

Q&A with Zack Tripp & Robert B. Niles-Weed

Zack Tripp is Co-Head of Weil's Appeals and Strategic Counseling practice, and **Robert Niles-Weed** is a recently promoted partner in Weil's Complex Commercial Litigation and Appeals and Strategic Counseling practices. Zack and Robert work together on a wide range of appellate cases and other significant litigations. They spoke with Benchmark editor **Michael Rafalowich** on a variety of topics relating to their cases and practices, as well as mentoring and team building.

You both have a dedication to the practice of appeals, while both also having some experience beyond this area. What are some of the aspects that distinguish this practice from the others? Could you cite any examples that stand out?

Zack: In appeals, you can't argue the facts—but you can establish legal precedent that delivers an outsized impact for your client, the industry, and even society as a whole. So the perspective is very different, and you need to take a step back and think about what legal rule you are advocating and how it would impact future cases. A good example of this is a pro bono religious liberty matter that we have been handling for several years. We are trying to obtain money damages for our client, a devout Rastafarian, whose rights were egregiously violated when state prison officials strapped him down and forcibly shaved off his dreadlocks. We are currently asking the Supreme Court to take the case to hold that state prisoners can obtain money damages in religious liberty cases like this, just like federal prisoners can. That rule would benefit our client directly, but it also would have wide-ranging impact on religious liberty in state prisons, far beyond our client. Indeed, fifteen judges on the Fifth Circuit called for Supreme Court review, and numerous religious groups and leading scholars have filed amicus briefs supporting the cert petition, precisely because of that broader impact.

Robert: Beyond litigating in appellate courts, appellate practice also involves bringing a particular skillset and orientation to litigation at every level and every stage. Appellate lawyers are experts in strategizing and presenting legal issues, whether it is at oral argument in the court of appeals or Supreme Court, in briefing to a trial court, or to a client evaluating potential legal risk in connection with a significant business decision or settlement discussion. At Weil, we have developed a toolkit for embedding appellate attorneys as part of trial teams early, long before any appellate proceedings, to develop and strengthen our legal arguments throughout the case and set the groundwork for any necessary eventual appeals. One recent example was working alongside Mark Perry, the Co-Head of our Appeals & Strategic Counseling



practice, to achieve a rare pre verdict “walk-off” victory for Comcast in a \$150 million patent infringement case before the trial court (which we are now defending on appeal). In another case, I worked with Drew Tulumello, a Co-Head of our Complex Commercial Litigation group, and Claire Chapla, to convince the trial court to vacate a \$228 million dollar jury verdict against our client BNSF in the first-ever case to go to trial under the Illinois Biometric Information Privacy Act. We achieved both of these significant victories by deploying appellate capabilities at the trial level.

How do you collaborate with the trial team and other outside counsel to prepare cases for successful appeals?

Robert: This will sound like a soundbite, but it is true: Weil has a real “one-firm” mentality. It means that no matter the practice or the geography or the seniority, everybody is working as a team to deliver the best results for our clients. This is especially true for our appellate practice, where, as noted above, we work alongside trial counsel and subject-matter experts every single day. As an associate, I worked with a wide range of attorneys from different offices and with different specialties, and we learned how to collaborate seamlessly and leverage the diverse skillsets of our whole team. That's something I've carried forward now as a partner. This collaborative orientation extends beyond the Firm too,

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as we are often partnering with other outside counsel and working as “one-firm” even across multiple firms. For example, I was part of the team representing Microsoft in the FTC and consumer challenges to its \$68.7 billion acquisition of Activision Blizzard, along with another partner in our group, Adam Banks, and a number of lawyers in our Antitrust practice. Through strategic emergency briefings and robust cross-firm collaboration, we successfully closed the merger ahead of the “drop dead” date and are now defending our victory before the Ninth Circuit.

Could you describe the appellate practice at Weil overall and what about it is attractive to you?

Zack: I came to Weil to help build out its appellate practice, and in particular to use appellate litigation not as a niche, but as a means to strengthen Weil’s litigation offerings across the board. It has been a real joy to help make that happen, and our growth has been remarkable. As Robert said, a key differentiator is our integration throughout the Firm, including not only litigation but also restructuring and a wide variety of other matters. The value of appellate work is not limited to appeals themselves. Ultimately, however, the best part of being here is the people. I’m so lucky to have amazing colleagues like Robert.

Tell me about some of your more salient successes at Weil.

Zack: One of my most significant recent achievements was securing a unanimous victory in the Supreme Court in *Barthenwerfer v. Buckley*. This case involved a nearly 15-year battle to recover losses from a fraudulent real estate transaction. The central issue was whether a debtor could discharge liability for money obtained through the actual fraud of their agent under Section 523(a) of the Bankruptcy Code, even if the debtor did not personally commit the fraud but benefited from it. The Court, led by Justice Barrett, endorsed our arguments, ruling that such debts are non-dischargeable and that the Bankruptcy Code cannot shield those who profit from fraud. The result is an important ruling that provides powerful protection to victims of fraud, including our client.

Another significant victory was in a Fourth Circuit case involving NBA star Zion Williamson. During his freshman year at Duke, Williamson was lured into signing a marketing contract with an agent who flagrantly violated the Uniform Athlete Agents Act when recruiting him. When Williamson realized what had happened, he backed out and nullified the contract on the ground that it was illegal. The agent sued him, however, for \$100 million in damages. Working as part of a great team, Robert and I helped to successfully defend Williamson in the district court and then also in the Fourth Circuit. Notably, the Fourth Circuit ruling in our favor was the first in the country interpreting the Uniform Athlete Agents Act, a uniform law, and it established an important precedent protecting student-athletes from predatory practices by sports agents.

