

Appellate Litigator Soars In Male-Dominated Field

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Woman Chairs MoFo's Appeals Practice,
Formerly Clerked for Justice Blackmun

By David F. Pike

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WASHINGTON — A glance around Beth S. Brinkmann's spacious office provides some clues about why she is among the very elite group of women who practice regularly before the U.S. Supreme Court.

On the walls and bookshelves are photos of Brinkmann with Justice Harry A. Blackmun, for whom she clerked in the court's 1986-87 term. And there is a photo of Brinkmann with her colleagues at the U.S. solicitor general's office, where she worked from 1993 to 2001 and regularly appeared before the high court representing the federal government.

Brinkmann, who oversees the appellate and Supreme Court practice in the nation's capital for San Francisco-based Morrison & Foerster, acknowledges that those two experiences, among others, have helped her rise to the top of the male-dominated world of appellate litigators.

"It's probably true that credentials matter more for women," said Brinkmann, 45. "It's made it easier for me."

"When you've clerked at the Supreme Court and argued 18 cases before the Supreme Court in the solicitor general's office, that makes you a known quantity. As more women get into those paths, there will be more women appellate litigators."

As it stands now, Brinkmann and Maureen E. Mahoney of the Washington, D.C., office of Los Angeles' Latham & Watkins are the only women who practice regularly before the high court.

"There is no one else in private practice who might be considered a regular member of the Supreme Court bar," said Mahoney, who has argued 14 high-court cases and chairs Latham's appellate and Supreme Court practice. Like Brinkmann, Mahoney's resume includes the solicitor general's office

and a high-court clerkship, with then-Justice William H. Rehnquist.

"Beth certainly has an excellent reputation," said Mahoney, who has never worked on a case with Brinkmann.

Brinkmann attributes her success to her credentials and being at a firm where "being a woman is not an issue."

"[Morrison & Foerster] is a great firm as far as support for women is concerned," she added.

The firm has long been considered one of the best places for women to work and succeed to the leadership ranks: Four women sit on Morrison & Foerster's board of directors — Michelle Corash, Kathryn Johnstone, Penelope Prevolos and Linda Shostak. Women serve as managing partners of the firm's two largest offices, in San Francisco and New York City, and two of the three firmwide managing partners for operations are women, as are three practice chairs.

Among Brinkmann's high-court wins was an amicus brief for VISA U.S.A. in *Verizon Communications Inc. v. Law Office of Curtis Trinko*, 134 S.Ct. 872 (Jan. 13, 2004). The case limited antitrust liability under the Telecommunications Act of 1996.

Stephen Theoharis, senior vice president and assistant general counsel at VISA U.S.A. in San Francisco, said that Brinkmann's brief led to the high court taking the rare antitrust case and then issuing a positive decision.

"She listened to a client's complaints for an hour and distilled out the issue that the court was most likely to seize upon," Theoharis said. "It was an outstanding experience."

Brinkmann also worked on an amicus brief filed last term by the American Bar Association on behalf of John Geddes Lawrence and Tyron Garner, who were arrested and prosecuted for engaging in homosexual sex under the Texas law forbidding same-sex sodomy.

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CHARLES VOTAW / For the Daily Journal

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Brinkmann's "superb" effort helped get the brief through the ABA's complex internal screening process, said Mark Agrast, who at the time was chair of the ABA's individual rights and responsibilities section and senior vice president and is director of domestic policy for the Center for American Progress, a new Washington, D.C., think tank. The brief was one of many filed in the landmark case, in which the justices struck down laws banning homosexual sex.

Drew S. Days III, who has observed Brinkmann since he was her teacher at Yale Law School — she graduated in 1985 — and was her boss as U.S. solicitor general from 1993 to 1996, said, "Beth is very smart, has tons of energy and brings a passion to her work."

"She writes well and is a wonderful oral advocate," added Days, who started Morrison & Foerster's Supreme Court and appellate practice section in 1997 and now is of-counsel at the firm while continuing to teach at Yale. "And Beth never seems to lose her cool."

Days recruited Brinkmann for the firm, saying, "I take full credit for that."

Brinkmann brought an unusually wide range of experience to her current job. The Toledo, Ohio, native who attended high school in Tustin said she decided to be a lawyer while majoring in political science at the University of California, Berkeley.

"I came to D.C. on an intern program at the Justice Department and knew I wanted to be a lawyer," Brinkmann said.

Like many appellate litigators, Brinkmann said she enjoyed "the wonderful intellectual rigor" in law school.

After graduation, Brinkmann clerked in 1985-86 for Judge Phyllis A. Kravitch of the 11th U.S. Circuit Court of Appeals in Savannah, Ga., the third woman

appointed to a federal Court of Appeals.

"Clerking is one of the best things an aspiring attorney can do," Brinkmann said. "It's a real learning experience, and the 11th Circuit has a wide-ranging docket."

