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The Hottest Topics Appellate Attys Are Tracking In 2025

By **Jeff Overley**

Law360 (January 1, 2025, 8:01 AM EST) -- Appellate lawyers in 2025 should probably stock up on coffee and expect some all-nighters — numerous high-profile appeals, a new presidential administration and a new framework for legal challenges to regulations suggest it'll be an uncommonly tumultuous trip around the sun.

The frenetic forecast stems from an expansive assortment of important appeals, circuit splits and Judicial Conference policy moves, plus the arrival of a new president whose aggressive agenda is guaranteed to spark suits that rapidly rise higher in the federal court system. Also, in countless cases, emboldened conservatives will seize on the post-Chevron paradigm for challenges to regulations, although some lawyers expect that paradigm to be a surprising boon for liberals.

"Whenever you have a change in presidential administrations, it's always a very interesting year for appellate law," Boies Schiller Flexner LLP partner Jesse Panuccio, a top official at the U.S. Department of Justice during President-elect Donald Trump's first administration, told Law360.

Things will be especially interesting in 2025 because "the Trump administration is going to take over in late January and, right out of the gate, it's going to put a number of likely bold policy initiatives in place," Panuccio said. "And of course, with new policy comes the lawsuits and the appeals that quickly come after."

Here, Law360 surveys the legal landscape — in existing and expected matters, in specific practice areas and across the board — for the appellate bar in 2025.

As Trump Returns to White House, Foes Return to Courthouses

Trump in 2017 wasted no time testing the limits of his presidential powers, using his first days in office to advance construction of a border wall, clear the way for controversial oil pipelines, withdraw from a multinational trade pact, weaken the Affordable Care Act, freeze federal hiring and bar travelers from several predominantly Muslim nations. Opponents also wasted no time suing the 45th president, and barely a week after his inauguration, courts had already issued numerous rulings.

There's every indication that Trump 2.0 will double down on audacious actions. Rather than merely restrict the entry of certain noncitizens, for example, Trump is vowing to expel millions of migrants who've unlawfully entered the U.S. Rather than simply freeze hiring in segments of the federal workforce, the incoming president has suggested he's open to firing thousands of federal workers.

"We'll have many executive orders and other things that we'll be signing on the first day," Trump said at a Dec. 16 news conference, where he discussed a border wall, pipelines and his planned termination of a remote-work waiver that he said "involved 49,000 people."

"If people don't come back to work, come back into the office, they're going to be dismissed," Trump said when criticizing the waiver. "It's ridiculous. It was like a gift to a union, and we're obviously going to be in court to stop it."

If past is prologue, the second Trump administration is obviously going to be in court for many reasons, and one of its likely opponents is the American Civil Liberties Union. The ACLU says it "filed 434 legal actions against the first Trump administration," and tax filings indicate that the group was a well-heeled adversary, with contributions and grants to its litigation wing surging to roughly $225 million in the final year of Trump's first term from $90 million the year before he became commander-in-chief.

"We're clear-eyed about the chaos and destruction a second Trump administration will cause to our nation," Anthony D. Romero, the ACLU's executive director, said in a November statement. "We are ready to take action the minute Trump takes the oath of office."

Democratic state attorneys general were also some of Trump's most frequent and formidable foes in his first term, launching scores of suits and winning more than 80% of the time, according to a database maintained by Marquette University associate professor Paul Nolette.

"If Trump attacks your rights, I'll be there. … California DOJ did it before, and we'll do it again," Golden State Attorney General Rob Bonta said in a recent speech, implicitly referencing the California Department of Justice's successful work in a U.S. Supreme Court case where Trump sought to overturn the Affordable Care Act, often called Obamacare.

Many of Bonta's Democratic peers have also proclaimed that they're girding themselves for four years of courtroom combat, and a noteworthy example is Maryland Attorney General Anthony G. Brown. One day before the November election, Brown announced that he had established a solicitor general's office in the Old Line State, and one day after the election, Brown revealed that he was preparing to create a "federal litigation team to swiftly respond to any federal actions or policies that may harm Marylanders."

Soon after, Brown's office began posting job openings for the "newly established federal litigation unit," and descriptions for multiple positions said, "In preparation for potential actions by the federal government that could threaten the health and well-being of Maryland residents, this unit will play a pivotal role in protecting Marylanders' rights and defending against federal overreach."

