

*Attorneys—Law Firms***Mind the Gap: Appellate Boutique Going to Bat for the ‘Little Guy’**

With so many attorneys in D.C., it’s hard to believe that any gap in legal services could exist in the Capital city.

But the proverbial “little guy” in the middle of a high-stakes appeal often finds he has nowhere to turn, Deepak Gupta of Gupta Wessler PLLC, Washington said.

And that’s a gap Gupta and his new partner Matt Wessler told Bloomberg BNA they hope to fill.

Other Side of ‘v.’ “When big corporations face high-stakes appeals, they have their pick of specialized Supreme Court and appellate groups at big firms,” Wessler, who recently left the public-interest law firm Public Justice to join Gupta’s appellate boutique, said in a July 16 e-mail.

“But for plaintiffs and public-interest clients on the other side of the courtroom, comparable options often aren’t available.”

“Our aim is to fill that void, and to provide plaintiffs and public-interest clients with an option for litigating cases and issues that will have wide-ranging impact on the law and the civil justice system,” Wessler said.

That’s what Gupta has been doing for three years since opening his own shop, previously known as Gupta Beck PLLC.

“It’s an idea I’d been kicking around since 2004,” Gupta said in a July 16 interview.

In the face of so many options for corporate defendants, Gupta said he wanted to provide options for those “on the other side of the ‘v.’”

So after setting up an appellate department for the newly created Consumer Financial Protection Bureau, he decided to put his plan into action.

Where Is Everyone? But Gupta admitted that he often wondered, “If this is such a good idea, why isn’t anyone else doing it?”

Wessler said one of the major reasons is that “unlike the corporate defense side, the plaintiffs’ bar is more fragmented.”

General counsel of large corporations are pretty visible, Gupta said. “So it’s easy to access the decision makers.”

On the other hand, plaintiff-side “trial firms range widely in size and practice—from the sole practitioner doing personal injury or insurance law to the large class and tort firms—and so there often is less coordination and communication within the community than one would find on the defense side,” Wessler said.

Gupta said another reason for the lack of plaintiff-side appellate boutiques could be the fact that there really isn’t the same kind of steady money as from defense-side work.

There “is a clear resource asymmetry between plaintiffs and defendants,” Wessler said.

“Plaintiff-side trial lawyers have historically tended to handle appeals themselves—often because the cost of bringing in an outside firm might be too great or because an outside firm might not understand the issues facing the plaintiff,” he said.

“On the defense side, by contrast, corporate defendants have much deeper pockets that allow them to bring in outside help at the right time.”

“So it’s a lot easier and more lucrative to set up a practice on the defense side,” Wessler said.

Finally, Wessler said another impediment to this kind of practice may have just been a lack of demand.

A “firm devoted to appellate practice on the plaintiff and public-interest side might not have been much in demand 25 years ago,” he said.

“Today, the climate is much different. The increase in appellate specialization on the corporate side, coupled with the hostility in many quarters to claimants in the civil justice system, raises the stakes and places a greater premium on appellate work,” he said.

Creating Balance. Gupta acknowledged that some of that new demand is being met by law school clinics and non-profits, like his old stomping ground Public Citizen.

But non-profits are tied to a mission statement, Gupta said.

Here, “we don’t have a board of directors to consider, so we have a lot more flexibility,” he said.

Gupta pointed to his work on behalf of gun control advocates as an example.

Gupta, whose firm takes on many cases dealing with consumer and worker rights, said he never imagined when he started the firm that he'd be doing gun cases.

But there was a desire to create a counterbalance to the powerful National Rifle Association, and that actually fit perfectly with the firm's model, Gupta said.

Improving the Odds. Both Gupta and Wessler noted a potential hurdle for their new firm.

The stereotypical appellate lawyer is someone that stays in the library solving problems and writing up legal issues, Gupta said.

But it's absolutely essential that appellate lawyers get out and talk to plaintiff-side trial attorneys, he said.

It's "a challenge to know when a case has gone up on appeal that poses an important issue with the potential for broad impact," Wessler said.

"I think our challenge is, in many ways, to continue to communicate with and educate plaintiff-side trial firms and public-interest groups about our work and practice."

"The more our side can coordinate and communicate effectively about the issues affecting our community, the better our advocacy will be when we go up against corporate defendants and their appellate specialists in the biggest cases," he said.

Wessler added that in "the three years since [Gupta] started the firm, he has had tremendous success in reaching out to plaintiffs and public-interest clients across the country."

Falling With the Flag? One example of Gupta's success at getting his firm's name out is his work on behalf of the family of a Mexican teenager.

Gupta told Bloomberg BNA that lawyers in Texas just called him up and asked him to take it on.

They heard about the firm from other lawyers the firm worked with on a case involving First Amendment issues in an antitrust case, he said.

So that work led to this civil rights case, Gupta said. "Our docket is pretty broad."

According to the en banc U.S. Court of Appeals for the Fifth Circuit, Gupta's new civil rights case involves "the death of a teenaged Mexican national from a gunshot fired by a Border Patrol agent standing on U.S. soil."

In *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015) (en banc), the full Fifth Circuit said it was "some-what divided" on the question of whether the agent violated the Fifth Amendment by using excessive force.

As Gupta puts it, the teenager was playing a game with his friends, in which they ran up to the barbed-wire fence that separates Mexico and the U.S., when he was shot to death by the agent.

The dispute among the Fifth Circuit judges centers on whether the U.S. Constitution protects a foreign national killed on foreign soil when they were killed by a U.S. citizen standing in the U.S.

It's kind of a "legal no man's land," Gupta said.

The issue is whether the Constitution falls with the flag, or if it has some extraterritorial application, he said.

But although the court was divided on that issue, they were unanimous that the teenager's constitutional right wasn't "clearly established" at the time of the shooting, and that the agent was therefore entitled to qualified immunity.

Gupta said the U.S. Supreme Court should step in and address these issues.

This week his firm will follow through with its mission, and will file a cert. petition in the highest court in the land on behalf of the family of this "little guy."

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