's majority opinion picked up on the Root theme, declaring at its outset that the "sober-minded" Root advocated limits on campaign spending.

Waxman says that any case, even one as "incredibly

complex" as the campaign finance case, can be boiled down to its essence. An appellate lawyer must ask himself or herself: "If you had 50 words or 100 words to explain your case, what is it?"

An advocate must also "know the case better than anyone else in the room," Waxman says. "That means both the facts and relevant legal authority, as well as the backdrop to the case."

Besides compiling a list of questions that the judges might ask and developing answers to them, Waxman says an outstanding advocate should also "create a second-order list of questions that can derive from those answers," and

then come up with answers to those queries as well.

In a 2001 law review article on appellate advocacy in the 21st century, he quoted Daniel Webster as saying a great lawyer "must first consent to be only a great drudge." Waxman wrote that this means that "every argument demands what others might describe as over-preparation."



ROBERTO WESTBROOK

Waxman, a 1977 graduate of Yale Law School, was a partner at the now-defunct Miller, Cassidy, Larroca & Lewin before joining the Clinton Justice Department in 1994.

Mark Leopold, deputy general counsel of Household International, a major consumer lending company, has turned to Waxman for Supreme Court arguments twice in two years. In *Beneficial National Bank v. Anderson*, a 2003 case, the Supreme Court held by a 7-2 margin that a usury claim filed in state court by a borrower is pre-empted by federal law.

"The case was important to us and to our industry," says Leopold. "What really struck me about Seth was how much respect there was for him among the members of the Court and even among the Court's staff. There was a familiarity there that was comfortable."