In small states that desire big roles in litigation against Uncle Sam, it's essential to load up on legal talent, said Troutman Pepper Locke LLP partner Misha Tseytlin, who previously served as general counsel at the Office of the West Virginia Attorney General and as solicitor general at the Wisconsin Department of Justice.

"It's one thing to be able to go out and give a press conference or do a press release," Tseytlin told Law360. "But in order to do these complex challenges, and to litigate against the biggest law firm in the world, which is the U.S. Department of Justice, you need to have a sizable staff."

Legal Battles to Play Out in Reshaped Judiciary

It's also helpful to have a favorable forum, and several of the Democratic attorneys general with ample

resources are also in left-leaning circuits, such as the First, Fourth and Ninth circuits. Blue states could, however, face a taller task in the second Trump administration, given that Trump created a conservative supermajority on the Supreme Court and added more than 50 circuit judges.

Ten of those judges joined the Ninth Circuit, transforming it from a progressive stronghold into a center-left bench with a 16-13 split of Democratic and Republican judges. But some observers say the legal playing field has shifted less than those numbers might suggest. Although three-judge panels at the Ninth Circuit sometimes issue conservative-friendly rulings, the court hasn't been hesitant to grant en banc rehearing, which only requires majority approval from the 29 active judges.

"[Something] we're almost certain to see is an increased number of cases in the Ninth Circuit, and in district courts in the Ninth Circuit, challenging President Trump's policies," Morrison Foerster LLP partner Aileen M. McGrath, an appellate litigator in San Francisco, told Law360. "The question is whether those cases are going to look different than they did eight years ago. And I think all indications are that they probably won't, because despite the increasing number of conservative judges on the Ninth Circuit, the liberal majority still has close control over the court's direction."

The liberal majorities in various circuits also matter because they oversee district courts that often issue nationwide injunctions in politically charged matters. Democratic-nominated judges occupy the vast bulk of seats in several key districts, and it's reasonable to expect that liberal litigants during the next four years will mimic their conservative counterparts, who often sue in venues where a Republican-nominated judge is virtually certain to preside. Many critics have maligned that practice as "judge shopping," and some observers are already asking if the same critics will hold liberals to the same standard.

One example occurred at a Federalist Society event in November, when U.S. Circuit Judge Edith Hollan Jones of the Fifth Circuit accused Georgetown University Law Center scholar Stephen I. Vladeck of unfairly denigrating Texas federal judges whose courthouses have often attracted lawsuits from conservatives and corporations.

"I look forward to Professor Vladeck keeping as close attention to the courts of the Southern District and Northern District of California during the next four years," Judge Jones said.

'Comity and Continuity' in Short Supply Amid Transition

Although Trump is expected to pursue brand-new policies that ignite litigation, he's also likely to set off legal fireworks by changing the government's position on existing policies or cases.

There's nothing unusual about an about-face when the White House changes political hands; after President Joe Biden's inauguration, he quickly changed course in major Supreme Court cases involving Obamacare, immigration and abortion rights, and in circuit court matters involving the environment, offshore drilling and vehicle emissions standards.

After Jan. 20, experts say, the federal government might switch postures in pending litigation over transgender rights, Clean Water Act enforcement, the Federal Communications Commission's authority and the powers of the White House Council on Environmental Quality, to cite just a few examples. Those experts also say the Trump administration might feel less encumbered by unspoken norms than past administrations.

"Twenty or 30 years ago … there might have been expectations of comity and continuity," Kirkland & Ellis

LLP partner George W. Hicks Jr. told Law360. "I think we're at the point now where it's just become accepted wisdom that the new administration is going to come in and boldly assert its new positions, and almost put the Supreme Court on the spot as to what it's going to do about it."

But the outgoing administration might not be making it any easier for its successor to pivot. Epstein Becker Green member Paul DeCamp observed, for instance, that after the U.S. Department of Labor recently lost a major Fair Labor Standards Act case, it started its appeal far sooner than necessary.

"The department wasted no time in getting that appeal on file, and I think that was probably, at least in part, to give the department the opportunity, under the current administration, to get their opening brief on file at the Fifth Circuit," DeCamp said. "[That] makes it … a little bit more awkward if the Department of Labor, several months from now, in the context of a reply brief or otherwise, tries to take a position that is directly at odds with what's in the opening brief."

