

## Appellate Group Of The Year: Jenner & Block

By **Amanda James**

*Law360 (January 15, 2019, 11:19 AM EST)* -- Jenner & Block's 22-person appellate team won a case that could radically change how people watch sporting events and successfully argued a case at the U.S. Supreme Court that will affect anyone who pays taxes, earning the firm a spot among Law360's 2018 Appellate Groups of the Year.

According to Ian Gershengorn, chair of Jenner & Block's appellate practice group, it's hard to pick the biggest achievement the firm had last year, but the FanDuel case stands out because of its implications for sports and because of the questions it raises.

The lawsuit was brought by a group of college athletes who said they should be paid for the use of their information in fantasy sports contests, which are based on the performance of the athletes. But DraftKings and FanDuel said their use of athlete names, images and game statistics is the same as having that information reported in newspapers.

The Seventh Circuit sent the issue to the Indiana Supreme Court, asking it whether such uses fall within a "newsworthy" exception to the state's publicity rights law, which, as in many other states, gives individuals the right to limit the use of their names and likenesses for commercial purposes. The Indiana high court held in October that the exception does apply.

Gershengorn argued the case and said it raised interesting questions about what should be protected by the First Amendment. The case has broader implications for all athletes as fantasy sports — and now sports betting in the wake of the Supreme Court's *Murphy v. NCAA* decision in May 2018 — become more prevalent.

"Maybe now there will be betting at sporting venues when you watch a game," Gershengorn said.

Over the last year, attorneys at the firm argued four cases in the U.S. Supreme Court. In one of the cases, *Marinello v. United States*, a client challenged a decision upholding his felony conviction for obstruction of the tax code. According to Gershengorn, the government had taken a very broad view of what it would mean to obstruct administration of the tax code, such as not keeping records, or paying in cash.



Matthew Hellman, practice co-chair, argued the case on behalf of his client Carlo Marinello who had been found guilty of not keeping financial records, paying employees in cash and using business money personally. He achieved a narrow reading of the statute, according to Gershengorn.

“It’s important to anyone who pays taxes to have a clear, rational interpretation of the tax code and we thought the government was taking an untenably broad interpretation of the tax code,” Hellman said. The court grappled with questions like, “Is paying a gardener in cash an obstruction of justice?” If the answer is yes, that could make someone a felon.

Hellman argued that the obstruction statute should apply only when the defendant specifically intends to obstruct a known government proceeding, like an audit or investigation. The court ruled in favor of Hellman's client in a 7-2 vote decided in March.

The practice group also obtained a win in the U.S. Supreme Court case *Class v. U.S.*, argued by practice co-chair Jessica Ring Amunson on behalf of her client Rodney Class. She convinced the judges to side with a criminal defendant who wanted to challenge the constitutionality of the statute under which he was convicted.

The case brought up questions about what the implications are for someone who has pled guilty. Amunson persuaded the justices to rule that criminal defendants can challenge the constitutionality of laws they already pled guilty to breaking if they didn't explicitly waive the right to do so.

“Class’ acquiescence neither expressly nor implicitly waived his right to appeal his constitutional claims,” Justice Stephen Breyer wrote in the opinion released in February.

In 2018, Jenner & Block also argued a case that will have implications for the telecommunications industry. The case, *Charter Advanced Services v. Lange* was argued by Gershengorn in the Eighth Circuit. The case raised the question of whether Charter's Voice Over Internet Protocol service should be classified as an information service, which would make it exempt from all state regulation.

“It was a very important win,” partner Adam Unikowsky said, and as a result, the regulation of voice services will now be controlled by the FCC.

--Additional reporting by Zachary Zagger and Bill Wichert. Editing by Alyssa Miller.