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Navigating an 11-Judge Pile-Up: Orrick Associates Talk Shop About En Banc Ninth Circuit Arguments

By Ross Todd

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In the heady world of appellate, an en banc argument at the Ninth Circuit is about as close as you're ever going to get to a demolition derby.

With 11 appellate judges—all more accustomed to the paces and rhythms of sitting on three-judge panels—competing to get their questions in, the lawyers at the podium have to have their heads on a swivel. The advocates are often tasked with answering multiple overlapping questions at once. Just keeping the judges' names straight seems daunting, much less putting forward your best argument under those circumstances.

Over the past six months, **Katherine Munyan** and **Alyssa Barnard-Yanni**, two senior associates at **Orrick, Herrington & Sutcliffe**, both navigated the 11-judge pile-up of Ninth Circuit en banc arguments. *Litigation Daily* sat down with them last week to talk about how the argument opportunities came their way, what they did to prepare for them and their general impressions of the experience.



Courtesy photos

Orrick, Herrington & Sutcliffe senior associates Alyssa Barnard-Yanni, left, and Katie Munyan, right.

First, a little background: Munyan's argument came in an immigration case heard en banc in September. She argued the appeal of an in-absentia removal order facing client Claudia Elena Montejo-Gonzalez and her children after two major, highway-closing accidents caused them to miss their initial court hearing in Seattle. In that case, a majority of the en banc court held last week that the immigration judge and Board of Immigration Appeals abused their discretion by finding traffic categorically cannot constitute

“exceptional circumstance” under the applicable statute. The court remanded the case to consider the “totality of the circumstances.”

Barnard-Yanni, meanwhile, handled arguments last month in *USA v. \$1,106,775 in United States Currency*, a civil forfeiture case where Oak Porcelli is challenging Drug Enforcement Agency officers’ seizure of cash from his car following a traffic stop. That appeal remains pending.

When I spoke with the two of them, I opened the conversation by sharing one of the kindest things a coworker ever did for me. In one of my first days on the litigation beat in San Francisco, before en banc Ninth Circuit arguments in Barry Bonds’ criminal case, my former colleague Scott Graham drew up a seating chart laying out which judge would be located where on the two tiers of benches in the courthouse’s big courtroom. Trying to figure out who everybody was on the fly would have made the already difficult task of covering an 11-judge argument impossible.

“It is hard to conceptualize exactly how many judges it is until you see them filing in. That’s when it really hits home.” said Munyan, who was handling her first oral argument ever in the *Montejo-Gonzalez* case.

Munyan said that Orrick was brought into the case by a sole practitioner immigration attorney who had gotten a win before a three-judge Ninth Circuit panel and asked the firm to help out after the court took the case up en banc and ordered expedited briefing. She said that she and her colleagues **Nicole Ries Fox** and **Danny Rubens** got the case on a Monday and had their first supplemental brief due that Friday.

“It was an incredibly swift time period to get up to speed on the issues and make sure we were really putting our best foot forward for what

the court was going to consider at the en banc stage,” she said.

Barnard-Yanni had a similar time crunch in her case, compounded by the fact that she learned that she would be handling the Jan. 14 en banc argument on the day before Christmas Eve. “I will say, as someone with young children, whose children were on winter break for much of that time, it was logistically challenging,” said Barnard-Yanni, whose sons were four and almost two at the time she was preparing.

“It’s the holidays. You’re visiting family. You want to spend quality time with your kids, and then you’re trying to cram all of this prep in, around all of this family time,” she said. “So, there were a lot of late nights and a lot of early mornings.”

Barnard-Yanni said that, being a relative newcomer to the case, she spent considerable time just thinking about the conceptual framework and less about specific answers to particular questions—an approach she has taken in prior cases where she had more time to prepare. “A lot of it was really just thinking—me sitting, thinking about how this all works, and making sense of it in my brain,” she said. She said that the hope was that by sitting and grappling with the issues in the case and developing her own approach to unraveling them, “that would resonate with the judges too, as similarly newcomers to the case.”

Munyan said that she had the benefit of a little bit more preparation time than her colleague, having worked through the issues through two rounds of supplemental brief. “Just being able to get my head around it really fast and figure out what the key questions were at that stage and how we wanted to approach them was the first stage of preparation for me,” Munyan said.

She was preparing for arguments in August while daycare for her own son, now two-and-a-half, was closed for vacation. Both Munyan and Barnard-Yanni expressed gratitude for husbands and in-laws ferrying kids around and helping keep them occupied during argument preparations.

But both also said they were thankful for colleagues at Orrick—both those who helped prepare them for argument and those who helped pick up the slack on some of their other matters to allow them to focus. “A great thing about our group is that we have people who’ve clerked for all kinds of different judges,” said Munyan, who did two formal moot arguments, each with three colleagues acting as judges. “So, they’ve seen all kinds of different judges—styles of questioning, attitudes towards questioning, the way they approach legal questions. And they did a great job of preparing me to encounter some skepticism, encounter really tough questioning and keep going.”

Munyan added that going through the en banc argument made her appreciate the experience she picked up clerking. Both she and Barnard-Yanni clerked for federal judges in the Southern District of New York, for the late Second Circuit Judge Robert Katzmann, and at the U.S. Supreme Court—Barnard-Yassi for

Justice Ruth Bader Ginsburg and Munyan for Justice Sonia Sotomayor.

“It was my first time at a podium with an audience, but it certainly wasn’t my first time having tough conversation with a judge about a legal question, who’s really pushing me on the outer limits of a doctrine,” Munyan said. “So even though it was that first in-court experience, those clerkship experiences of having dozens and hundreds of conversations with judges around these difficult legal issues really offered me good preparation.”

Barnard-Yanni said that her preparation for the en banc argument was very similar, with the added benefit that she could talk to Munyan about her own experience. She ended up doing three moots. Due to scheduling issues, the last of those three moots featured a handful of colleagues filling the judges’ roles, instead of the typical three. “I really, really appreciated that, because there’s really an exponential increase in the chaos of the argument the more people that you add,” she said. “I’ve done state court appellate arguments with five judges, but I had not done 11 judges,” she said. “It really is a whole other can of worms.”

“Having done it, it just feels like you can handle anything,” she said.