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Q&A With Mayer Brown's Dan Himmelfarb

Law360, New York (May 14, 2013, 4:40 PM ET) -- Dan Himmelfarb is a partner in Mayer Brown LLP's Washington, D.C., office and a member of the firm's U.S. Supreme Court and appellate practice. He has presented 35 appellate arguments in a variety of civil and criminal cases, including 11 in the Supreme Court. Before joining Mayer Brown, Himmelfarb served as a law clerk to Judge J. Michael Luttig of the Fourth Circuit, a law clerk to Justice Clarence Thomas of the Supreme Court, an Assistant U.S. Attorney in the Southern District of New York, and an assistant to the solicitor general.

Q: What is the most challenging case you have worked on and what made it challenging?

A: I've worked on a number of challenging cases in private practice, but probably the most challenging case for me was one I worked on in the government: United States v. Booker, which decided the constitutionality of the federal sentencing guidelines. The Supreme Court had held that a similar state sentencing regime was unconstitutional in a case called Blakely v. Washington, which immediately caused chaos in the federal system and prompted the court to grant certiorari in Booker only six weeks later to decide whether Blakely applied to federal sentencing.

Booker was challenging for a number of reasons: because of its importance (the case affected every federal criminal prosecution in which there was a plea or verdict of guilty); because of its difficulty (Blakely was sufficiently hard to distinguish that we felt constrained to argue in the alternative that it should be overruled only a couple of months after its issuance); because of the compressed time frame for litigating the case (only three months elapsed between the decision in Blakely and the completion of merits briefing in Booker); and because of the generally chaotic atmosphere in the lower courts during this period (it seemed like another district court or court of appeals issued a decision on whether Blakely applied to the federal sentencing guidelines every day).

Booker turned out to be a loss for the government, but not a total loss: while a 5-4 majority held that the guidelines were unconstitutional, a different 5-4 majority held that the guidelines should be treated as advisory (rather than mandatory) and that sentences imposed under them should be reviewed for "reasonableness." For better or for worse, we are still living under this regime.

Q: What aspects of your practice area are in need of reform and why?

A: To the extent that "reform" suggests something structural or otherwise fundamental, I don't think there is a pressing need for any. By and large, appellate litigation works pretty well in the United States, at least in the federal system.

I would make one modest proposal, however, relating to oral argument. In some circuits, the default argument time allotted to each side is 10 minutes. Those circuits could do a better job of screening cases that require more than 10 minutes per side, and they could be more willing to deviate from the default allotment. In the past few years, I have had two arguments in the Second Circuit and one in the Seventh that involved complex issues and yet the parties were given only 10 minutes per side to argue. Predictably, 10 minutes was not enough time in any of the cases for the argument to be particularly helpful to either the parties or the court — at least in my view.

Federal court of appeals judges are extremely busy — especially in the circuits I've mentioned — but it's hard to believe that they're so busy that they're unable to give 15 rather than 10 minutes of argument time to the parties in a greater number of cases. Five minutes may not seem terribly significant, but it can make a big difference in an oral argument in a complex case, especially when one considers that counsel for the appellant or petitioner will have to reserve two or three minutes for rebuttal.

Q: What is an important issue or case relevant to your practice area and why?

A: In the past few terms, the Supreme Court has decided an unusually large number of cases involving either arbitration or class actions. In fact, it has decided cases involving both arbitration and class actions, such as Stolt-Nielsen in 2010 and Concepcion, a case that my firm handled, in 2011. And the court is poised to decide two more such cases this term — Oxford Health Plans, a follow-on to Stolt-Nielsen, and American Express, a follow-on to Concepcion.

These cases and the issues they present — when an arbitration agreement may be interpreted to permit class arbitration, and when an arbitration agreement that precludes class adjudication is enforceable — are important for obvious reasons: businesses favor bilateral arbitration because it reduces transaction costs for them and their customers and employees; plaintiffs' lawyers resist it because it reduces their prospects for high fee awards.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Jeff Lamken of MoloLamken. Jeff clerked for Justice O'Connor when I clerked for Justice Thomas and was universally regarded as one of the smartest clerks at the court. Jeff also worked in the solicitor general's office when I worked there and was universally regarded as one of the smartest lawyers in the office. At the same time, Jeff has none of the arrogance or self-importance that unfortunately is characteristic of some members of our profession — including many who are far less talented than Jeff. His combination of brilliance and decency is so impressive in part because it is so rare.

Q: What is a mistake you made early in your career and what did you learn from it?

A: When I was a young lawyer, I often wasn't terribly receptive to suggested edits to briefs. On both style and substance, I almost always liked what I had written better than what was being suggested to replace it. I learned a long time ago that this is not a good way to cultivate productive relationships with colleagues, who might justifiably wonder why they had spent hours reviewing and commenting on a draft brief if their comments were going to be rejected. I also learned that, if a colleague had a negative reaction to something I had written, there was a good chance that a judge or a law clerk — who would likely have about the same level of familiarity with the case — would have the same reaction, and that it could therefore increase the likelihood of success in the appeal to make the change.

Today my general policy is to incorporate colleagues' suggested changes unless there's a good reason not to (subject of course to the need for some editing of the edits), and also to explain why I'm not incorporating a particular change whenever possible. I have found that this approach improves both the quality of my relationships with other lawyers and — more often than not — the quality of my briefs.

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