

Four Cases. Three Arguments. Two Circuits. One Week.

Theane Evangelis of Gibson, Dunn & Crutcher discusses what it was like handling three oral arguments in four cases for gig economy clients on back-to-back days in two separate circuit courts last month.

By Ross Todd
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When you're a go-to lawyer for gig economy companies—where the law is relatively unsettled and the legal challenges come in waves—the appellate arguments can stack up. That was definitely the case last month for **Theane Evangelis** of **Gibson, Dunn & Crutcher**, who faced a gauntlet of arguments for three gig economy companies—Uber Technologies Inc., Postmates Inc., and Grubhub Inc.—held on back-to-back days in the First Circuit and Third Circuit last month.

While there were technically four appeals, two were in cases involving Uber that were consolidated for argument in Philadelphia at the Third Circuit. The next morning Evangelis handled back-to-back virtual arguments for Postmates and Grubhub at the First Circuit.

These sorts of rapid-fire transitions seem to be a job hazard for top-flight appellate advocates these days. As we've previously noted, Kannon Shanmugam, the chair of the Supreme Court and appellate practice group at Paul, Weiss, Rifkind, Wharton & Garrison, in March shuttled 1,100 miles between the Eighth Circuit in St. Paul, Minnesota, and the Second Circuit in Manhattan on back-to-back days for arguments. He then set up shop at the Second Circuit in September for three arguments in one week.

Although I labeled such stretches a "job hazard" above, I get the feeling the appellate advocates themselves consider them a gas. Evangelis, for



Theane Evangelis, partner with Gibson, Dunn & Crutcher. October 27, 2021.

Photo: Diego M. Radzinski/ALM

her part, said last month's stretch of arguments was "incredibly fun."

"I had more fun that week than I have in a long time," she said.

When the arguments initially were scheduled, Evangelis said she was concerned about how she would get from the Third Circuit in Philadelphia on Nov. 8, up to the First Circuit in Boston for arguments the next day without risking travel delays. But then, without any prompting from the parties, the First Circuit opted to handle arguments in the Postmates and Grubhub cases by videoconference.

That move prompted another quandary for Evangelis: Fly back to her home in Los Angeles to handle the First Circuit arguments or stay put in

her hotel room in Philly? “I decided with the transaction costs and the risks of trying to fly back to L.A. and doing the argument at 6 a.m. the next day after I landed at midnight, that would probably not be the best idea,” she said.

Evangelis actually flew into Philadelphia two days before her Third Circuit argument to make time for a tech run-through with the First Circuit staff to test her remote set-up. “I did not want to be arriving on a cross-country flight the night before or even the day before, so I came in two days before,” she said. “I think that was a good call. I got to get settled in and get ready and test everything out.”

The morning of the remote argument, she took the phone in her hotel room off the hook an hour before the argument and informed the staff at the front desk not to call during that time. “Fortunately it worked and the ‘Do Not Disturb’ sign on my door was a success,” Evangelis said.

But beyond the logistics, Evangelis said that her preparation began in earnest about a month before the arguments. All three appeals centered on whether gig economy workers are “engaged in interstate commerce” in such a way that would invoke the Federal Arbitration Act’s exemption for transportation workers—an issue where she’d already scored wins for gig companies at the Ninth Circuit and the Massachusetts Supreme Judicial Court routing workers’ claims to arbitration.

Evangelis said that she approaches argument as if she’s prepping for a final exam, something she picked up from partners **Ted Olson** and **Ted Boutsos**. She said that she breaks the case down into outlines and one-page modules dedicated to individual issues. “I’ve got in my head, ‘If this particular issue comes up, these are all the points I want to make,’” she said. She said that her outlines start long and get shorter. “I never go to the podium with outlines longer than five pages,” she said. “If I can get it down to two pages that are facing me, then I know I’ve really done my job.”

She travels with clear-cover spiral-bound binders—not hard-sided black ones—to make sure all

her materials fit in her carry-on. “I use the same font and the margins are a certain way,” she said. “It’s funny. You get into a mode where when you look at the paper and it just fits better in your brain when it looks a certain way.”

Evangelis said that her argument preparation both begins and ends with reading the briefs. She reads them one last time either the morning of an argument or the night before. “That’s where the judges start and that’s usually where they end,” she said. “And so I want to be in their mind frame when I get up.”

And though she’s the person arguing at the podium, she said that preparation is a team effort, especially when it comes to moot arguments. In the run-up to last month’s three arguments, she did moot arguments the week before on back-to-back days mirroring the sequence she would face during the actual arguments. She also faced questions from the same moot panel in the Postmates and Grubhub cases, just as she would argue both cases to the same panel at the First Circuit. She said that in all cases she tends to lean on lawyers who haven’t worked on the case. They can come to the issues with fresh eyes as judges and clerks would.

“Sometimes you come up with a perfect opening on the fly in the moot court, and then you’ve just got to write it down and remember it the day of,” she said. “That’s where I find I get my best material.”

In the wake of last month’s arguments, Evangelis has already racked up two wins, with the First Circuit siding with her clients in both the Postmates and Grubhub cases. As of this writing, the Uber cases remained pending at the Third Circuit.

Evangelis had already done a certain level of celebrating back home in L.A. even before the decisions landed. “One thing I look forward to after an argument is over is getting my fill of sushi and oysters as well as a really good glass of wine,” she said. Although she loves raw seafood and shellfish, she abstains for a week or two in the lead-up to arguments. “You never know when that oyster will really set you back,” she said.