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Attorneys

Split Ticket: One Firm on Both Sides of Gerrymandering Wars

Mayer Brown's Michael Kimberly was surprised to see his colleague's name on a similar redistricting case as he was preparing to take his own redistricting dispute to the U.S. Supreme Court in 2015.

Kimberly was seeking review of a procedural issue in his Supreme Court gerrymandering case—an issue he ultimately prevailed on.

Meanwhile, Michele Odorizzi—Kimberly's Mayer Brown colleague—was preparing to take her partisan gerrymandering case to trial, alleging that Wisconsin Republicans considered politics too much when drawing voting districts for state elections.

She would eventually find herself at the Supreme Court, too. This time the issue wasn't a procedural one, but rather a potential blockbuster that could dramatically change the way states draw their districts for federal and state elections.

These partisan gerrymandering cases are notable on their own given their consequences for future elections. But, the cases stand out for other reasons, too: Their clients, both represented pro bono by the firm, are political opposites.

Both Sides of Fight The cases found their way to Odorizzi and Kimberly in very different ways.

Odorizzi's came to her through previous work she'd done on behalf of Republicans in Illinois. While seeking to get through a redistricting ballot initiative, she worked with some of the lawyers who would later represent Democrats in their redistricting fight in Wisconsin. Odorizzi told Bloomberg BNA she was honored when those attorneys asked her to work on the Wisconsin case, too.

Kimberly, however, got his case through an old friend of another Mayer Brown partner. That friend had been representing himself in the lower federal courts when he brought the case to Mayer Brown, Kimberly told Bloomberg BNA in 2015. Kimberly took the case from there, ending up with his first Supreme Court victory when he was still an associate.

Kimberly continues to represent Republicans in that case at the trial level.

Given the explicitly political nature of redistricting disputes, it could have been a problem for these Mayer Brown attorneys to wade in on both sides of this issue.

But that wasn't the case, both Odorizzi and Kimberly said.

The firm was entirely supportive, and found it beneficial that Odorizzi herself had worked on the issue for both Democrats and Republicans.

Packing & Cracking Both cases involve partisan gerrymandering, an issue that has confounded the Supreme Court for decades. *Gill v. Whitford* is Odorizzi's case; *Benisek v. Lamone*, formerly known as *Shapiro v. McManus*, is Kimberly's.

Although incorporating partisan considerations in redistricting is nearly as old as our country itself, the justices have said too much partisanship could run afoul of the Constitution, Odorizzi said.

Such gerrymandering is most often done by either "packing" members of the same party into one district so that they all cast their votes in favor of just one candidate, or "cracking" those party members into several districts so that they can't form a majority in any district.

The problem is that the Supreme Court hasn't come up with a reliable way to determine when political considerations cross the line into excessive, Odorizzi said.

Fox Guarding Hen House The time is right to do something about partisan gerrymandering, Odorizzi said.

There was an upsurge in partisan gerrymandering following the 2010 census, she said.

"In fact, the plans in effect today are the most extreme gerrymanders in modern history," a 2015 law review article by University of Chicago Law School professor Nicholas Stephanopoulos and Public Policy Institute of California's Eric McGhee said.

One third of the most partisan gerrymandered districts since the 1970s were drawn in 2012 alone, the article said.

Allowing legislatures to draw districts is like putting the fox in charge of the hen house, Kimberly said.

Voters are supposed to choose their representatives, not the other way around, he said. But that's exactly what's happening now in many places.

Extreme Candidates Both Odorizzi and Kimberly attribute the sharp political divide between Republicans and Democrats to the uptick in partisan gerrymandering.

In districts where the cards are stacked against one party, the real election takes place in the opposing party's primary, Kimberly said.

But only about ten percent of the voting population actually votes in those primaries, and those are often

the most outspoken and extreme members of either party, he said.

Taken together, that means that the candidate chosen in the primary and, typically, elected to the post will likely tend toward the party's most extreme views, Kimberly said.

Not Partisan Issue Even though partisan gerrymandering has partisan consequences, though, it's not a partisan issue, Odorizzi and Kimberly said.

The Wisconsin Democrats Odorizzi represents are challenging a Republican-led redistricting effort.

