

## Once Overlooked, State SGs Enjoying Time In The Sun

By **Jimmy Hoover**

*Law360, Washington (April 14, 2017, 9:58 AM EDT)* -- Perhaps more than ever before, state solicitors general offices enjoy a position of prestige in the nation's appellate community, the result of a decadeslong effort to transform the practices from provincial legal backwaters to top-flight appellate shops staffed with former Supreme Court clerks, former BigLaw attorneys and future federal judges.

Gone is the U.S. Solicitor General's office's monopoly on government appellate expertise, with a reported 39 states now boasting their own dedicated SG positions to boost the quality of advocacy in the Supreme Court and federal and state courts of appeal, a development that is enticing some of the nation's top appellate talent with the chance to enter the ring in high-stakes cases.

Michael A. Scodro, Illinois' former solicitor general, said in an interview with Law360 that states were mostly overlooked by the appellate community when he was a Supreme Court clerk still mulling his career options in 1998.

"It seemed to me that at that point, in most states, my guess is there would not have been a huge amount of attention and prestige draped on their state solicitor general," said Scodro, now a partner in Mayer Brown's Chicago office with an appellate practice.

"I think states had a mixed record in terms of the quality of the reputation in appearing before the court," he said.

Now, in response to a state SG vacancy, state attorneys general will receive a flood of applications from blue-chip appellate lawyers from not only in-state candidates, but experienced practitioners in the appellate epicenter of Washington, D.C., Scodro said.

"It has really become an extremely high-profile position, prestigious position and one that opens doors going forward," he said, explaining that appellate groups now seek out former state SGs "because of the breadth of their exposure" to state, federal and Supreme Court advocacy.

Alumni of the state solicitor position include well-known legal figures such as Sen. Ted Cruz, R-Texas, and Sixth Circuit Judge Jeffrey Sutton.

Recent headline-grabbing lawsuits from various Democratic states against the Trump administration have only fueled the stature of the state SG position. In February, thousands of people tuned into the livestreamed audio of oral arguments in a Ninth Circuit case involving the state of Washington's

challenge to President Donald Trump's original ban on travelers from seven predominantly Muslim countries. State Solicitor General Noah Purcell, once a clerk to former U.S. Supreme Court Justice David Souter, fielded various questions from the appeals court during the contentious hourlong hearing.

"I can't help but assume that this really is adding to the prominence of these offices to candidates who are thinking of what to do with their careers as appellate lawyers," Scodro said. "It has to further increase their prestige, and increase the applicant pool for these spots."

The state SG position has existed in the U.S. for more than a century. New York established the position by statute as early as 1909 and state solicitors general from Michigan, Tennessee and Minnesota began appearing in court decisions later in the 20th century, according to a widely cited 2001 article by former Missouri Solicitor General James R. Layton in the *Journal of Appellate Practice and Process*.

But the position has proliferated over the last two decades, going from what Layton reported was eight offices in 1987 to a reported 39 offices today, plus those of the District of Columbia, Puerto Rico and the Virgin Islands. Several of those offices, including Arkansas, Georgia, Massachusetts, have sprung up only in the last few years.

As was the case with private firms, states recognized the strategic advantages of a model like that of the U.S. SG's office, a division within the U.S. Department of Justice specifically tasked with representing the federal government before the Supreme Court.

Not only did the federal government enjoy greater success in those appeals, but some justices even chafed at the quality of state advocacy. A former clerk for the late Associate Justice William Brennan, an Eisenhower appointee who died in 1990, recalls the liberal jurist railing against the lawyering of outside-the-beltway state counsel unfamiliar with the high court's rules and practices while inside his chambers.

"He really didn't like it when state AGs argued cases in the court, because they generally didn't have time to prepare," said Timothy S. Bishop, another appellate partner at Mayer Brown.

Indeed, the *New York Times* reported in a July 1983 article that cities and states were "outlawyered, outmaneuvered and, in about two cases out of three, on the losing side" at the Supreme Court, falling far behind not only the U.S. SG's office, but also private litigants and advocacy groups such as the American Civil Liberties Union.

Perhaps in response to the unflattering press coverage, then-Chief Justice Warren E. Burger remarked that October at a Georgetown University conference on Supreme Court advocacy that states and local governments "have not provided experienced and qualified personnel" to argue before the justices, instead picking counsel who "fail to appreciate fully the crucial importance of well-organized and carefully researched briefs."

Organizations like the National Association of Attorneys General contributed enormously to the expansion of state SG programs. Another former Illinois solicitor general, Joel D. Bertocchi, recalls that Dan Schweitzer, NAAG's Supreme Court director, was dogged in trying to improve the quality of state appellate advocacy in the late 1990s and early 2000s, scouring the Supreme Court docket for state-related appeals, sending encouraging emails and even editing briefs. Schweitzer also created a Supreme Court fellowship for state SG staffers to learn ply their trade in the nation's capitol for months at a time, and handed out awards to the states for excellence in appellate briefing.

“He just tried to encourage all the states to think of the Supreme Court as somewhere where they belonged,” said Bertocchi, now a partner at the firm Hinshaw & Culbertson LLP. “And he was very good at it.”

Reached by Law360, Schweitzer downplayed his role in the trend.

“I think state solicitors general offices recognized, as much of the rest of the bar recognized, that appellate practice is both very important and distinct skill from both trial work or being agency counsel,” Schweitzer said. “Although many trial lawyers are very capable appellate lawyers, it’s not always the case.”

The justices themselves, however, are less shy about those reasons.

"I think that the representation of cities and states has gotten much better as a result of the organizations formed to help them with their brief-writing," Associate Justice Ruth B. Ginsburg said at the 2010 Burton Awards, according to a LexisNexis transcript. "The quality of those briefs I think today is better than it was before those organizations started up and began assisting the state attorneys general and the corporation counsel of the cities."

--Editing by Rebecca Flanagan.