Working for a female appellate judge was "particularly meaningful," she added, though she also applied to clerk with two male judges on the circuit.

Brinkmann then clerked for Blackmun, who regularly hired female clerks.

That clerkship "was an amazing intellectual and professional experience," Brinkmann said.

In addition, she got to know the justice beyond the usual work contacts at the breakfasts he convened daily in the Supreme Court cafeteria with current and former clerks.

"I only wish I'd known more about baseball," Brinkmann quipped, referring to Blackmun's love for the game that sometimes found its way into his opinions.

Most young lawyers use the clout of a high-court clerkship to hook up with a major law firm or a prestigious law school. But Brinkmann decided to return to San Francisco to practice with Turner & Brorby, a now-defunct three-partner litigation firm that did a lot of public interest work. That move showed Brinkmann litigation in the trenches.

"I did everything — trial and appellate work, federal and state, and civil, criminal and constitutional law," Brinkmann said.

"It was good to have the trial experience — not many appellate litigators do these days — because it gives you a perspective of reality," she added.

After four years at Turner & Brorby, Brinkmann decided to move back to

Washington, D.C., to get even more trial experience with the city's Federal Public Defender Service.

Among the lawyers Brinkmann came to know during her two years in the job was Seth P. Waxman, then a litigator with Miller, Cassidy, Larroca & Lewin.

"We were both doing post-conviction death penalty cases and belonged to a brown-bag lunch group," Waxman recalled.

When Waxman became U.S. solicitor general in 1997, he learned that Brinkmann was in the office. "I thought that was really great, fantastic," he recalled.

"Her criminal experience in the public defender service — her experience on the other side — was really an asset to the other assistants in the office," said Waxman, who now heads the Supreme Court and appellate practice at Washington, D.C.'s Wilmer, Cutler & Pickering.

Since he re-entered private practice in 2001, Waxman has worked with Brinkmann on two amicus briefs, and they have appeared together on moot courts.

"Beth is multitalented," Waxman said. "She knows how to try cases and is familiar with the litigation practice from the ground up. That's very valuable because you really can't talk to appellate courts without that experience."

"She's also a really wonderful human being. She was a uniter rather than a divider at the Justice Department."

Brinkmann was hired into the solicitor general's office in 1993 by Days, her old law professor.

The move was a natural, Brinkmann said, because "I had been veering more toward appellate cases."

Her eight-year tenure was every-

thing Brinkmann had hoped it would be.

"Next to clerking, it is the chance of a lifetime," Brinkmann said.

"One of the great things about the job is the variety," she added.

Brinkmann's 18 arguments included several immigration cases, Title IX gender discrimination cases and others dealing with the Employee Retirement Income Security Act and Native American law.

In discussing the cases, Brinkmann repeatedly used the phrases "a really good experience" and "a real challenge."

One of the greatest challenges was "representing the entire government," she said. "You have to have nuanced arguments; you have to be concerned about how this case might affect other cases coming along."

Brinkmann made her first high-court argument on March 2, 1994, in a case dealing with taxes on sales of cigarettes by Native American tribes. *New York Department of Taxation v. Milhem Altea & Brothers*, 512 U.S. 61 (1994).

In addition to the stress that comes with a first argument, Brinkmann faced a special pressure that most lawyers don't experience, she recalled in a 2003 law review article.

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"I was keenly aware that Justice Blackmun would be on the bench that morning," Brinkmann wrote. While "I was so proud that he would see me argue before the Court ... I also felt an added pressure because I had to make sure that my argument did not disappoint him."

The argument was special in another way, Brinkmann said in the article.

"When I approached the Court for my first appearance as an advocate before it," she wrote, "I could not help but feel a sense of satisfaction (as I had when I was hired as a law clerk there) knowing that I was joining the ranks of women who had righted an historical wrong."

Brinkmann's goal during the argument was to convince the justices not to reach the "troubling" issues in the case regarding Native American sovereignty, she added. "Although the Court did

not affirm the judgment as we had urged, we felt some measure of victory in avoiding a broader proclamation by the Court that would have curtailed tribal self-government or federal authority over Indian affairs."

Another case that stands out for Brinkmann is *Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000). The justices broadened the parties who can be sued by private parties under the Employee Retirement Income Security Act. Harris Trust brought the case as the fiduciary for the Ameritech Pension Trust over failed motel investments by Salomon.

Brinkmann argued the case for the government as an amicus for Harris Trust, which was represented by Robert A. Long of Washington, D.C.'s Covington & Burling.

"It was a difficult case because there was troubling dicta in a precedent dealing with the common law of trusts," Brinkmann said. "But we won 9-0—the vote count was surprising."

Long, the coordinator of Covington & Burling's appellate and Supreme Court practice, called Brinkmann "one of my favorite lawyers."