Similarly, the Biden administration might see an advantage in swiftly settling certain suits. As one example, after a Maine federal judge in early November **ruled** that the U.S. Department of Defense's denial of coverage for transgender surgeries was unconstitutional, the DOD quickly told the court that "all remaining issues in this case … may be amenable to resolution via a settlement agreement."

The following month, the Republican-led U.S. House of Representatives stepped in to defend the ban, averring in a motion to intervene that the November ruling was "a foregone conclusion given DOJ's failure to substantively defend the statute" at issue, and that the "DOJ's lukewarm defense appears to have become a full-blown abandonment of its duty to defend the constitutionality of federal law in this case."

Another Blockbuster Year Looms for Administrative Law

Even if nothing new was happening at 1600 Pennsylvania Ave., appellate courts would be busy in 2025 with something new that's happening in administrative law: an entirely different method of assessing whether federal regulations comport with federal statutes.

Under the Supreme Court's mid-2024 holding in Loper Bright Enterprises v. Raimondo, judges must determine the "single, best meaning" of statutes, rather than deferring to agency interpretations of ambiguous laws. That holding overturned the 40-year-old Chevron doctrine, and even before Trump won the White House, fallout from Loper Bright was expected to dominate dockets in every circuit and practically every conceivable context.

Many cases will be straightforward scuffles over the wisest way to read a statute. But there will also be trickier tussles about nuanced issues, such as whether Congress delegated certain powers to an agency.

"That issue is going to come up in every circuit in which there's a fight over what the scope of an agency's rulemaking authority is," Kirkland & Ellis partner John C. O'Quinn told Law360. "The question is going to be, do they have delegated authority?"

O'Quinn, formerly a top DOJ official overseeing civil litigation, added that the issue will "take some time to percolate," and that "if the circuits either have a hard time applying Loper Bright or they come to different conclusions about what constitutes delegated authority, then it's inevitable that the Supreme Court will have to step in."

But all of that was expected regardless of what happened in the presidential election. With Trump heading

back to the Oval Office, the implications and uncertainty have been magnified considerably.

That's partly because Trump and his allies — such as Elon Musk and Vivek Ramaswamy, whom Trump tasked with leading a nongovernmental entity, the Department of Government Efficiency — are vowing to slash regulations galore and significantly shrink the government workforce. That mission will be a magnet for legal challenges, meaning that 2025 could rival 2024 when it comes to the most important years in history for administrative law.

"It is going to be so centrally focused on administrative law, unlike any other year," Hicks, of Kirkland & Ellis, told Law360. "And that's saying a lot, because there's been a lot of action in administrative law in the past several years. But ... now we have a new administration that is coming in with an almost explicitly stated desire to robustly challenge the administrative state."

'Revenge of Loper Bright' Awaits Trump Agency Moves

The end of Chevron deference is generally seen as a triumph for those who think of regulation as a four-letter word. But Chevron deference didn't just apply to regulations that constrained or dictated how businesses operate — it also gave conservative administrations more wiggle room to advance many initiatives, including industry-friendly policies.

As one example, the D.C. Circuit in 2019 upheld the Trump administration's rollback of U.S. Environmental Protection Agency rules opposed by the mining industry, saying that the relevant statute "is ambiguous and the EPA's interpretation is reasonable." On the flip side, in a decision that essentially used the post-Chevron approach, the D.C. Circuit in 2018 rejected the Trump administration's delay of EPA rules opposed by the chemical industry, writing that "the plain text of [a statute] limits EPA's authority to delay final rules."

Moreover, scholars have found empirical evidence that Republican administrations benefited from Chevron deference. In the Loper Bright case, for instance, one amicus brief — authored by Christopher J. Walker of the University of Michigan Law School and Kent Barnett of The Ohio State University's Moritz College of Law — analyzed a decade of circuit court opinions and found that "the most liberal panels agreed with conservative agency statutory interpretations only 24% of the time when they did not use Chevron deference but 51% when they did."

Hicks, who clerked on the Supreme Court for Chief Justice John G. Roberts Jr., told Law360 that attorneys in 2025 should be ready for "the revenge of Loper Bright," with "so-called liberal judges using Loper Bright to now strike down administrative actions by the new administration, [including] efforts to scale back the administrative state."