Robert: In addition to the cases Zack just mentioned, both of which I had the great joy and privilege to work with him on, I have had a number of other successes. One set of wins that stands out are the several cases where I’ve gotten to partner with our iconic restructuring practice to win major appeals coming out of some of the most significant bankruptcies in recent history, including Lehman Brothers, Sears, and Westinghouse. The Westinghouse appeal in the Third Circuit was the first appeal I argued at the Firm—over Zoom at the height of the pandemic—and involved an important and complex issue of bankruptcy claims administration.

I am also proud of a number of significant constitutional law cases I have litigated and won during my time at Weil. Along with Zack and Greg Silbert, one of the Co-Heads of our Appeals and Strategic Counseling and Complex Commercial Litigation group, I led the landmark First Amendment case, *Upsolve v. James*, which expanded access to justice by allowing non-lawyers to offer free legal advice to underserved communities. This case, recognized as a major victory for low-income individuals, has attracted considerable media and scholarly attention, including from *The New York Times*.

What are some notable lessons you learned from previous roles, such as positions within the Solicitor General’s office and Supreme Court clerkships?

Zack: Clerking for Justice Ginsburg and then later working in the Solicitor General’s Office were both life-changing experiences. I apply lessons learned every day. One lesson from Justice Ginsburg is to always remember that every case, no matter how big and abstract-sounding, is ultimately about real people. Keeping sight of the impact on people’s lives helps to keep your work grounded and concrete, and ultimately makes your arguments more persuasive. And a lesson learned from the Solicitor General’s Office is the importance of addressing weaknesses and vulnerabilities in your argument head on, in the briefing, long before the oral argument. If you wait until the time of the oral argument to address the part of the case you would rather not talk about, then it is too late. So I always try to think forward to what an oral argument would be like, what the hardest questions will be, and then work backwards from that to make sure we answer the key questions up front.

Robert: In his recent memoir, *Vision*, Judge David Tatel (who I had the great fortune to clerk for on the D.C. Circuit) described his experience of blindness as a lawyer and judge in words that stick with me: “I can’t see, but I can listen closely.” This discipline of close listening is something I learned from Judge Tatel, and also from Justice Kagan on the Supreme Court, who I also had the privilege to clerk for. I saw this in action at oral argument, when Justice Kagan or Judge Tatel would respond in the moment to a comment by counsel or a colleague with a perfectly timed and pitched intervention—this is the power of close listening and its impact was palpable. As lawyers, we can sometimes be quick to speak; but it is only through listening closely that we can learn what really matters to a client or a colleague or a judge.

I noticed that your respective appeals practices seem to intersect with other practices that Weil has been particularly notable for, such as bankruptcy, IP and anti-trust. Has this enhanced your overall skill sets?

Robert: Definitely. By its nature, an appeals practice will tackle diverse cases impacting a wide variety of legal issues, and any practitioner worth their rate is going to have to build up skills in a number of different areas of law. We are fortunate that at Weil, we have a strong knowledge base with a number of market leading practices, not just in bankruptcy, IP and antitrust, but also other areas such as securities, product liability and class actions. Speaking for myself, having exposure to the practices of the numerous experts at Weil has been invaluable in my growth as an appellate lawyer, and has provided me with a well rounded perspective and the ability to adapt and apply legal principles across disciplines. But this only works if you have a collaborative culture and team mentality like we do here at Weil. Platform strength and integration is an extremely important driver of our appellate business model.

What do you view as the future of the appellate practice in Big Law, particularly for someone of Robert's vintage? Do you observe other firms cultivating this dedication to this area? Any particularly notable ones?

Zack: Our sense is that the path to the greatest success for an appellate practice in Big Law is by integrating the offering throughout the Firm. Appeals can come from a wide variety of sources, but more importantly, appellate-like problems are not limited to the appellate courts. Clients face the same kinds of problems in many other contexts, like in dispositive motions, and appellate practitioners can add enormous value for clients by bringing their skills to bear in those other contexts.

Robert: I completely agree. So much of my most impactful work has been outside of the appeals process – serving on trial teams, developing overall litigation strategy, corporate counseling. The skills appellate lawyers bring to the table can add value at every stage and I'm very much of the view that the best place to win an appeal is in the trial court (or, sometimes, by avoiding litigation entirely). That's a large reason why we rebranded our group as "Appeals and Strategic Counseling," to best capture the full range of what we can offer our clients, in addition to more traditional appellate work.

Are there any other appellate specialists you would like to take the opportunity to cite as extraordinary stand-outs, within Weil and also externally?

Zack: As I said earlier, the best part of Weil is the people. We have a remarkable bench of talent, including standouts like Robert and Claire, who was already mentioned. And anybody who sees Adam Banks in action will immediately see that he is an extraordinary lawyer.

Robert: In addition to all of the great folks we've already mentioned, I feel extremely lucky to get to work with and learn from our global Litigation Department Co-Chairs here at Weil—David Lender, Jonathan Polkes, and Liz Weiswasser—who are all great lawyers and leaders. They are driving the integrated and client-focused culture that makes Weil such a special place to be right now and makes what we do possible. Looking beyond the Firm, I'm excited to be part of an emerging generation of appellate lawyers who are working to make our practice more diverse, inclusive, and representative of the clients and communities we serve.