The Age of the Expert Advocate

T o be sure, the modern Supreme Court bar pales in many respects in comparison to the bar’s heyday in the early 19th century, when a handful of expert advocates dominated. Today, one is not going to see the likes of Daniel Webster, who argued with such passion that he would literally bring tears to the eyes of the justices. Nor will one witness an attorney today arguing, like William Pinkney, with amber-colored doesskin gloves on, or, like Luther Martin, intoxicated, and wearing soiled, old-fashioned clothes.

The Supreme Court bar is nonetheless dominating the cases before the Court to an extent not seen since the days of Webster, Pinkney, and Martin. In 1980, putting aside the petitions filed by the Solicitor General’s Office, fewer than six percent of the successful petitions had been filed before the Court. By contrast, during Term 2007, more than 50 percent of the petitions filed by the Solicitor General’s Office, environmental advocates tended to be environmental lawyers rather than Supreme Court experts. The same lawyer who handled the case below would write the petition seeking the High Court’s review, or write the brief in opposition trying to persuade the Court to deny review. That has changed, and so has now the Court’s docket.

Three of the environmental law cases to be heard by the Court during October Term 2008 have the fingerprints of the modern Supreme Court bar. And, none of them is a case that would likely have been granted without their skill. Why? Because each presented the kind of legal issue that the Court has in the past routinely denied. But the expert Supreme Court advocates avoided a similar fate by understanding their audience, including the law clerks who serve the primary screening function at the jurisdictional stage.

For instance, in two of the cases, the federal courts of appeals invalidated federal agency action but the federal agency declined to file a petition and instead opposed Supreme Court review. Traditionally, that is a clear cert denial. After all, if the federal agency itself informs the Court that it can live with the adverse ruling, why should the Court enter the fray? Yet, in both Entergy v. Riverkeeper and Coeur d’Alaska v. Southeast Alaska Conservation Council, the Supreme Court granted review at the request of businesses unhappy with the lower court rulings. Both arise under the Clean Water Act: Entergy concerns the meaning of Section 316(b) of the act and Coeur d’Alaska considers whether Section 402 permit requirements apply to fill material permitted by the Army Corps of Engineers under Section 404. Neither is a front burner issue in environmental law, let alone in law generally. (The author is counsel for environmental respondents in Entergy).

What the cases have in common is the nature of the lead counsel for industry. In Entergy, lead counsel is Maureen Mahoney, who heads Latham & Watkins Supreme Court practice. A former deputy solicitor general, Mahoney has won a series of high profile cases before the Court. Lead industry counsel in Coeur d’Alaska is Ted Olson, former solicitor general and the winning lawyer in Bush v. Gore.

The bar’s influence can also be seen in the Court’s recent decision to grant review in two Superfund cases, Burlington Northern v. U.S., and Shell Oil v. U.S. These are likely to be the most significant Superfund cases ever decided by the Court. Industry has long chafed under lower court rulings that embraced an expansive view of both the application of joint and several liability and so-called “arranger liability” — the liability of those who arrange for others to treat, dispose, or store hazardous substances. For just as long, industry has tried and failed to persuade the Court to grant review.

That has now changed. The Court granted review, over the opposition of the United States, and should hear argument this winter. The lead counsel who persuade the Court to grant review? In Burlington Northern, it was Maureen Mahoney again. In Shell Oil, it is Kathleen Sullivan, formerly Dean of the Stanford Law School and head of Quinn Emmanuel’s Supreme Court practice.

Advocacy matters. Including in the Supreme Court.

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