Supplement to the Los Angeles and San Francisco
Daily Journal
MARCH 27, 2019

THE 2019 CLAY AWARDS

The 23rd Annual California Lawyer Attorneys of the Year

LABOR & EMPLOYMENT

Guiding Dynamex could have dramatic impact on Labor Code dynamics

Dynamex Operations West Inc. v. Superior Court of Los Angeles

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It's rare for a veteran appellate specialist like Jon R. Williams of Williams Iagmin LLP to sit while the lawyer who did the trial argues before the state Supreme Court. "Typically, I say to my trial counsel, 'No way,'" Williams said. But this was no ordinary case. Indeed, the outcome—making it harder for companies to classify workers as independent contractors—could transform the gig economy and end up rewriting the Labor Code.

Trial counsel Kevin F. Ruf had been with the case for more than a decade. "He had also argued to the court of appeal in 2014 and prevailed," Williams said. "So it seemed like a winning formula for us."

Ruf, a partner at Glancy Prongay & Murray LLP, and sole practitioner A. Mark Pope, Ruf's co-trial counsel for the plaintiff class of delivery drivers, had independently filed class actions protesting the drivers' summary reclassification from employees to independent contractors. Ruf said he considered Pope a major contributor to the theory of the case; they joined forces in 2008. The case's long history included an early discovery dispute that resulted in denial of class certification; a successful appeal that led to class certification; and a defense appeal of that ruling rejected by a state appellate panel.

"When the defense sought review at the Supreme Court, we didn't oppose it," Williams said. He added that in his quarter century of appellate practice, "you have a sense of what cases will go up. It was exciting because I got to work on a cutting-edge issue, the legal status of the budding gig economy. A business model had emerged that gave the issue universality, or what I call Supreme Court resonance."

KEVIN F. RUF Glancy Prongay & Murray LLP

Ruf credited Williams with drafting the original pleadings that teed the argument up for the justices. "Jon was great on the papers, but there's no substitute for someone who worked a case this long," he said. "You can never be sure what they're going to ask you, but you know your case. I'm arrogant enough that I might like to argue a U.S. Supreme Court case some day. My view of appellate advocacy is that you bring your trial instincts. You read the room. How do you play to their interests?" He shared his time at the lectern with Michael Rubin of Altshuler Berzon LLP.

Rubin, a veteran, employee-side labor lawyer, argued the big picture workplace rights issue for three unions and other amici. "When you get to the Supreme Court level, broad policy is what they're interested in," he said. "How do we protect low wage workers? The court was obviously struggling with how to protect workers, employers and the economy. But it was fairly clear they were going to rule for the plaintiffs."

Ruf decided to open with what he called "a jarring fact": "One day these guys were employees. Then at the stroke of midnight, with a wave of the corporate wand, the company changed their model and suddenly my clients were independent contractors. It was hard for the defense to argue this was any kind of organic evolution."

Prior to the argument, the justices called for supplemental briefing to zero in on the worker-friendly ABC test and Ruf, Williams and their team embraced it, with a modification, as a way to clarify the controlling case, Borello, from 1989. They held two moot court rehearsals. "During the argument, it was not all that clear to me that the court was really about to embrace the ABC test," Ruf said. "Justice [Mariano-Florentino] Cuéllar threw me a rope, allowing me to agree with him that the ABC test has been used elsewhere with success and [several other] difficult questions could be resolved as the law developed."

Now efforts are afoot in the Legislature to deal with the fallout—by business interests to abrogate the opinion, and by pro-worker forces to codify it in the Labor Code. "To be able to revisit a landmark case, that's good stuff for an appellate guy like me," Williams said.

—John Roemer