"The prevailing view of Loper Bright previously had been that it was a good decision for scaling back the administrative state. But I think that you're going to see it rebound a bit," the Kirkland & Ellis partner said.

Epstein Becker's DeCamp echoed that prediction, telling Law360 that "what's good for the goose is good for the gander" and that Loper Bright's directives should "apply equally to rules, regardless of who happens to be in power."

"The challenges to regulatory action … that the new administration takes will tend to have greater success than they might have before Loper Bright because of the absence of deference," DeCamp said. "I don't think that's an issue that skews in favor … of one party or another."

Amicus Brief Initiative Fueling Abundant Outcry

On the policymaking front, the Judicial Conference's Advisory Committee on Appellate Rules is expected to get an earful regarding its proposed procedures and transparency standards for amicus briefs in circuit courts. The blowback is expected to occur at a Feb. 14 hearing, and objections are already pouring in from industry groups and the federal bench.

At issue are draft amendments to Federal Rule of Appellate Procedure 29 that would obligate amici to divulge details about the financing of briefs and require amici to obtain leave of court before filing briefs. Proponents have fretted about amicus briefs bankrolled by unknown parties or deliberately filed in large quantities to create a misleading portrait of widespread support for certain views.

But a number of organizations and individuals started voicing protests even before the comment period, which began Aug. 15 and ends Feb. 17. Additional concerns have appeared in recent comment letters, such as a Dec. 2 letter from the Securities Industry and Financial Markets Association, which said it "strongly opposes" requiring leave of court instead of simply allowing briefs when all parties consent, as is standard.

The impetus for requiring court permission is to ensure briefs are "helpful," and SIFMA conceded that ensuring helpfulness would carry "some marginal benefit." But there are too many trade-offs, the group added, writing that "courts of appeal would be burdened by having to review many hundreds, perhaps thousands, of additional motions for leave annually."

Lawrence S. Ebner of the Atlantic Legal Foundation, a small-government advocacy group, shared similar sentiments with Law360, calling the leave proposal "a half-baked idea" that "would unnecessarily burden judges or court personnel" and add uncertainty that "may deter some organizations from investing the time in preparing an amicus brief."

Some commenters have also balked at expanded financial disclosures, such as identification of certain donors who gave more than $100 to help pay for a brief's preparation. In a Dec. 10 letter, the National Taxpayers Union Foundation and the People United for Privacy Foundation contended that the Rule 29 overhaul flouts the First Amendment because "the Judicial Conference has shown neither a weighty enough interest nor that the proposed amendments are tailored to that interest."

Judge Jones of the Fifth Circuit aired similar criticisms during the Federalist Society event in November, and she asserted that the true motivation of financial disclosure is to connect conservative legal groups with certain judges.

"They can dox them, they can harass them, they can say, 'Oh, that judge was at such-and-such meeting with those people, therefore, there's an air of impropriety,'" Judge Jones said at the Nov. 14 event. "I'm so sorry to say that the federal judiciary is allowing this to go through the rules-making process."

Fed. Circ. Showdown Augurs 'Widespread Impact' on Patent Cases

At the start of 2025, all eyes in the patent bar are on EcoFactor Inc. v. Google LLC, where the full Federal Circuit has agreed to examine expert testimony supporting $20 million in damages awarded to home-energy management company EcoFactor, which successfully alleged patent infringement by Google's Nest line of thermostats.

"It's significant in that the Federal Circuit rarely takes cases en banc — it hasn't taken a utility patent case en

banc in many years, and this is a case about damages, which is a significant and recurring issue in patent law," said O'Quinn of Kirkland & Ellis. "So that's obviously a very important case to watch."

The intense interest is illustrated by the abundance of amicus briefs: roughly 20 such briefs from academics, tech companies and corporate lobbying groups hit the docket soon after Google lodged its opening brief, and more are expected in early January, after EcoFactor files its main brief.

When the Federal Circuit granted en banc rehearing, it specified that it would scrutinize "the district court's adherence to Federal Rule of Evidence 702," which governs expert testimony, and the Daubert standard for the reliability and relevance of such testimony. Subsequently, the circuit struck a large portion of Google's opening brief that addressed other issues, "suggesting the court's laser focus on the issue it framed in its en banc order," McKool Smith principal Charles E. Fowler Jr. told Law360.

