

## Penelope E. Nicholson

### Partner

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### Practice Areas

Appellate  
Trial

### Education

University of Texas School of Law, J.D.,  
1980, cum laude; Order of the Coif; *Texas  
Law Review*

Yale University, B.A., 1977, summa cum  
laude; Phi Beta Kappa

### Admissions

State Bar of Texas

U.S. Supreme Court

U.S. Court of Appeals for the Third, Fifth,  
and Tenth Circuits

U.S. District Court for the Southern District  
of Texas



### OVERVIEW

Penny's practice focuses on matters relating to appeals in civil cases, including issues that arise at the trial court level (such as matters relating to jury instructions, jury questions, and dispositive motions) and mandamus actions and amicus briefs. She has handled and participated in the appeal of numerous cases in various federal and state courts, including appellate proceedings in the U.S. Courts of Appeals for the Third, Fifth, and Tenth Circuits, and in the U.S. Supreme Court as well as in the Supreme Court of Texas, in intermediate Texas appellate courts, and in various other state appellate courts. As reflected in the following list of representative matters, the appellate matters that Penny has handled and participated in have included cases involving significant legal issues and many millions of dollars in damages. Penny has been board certified in the area of Civil Appellate Law by the Texas Board of Legal Specialization since 1990.

Before joining Schiffer Hicks Johnson as a partner, Penny was a partner at the law firm of Vinson & Elkins and practiced law there for 30 years. She participated in the founding of the Vinson & Elkins Appellate section in 1990. Prior to 1990, Penny's practice focused on commercial litigation, including first and second chair trial experience, taking depositions, and handling various other discovery and pretrial matters.

### NOTABLE EXPERIENCE

#### The Supreme Court of Texas

- Won reversal and rendition of a bad faith judgment against an insurance company; the court established the legal rule that an insurer does not owe an insured a duty of good faith while a case is pending on appeal.
- Won reversal of a multimillion-dollar judgment against two individuals and two closely held corporations in a commercial dispute involving a business venture; the court held that a ratification theory could not be used to circumvent Texas alter ego law.
- Won reversal of a so-called "agreed judgment" of \$2 million against a restaurant based on a personal injury claim; the restaurant had withdrawn its consent to a settlement after learning that the plaintiff, who had testified that she was confined to a wheelchair, could in fact walk without assistance. The case involved important legal principles concerning the rendition of judgment.
- Won reversal of a \$30 million judgment based on a breach of warranty claim; the case involved novel questions of Uniform Commercial Code (UCC) law that were certified to the

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Minnesota Supreme Court.

- Won reversal of a court of appeals decision holding that a trial court cannot set aside an order granting a new trial; the Supreme Court of Texas held that, during the time that a trial court has plenary jurisdiction, the trial court has the power to set aside a prior order granting a new trial.
- Won, in the Supreme Court of Texas and then on remand to the San Antonio Court of Appeals, reversal of a multimillion-dollar default judgment entered against a defendant as a death penalty sanction.
- Obtained mandamus relief requiring the dismissal of a lawsuit involving a car accident that occurred in Mexico brought by a Texas next friend on forum non conveniens grounds; the case resolved important issues relating to the construction of the Texas forum non conveniens statute.

### **Federal and State Courts of Appeals and District Courts**

- Led a successful appeal on behalf of a wheelchair user who was injured while boarding a major airline's craft in Houston, Texas, as a result of negligence on the part of the airline and its contractor. Through briefing and oral argument, Penny convinced the Fifth Circuit to affirm the district court's judgment in its entirety. (Read media coverage [here](#).)
- Obtained, in the U.S. District Court for the Northern District of Texas, reduction of a judgment in a commercial dispute from \$50 million to \$10 million and then won, in the U.S. Court of Appeals for the Fifth Circuit, reversal and rendition of the remaining \$10 million judgment. The case involved important legal principles relating to application of the judicial estoppel doctrine in the bankruptcy context.
- Won, in the U.S. Court of Appeals for the Fifth Circuit, affirmance of a summary judgment granted against the plaintiff in an offshore personal injury case involving a personnel basket transfer.
- Won, in the Dallas Court of Appeals, reversal and rendition of a \$15 million judgment in an asbestos case involving significant duty issues. The trial court's judgment was reversed on the ground that the defendant did not owe the plaintiff a duty with respect to second-hand asbestos exposure from asbestos fibers allegedly brought home on the clothes of the plaintiff's former husband.
- Won, in the Corpus Christi Court of Appeals, reversal of a multimillion-dollar judgment against a national magazine publishing company in a dispute between the company and one of its licensees, and then won, again in the Corpus Christi Court of Appeals, affirmance of the judgment rendered in favor of the magazine publishing company following retrial.
- Won, in the Beaumont Court of Appeals, reversal of a \$100 million judgment against a worldwide engineering, procurement, and construction management company; won reversal and rendition of a \$70 million judgment entered against one of the company's engineers in a commercial dispute involving claims of tortious interference and defamation.
- Won, in the Beaumont Court of Appeals, reversal and rendition of a \$79 million judgment in an oil and gas case involving a dispute over minerals and claims of fraud and breach of the duty of good faith.
- Won, in the First Court of Appeals in Houston, affirmance of a take-nothing judgment entered against a plaintiff in a wrongful death action seeking millions of dollars in damages based upon the alleged defective design of a life jacket.
- Won, in the Fort Worth Court of Appeals, a writ of mandamus against a trial court that had ordered an airline to produce materials that the airline considered to be trade secrets.

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- Won, in the Fourteenth Court of Appeals in Houston, affirmance of a summary judgment in a contract dispute as to the major claims in the case; the plaintiff promptly non-suited the one remaining claim on remand.

### **Other Matters**

- Handled the preparation of jury instructions and questions as well as the preparation of objections to jury instructions and questions in numerous cases (including mass tort litigation) in various courts.
- Handled numerous motions for summary judgment and other dispositive motions in various courts.

### **RECOGNITIONS**

- Martindale Hubbell AV Rated
- Texas Super Lawyer in Appellate Law, Thomson Reuters' *Super Lawyers*®
- Ranked in Appellate Law, *Best Lawyers in America*®
- Board certified in Civil Appellate Law by the Texas Board of Legal Specialization

### **PUBLICATIONS AND SPEAKING ENGAGEMENTS**

- Authored and presented "Appellate Practice in Texas State Courts," University of Houston Advanced Civil Litigation (1993-1997, 1999)
- Speaker for various teaching seminars sponsored by the State Bar of Texas, the University of Houston, South Texas College of Law, and the Louisiana Attorney General's Office

### **AFFILIATIONS**

- Texas State Bar Oversight Committee on Pattern Jury Charges (2007-2013)