By making it harder for Democrats to elect their candidates of choice, Wisconsin Republicans were able to win a supermajority of state house seats even though they lost the statewide vote, according to Supreme Court filings.

Kimberly, on the other hand, represents Maryland Republicans seeking to strike down Democratic-drawn districts.

Then-governor Martin O'Malley freely admitted that he viewed his role in the redistricting process as the leader of the state's Democratic party and, therefore, set out to stack the deck against Republican voters, Kimberly said.

Ideological Lines The issue has traditionally divided the court along ideological lines, despite Kimberly and Odorizzi's claim that partisan gerrymandering is a non-partisan issue.

Still, that division has more to do with how the justices view the court's role in the political process, Kimberly said. The Roberts Court especially has been sensitive to wading into politically charged issues, he said.

Conservative justices tend to want the Supreme Court to stay out of gerrymandering suits in order to let the political branches work out the kinks, Odorizzi said. Liberal justices, on the other hand, are more comfortable with the Supreme Court stepping in to enforce constitutional lines.

But the justices' votes will not come down to whether they identify as Republicans or Democrats, Odorizzi said.

Punching Back Still, reining in partisan gerrymandering now will tend to hurt Republicans more than Democrats, Odorizzi said.

Partisan gerrymandering was a deliberate strategy for Republicans following the 2010 census, she said. Therefore, more maps favoring Republicans are at risk if the Supreme Court decides to police partisan gerrymandering now.

But Democrats hope to adopt a similar strategy. In particular, top Democrats led by former-President Barack Obama are preparing to fight back in the partisan gerrymandering wars.

They've set up the National Democratic Redistricting Committee, headed by former Attorney General Eric Holder, in an effort to regain some footing in state houses before the next redistricting cycle in 2020.

Wasted Votes But Odorizzi and Kimberly hope to curtail partisan gerrymandering before then. To do so, they're attacking the problem from two different angles.

Odorizzi, whose case will be heard by the Supreme Court next term, challenges the entire redistricting map for Wisconsin, under both the First Amendment and the equal protection clause.

The essence of the argument is that the statewide map, as a whole, is dramatically imbalanced, Kimberly said. The challengers seek a state-wide map that translates Democratic votes into Democratic districts, and the same for Republicans.

To do so, the challengers attempt to measure the number of "wasted votes"—that is, the number of votes spent voting for the losing candidate or the excess votes beyond what's needed to elect the winning candidate. A higher number of wasted votes means it was harder for that party to translate votes into an election victory.

Kimberly, whose case is now back in the district court after the Supreme Court revived the case on procedural grounds, takes a more individualized approach to partisan gerrymandering.

The district-by-district challenges in his case are based on the First Amendment right to free association. If a voter was moved in or out of a district solely because of how they voted in previous elections, that runs afoul of the First Amendment, the challengers argue.

Those claims, however, must be brought "district by district," rather than on a statewide basis, Kimberly said. If a Republican voter in a Democratically gerrymandered district has that right impinged simply because he or she associated with Republicans, it's no answer that a Republican voter in another district wasn't similarly disadvantaged, he explained.

Associates Roll Up Sleeves The cases haven't just been a boon to Odorizzi and Kimberly, though.

Mayer Brown associates are also getting substantive experience while working on this potentially groundbreaking topic, Kimberly said.

Associates have been "critical" to his case, in which Mayer Brown attorneys have spent already around 4,000 attorney hours, he said. That's a lot of hands-on experience for interested associates.

"Associates have taken 12 depositions and defended 11. Only one deposition—the deposition of former Governor Martin O'Malley—was taken by a partner," Kimberly explained. One associate "took his first deposition in this case," he noted.

These associates have also been a part of developing the overall litigation strategy, and "have played critical roles in helping research and draft each" of the more than a dozen major briefs in the case, Kimberly said.

Not only has the associates' involvement in the case "been essential to our success," it has also provided "an unmatched opportunity for them to gain hands-on litigation experience."

BY KIMBERLY STRAWBRIDGE ROBINSON

To contact the reporter on this story: Kimberly Strawbridge Robinson in Washington at krubinson@bna.com

To contact the editor responsible for this story: Jessie Kokrda Kamens at jkamens@bna.com