The issue is complex, but it boils down to disagreement over how damages should be calculated if product licenses include multiple patents and someone infringes a subset of patent claims. Whatever the Federal Circuit says about expert testimony in that context will probably reverberate across much of the patent litigation realm.

"The EcoFactor en banc decision could clarify the standards governing admissibility of expert testimony on patent damages — particularly as it concerns purportedly comparable licenses — and could therefore have a widespread impact on patent cases," Fowler said.

Oral arguments are set for March 13.

Banner Appellate Year Ahead for False Claims Act

Several pending appeals and Trump's second term could make 2025 transformative for the False Claims Act, which punishes fraudulent billing of government programs and can lead to five-figure penalties every time someone submits a bogus invoice, as well as triple damages.

One of the pending matters, Wisconsin Bell v. Heath, is awaiting a Supreme Court decision after arguments in November. It's focused on reimbursement requests in the FCC's E-Rate program, which provides discounts for telecommunications services, and whether those requests qualify as billing claims for FCA purposes.

FCA suits normally don't target programs like E-Rate, which is administered by a nonprofit, and if the justices say it's off-limits for FCA suits, they'll essentially preserve the status quo, Morrison & Foerster partner Adam L. Braverman told Law360. But if the justices affirm the Seventh Circuit's holding that E-Rate is fair game, it could open up a new FCA frontier.

"What's the impact on other quasi-governmental agencies, like Fannie Mae or Freddie Mac, or other entities that are set up [and] that are dealing with private money?" Braverman said of the likely questions in that scenario. "Why so many folks are watching this case, in particular, is the impact it may have on other quasi-governmental entities."

Another major FCA case, U.S. v. Regeneron Pharmaceuticals Inc., is awaiting a First Circuit decision after arguments in July. It's about FCA cases premised on kickback allegations — one of the most productive FCA theories in recent years, generating billions of dollars in settlements and judgments — and whether cases must show that billing claims wouldn't have been submitted "but for" kickbacks.

If the First Circuit declines to require "but-for causation," it would align itself with the Third Circuit and widen a split with the Sixth and Eighth circuits, likely upping the chances of Supreme Court review. But if it does require that high standard of evidence, the odds of Supreme Court review might decline, given that no appellate court has agreed with the Third Circuit's holding in 2018.

"There does seem to be a trend in the direction of the but-for causation standard here, and if the First Circuit follows that trend, I do think there is a decent argument to be made … that review of the First Circuit's decision is not necessary, because the circuit split is fairly lopsided, and the other side of that circuit split is an older opinion," Ropes & Gray LLP partner Amy D. Kossak told Law360.

Yet another big FCA case, Zafirov v. Florida Medical Associates, recently arrived at the Eleventh Circuit after U.S. District Judge Kathryn Kimball Mizelle — a Trump nominee who clerked for Justice Clarence Thomas — issued a bombshell decision that said whistleblower-led FCA cases are unconstitutional. In one demonstration of the appeal's prominence, Kannon K. Shanmugam, appellate chair at Paul Weiss Rifkind Wharton & Garrison LLP, on Dec. 20 took over as lead counsel for medical companies that will try to persuade the Eleventh Circuit to affirm Judge Mizelle's holding.

Briefing at the Eleventh Circuit will begin in January, and regardless of how the circuit ultimately rules, the issue may wind up at the Supreme Court, where Justices Thomas, Brett Kavanaugh and Amy Coney Barrett have already questioned the constitutionality of FCA whistleblower cases. In the nearer term, it remains to be seen whether the Trump administration will continue the DOJ's defense of the whistleblower provisions. That's an open question because the first Trump administration declined to defend some federal laws, presided over decreasing FCA recoveries and ruffled feathers in the plaintiffs bar with certain actions, including a campaign to torpedo disfavored whistleblower suits.

"I would typically say that it would be really unusual for the Justice Department to … take a new position that a federal statute is unconstitutional," Morrison Foerster's McGrath said. "Of course, we are in really unusual times, right? And so, I don't know that I would find it completely shocking for DOJ to take that position."

--Additional reporting by Dani Kass and Hannah Albarazi. Editing by Bruce Goldman.