"She's obviously very smart and hardworking, and on top of that, she has excellent judgment and a good practical sense of what will work in particular circumstances," said Long, who was a Yale classmate and clerked for Justice Lewis F. Powell at the same time Brinkmann clerked for Blackmun. "That's a pretty good combination."

Brinkmann said she decided to leave the solicitor general's office two years ago after her longer-than-average tenure there because it was "time for a change, for a different type of experience."

"It was very difficult to leave—I wondered if I ever would get the chance to argue another Supreme Court case," she added. "But Drew asked me to come to MoFo, and I didn't even look at other firms."

"I was familiar with the firm's high quality of work in the Bay Area and already was a member of the San Francisco bar. And there were several Yale connections here in D.C. and in San Francisco. It was a really good fit."

Morrison & Foerster has 1,000 lawyers in 19 offices around the world, including 100 in its Washington, D.C., metro area offices. Eight of the firm's offices are in California, including those in Los Angeles, Sacramento and San Diego.

Both Brinkmann and the firm are clearly happy with the move.

Brinkmann was hired as of-counsel to the firm but was made a partner at the beginning of this year.

"Beth is doing extremely well," Days said. "Everyone in the firm is pleased with her."

Days had been working alone, recruiting other firm lawyers to work on appellate and Supreme Court cases.

"There were logistical problems because I spend most of my time at Yale," he said.

In 2002, Brinkmann brought on Seth M. Galanter, who had argued about 40 appellate cases for the Justice Department and had worked with the solicitor general's office.

The practice section now has six lawyers in Washington, D.C., and is looking to expand.

"But our practice is not structured," Brinkmann said. "Most of our attorneys do trial and appellate work, and we will team up with a lawyer [who has expertise in a certain subject matter area] for a particular case."

"That's easy in the Internet age. We work with people in Los Angeles and San Francisco as easily as with those who are here in D.C."

"We have a lot of appellate litigation on the West Coast, and we work with Shirley M. Hufstедler [in Los Angeles] on some of that."

Hufstедler, a former 9th Circuit judge who joined MoFo in the mid-1990s with her husband, Seth H. Hufstедler, has argued three cases before the Supreme Court.

As at other firms, the practice section gets its cases both from regular firm clients and from those "who come directly to us," Brinkmann said.

One of the latter cases provided Brinkmann in 2002 with another chance to argue before the justices.

Brinkmann represented a young man from Washington state who was denied a teaching certificate after his college dean informed state officials that a female undergraduate had alleged he engaged in sexual misconduct. The man sued the school for damages under the nondisclosure provisions of the Family Educational Rights and Privacy Act of 1974 and won more than \$1.1 million in damages.

The Washington Supreme Court upheld the verdict, but the justices reversed, 7-2, in *Gonzaga University v. Doe*, 536 U.S. 273 (2002). They held that the federal law did not confer a private right of action to redress violations.

Brinkmann enjoyed the argument but not the result, although she pointed out that two justices concurred only in the judgment. She also said that the experience was special because the client and his parents came to watch the argument.

"The positive experience of the case was having an individual client with a narrow interest," rather than representing a federal agency, Brinkmann said. "It's one of the things I like in private practice."

Brinkmann also does "a fair amount of consulting about federal regulatory

matters or Justice Department procedures."

"I learned about that in the solicitor general's office, and it's a value-added part for the client," she said.

"I also get calls from other attorneys in the firm about filing petitions for cert," Brinkmann said. "Sometimes they need a second look, and that's very efficient client-wise."

Although Morrison & Foerster was a late entrant to the fierce competition in Washington, D.C., for Supreme Court work — several Chicago-based firms began their practices in the mid-1980s and some Washington, D.C., firms in the early 1990s — Brinkmann is optimistic about the future.

"We've filed 18 briefs in two years from the D.C. office," she said. "And while there is competition for those cases coming in directly, we also work with all the other firms in some capacity or another," including amicus briefs.

Brinkmann's hectic schedule leaves her little free time.

Asked about her hobbies, she replied: "I spend a lot of time with my family."

Brinkmann, who lives in the suburban community of Takoma, Md., is married to Steve Cook, a journalist who writes about energy and the environment for the Bureau of National Affairs.

They have a young daughter, Eleanor.

Brinkmann said she is "very busy and looking forward to working on cases next term, and the results from the cases this term."

She is working on an amicus brief for the American Psychiatric Association that supports a Missouri death row inmate who is asking the justices to bar capital punishment for murderers who were younger than 18 when they committed their crime. *Roper v. Simmons*, 03-633.

Brinkmann also is awaiting the decision in *Household Credit Services Inc. v. Flynn*, 02-857, in which she filed an amicus brief for the American Bankers Association, the American Financial Services Association, VISA U.S.A. and others. The brief urges the justices to overturn a lower court decision that broadened the definition in the Truth in Lending Act of a "finance charge."

The Feb. 23 argument in the case "went very well," Brinkmann said. "We're optimistic the court will rule our way."