When Lightning Strikes Twice: Big Law Associate to Argue at SCOTUS

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By Kimberly Robinson

Shapiro v. Mack, 83 U.S.L.W. 3888, 2015 BL 179498, U.S., No. 14-990, granted6/8/15

Main Takeaway: Mayer Brown associate Michael Kimberly will join the ranks of an exclusive group when he argues in front of the U.S. Supreme Court next term.

Background: Only four big law associates argued in front of the justices this term, including Kimberly's Mayer Brown colleague Paul Hughes.

June 10 (BNA) -- Getting your case heard by the U.S. Supreme Court is like a "lightning strike," Mayer Brown's Evan Tager of Washington told Bloomberg BNA.

An even rarer occurrence: having a big law associate argue the case in front of the high court.

That is what's set to happen next term when the justices consider Shapiro v. Mack, 83 U.S.L.W. 3888, 2015 BL 179498, U.S., No. 14-990, granted6/8/15, a procedural challenge to the way courts handle voter redistricting suits, which frequently stir controversy.

Despite Mayer Brown's impressive bench of partners experienced in Supreme Court practice, senior associate Michael Kimberly will represent Mayer Brown's client when the Supreme Court hears Shapiro v. Mack next term.

It's a feat accomplished by only four big law associates this term, including Kimberly's Mayer Brown colleague Paul Hughes, according to research by Bloomberg BNA.

The Next Generation

Kimberly will be the sixth Mayer Brown associate to argue before the high court, Tager said in a June 9 interview.

It takes some unselfishness on the part of partners, but it's "part of our culture" to get those kinds of opportunities for our associates, he said.

He acknowledged that there were benefits for the associates themselves-helping them to become more "complete lawyers." But he said the effort is client-focused too.

Many sophisticated clients have really embraced the idea of an associate arguing their case, Tager said.

It helps develop the "next generation" of lawyers, and ensures continuity of service, he said. They can be sure that as older attorneys move on, another capable attorney will be able to step into their shoes.

Swim or Swim?

But Tager said the firm won't just put up any associate to argue in front of the justices.

You can't afford to put someone up there who isn't up for the job, he said. It's not the time to find out if someone can "sink or swim."

You have to find an associate with a good deal of confidence, Tager said.

But you get a good sense about whether they are up to the task by the way they discuss the issues and write the brief, he said.

If they really "hit the nail on the head," you have greater confidence that they are ready for "prime time."

Digging for the Issue

Tager said that's what happened with Kimberly and the Shapiro v. Mack case.

An old friend of Tager's-who had been representing himself pro se-brought the case to the firm. Tager asked Kimberly to take a look at it, and, according to Tager, Kimberly did a great job of identifying the "cert-worthy" issue.

Kimberly, who is based in Washington, told Bloomberg BNA that it took a little digging to get there.

That's because the case is somewhat unusual in that the Fourth Circuit's decision below is just a summary affirmance, Kimberly said.

Typically when the Supreme Court agrees to hear a case, there is a long, well-reasoned appellate opinion for the Supreme Court to review, he explained.

But that's not what happened here, Kimberly said. He had to comb through the record to discover the issue that the justices ultimately agreed to hear.

That question is whether a single-judge district court can refuse to convene a three-judge panel-required under the Three-Judge Court Act, 28 U.S.C. §2284, for certain cases like redistricting challenges-because the judge determines that the complaint fails to state a claim under Federal Rule of Civil Procedure 12(b)(6).

The petition for review argued that a three-judge panel is required unless the claim is "obviously frivolous," "essentially fictitious" or "inescapably foreclosed," under the Supreme Court precedent in Goosby v. Osser, 409 U.S. 512 (1973).

Kimberly said it's an important procedural issue that has divided the federal circuit courts. The Fourth Circuit is the only circuit to hold that a single judge alone can dismiss a case under Rule 12(b)(6).

But other circuits-like the Fifth, Seventh and D.C. circuits-have suggested that a three-judge panel can only be bypassed if the claim is "wholly insubstantial," Kimberly said. That's "a much lower bar than the 12(b)(6) standard."

Hitting Pause

The standard the Supreme Court finally lands on will have huge practical implications, Kimberly said.

It's vital that redistricting challenges get decided quickly, he said. If a case waits several years to even be referred to a three-judge panel, you have elections going on that are based on maps alleged to violate the constitutional rights of voters.

Here, Kimberly said that even if the Supreme Court agrees with him, the court will likely send the case back to the district court for a determination on the merits. In the meantime, there's no pause button for elections.

Varied Diet

Nevertheless, Kimberly said he hopes the justices provide some guidance on the merits of the dispute, which centers on Maryland's most recent redistricting efforts.

The case involves a political gerrymandering challenge, which Kimberly said generally is hard to litigate.

Sometimes it's easy for the court to look at a redistricting map and say, "Something is wrong here." But it's harder for the court to develop judicially manageable standards for fixing the problem, Kimberly said.

He's excited about the prospect of using the First Amendment as a manageable "measuring stick." According to Kimberly's petition for review, the question becomes whether the redistricting map unequally burdens a particular political group such that it chills associational activities protected by the First Amendment.

Kimberly says he doesn't know whether the justices will even get to that issue, but he'll have a long time to

consider that possibility. Kimberly said it's likely that the court won't hear the case until December.

In the meantime, he said there is no other work he would rather spend his time on than Supreme Court work.

One of the major benefits is the diverse subject matter, Kimberly said, adding that he's worked on cases involving environmental issues, judicial ethics, criminal law, and now redistricting.

It's a pretty "varied diet," he said, and "I'll take as much of it as I can get."

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