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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Latham Partner Brings Clerk Lessons To Hospital Pay Case

By **Mark Payne**

Law360 (October 29, 2024, 12:39 PM EDT) -- When Latham & Watkins LLP partner Melissa Arbus Sherry steps in front of the U.S. Supreme Court for the 12th time, she plans to bring a lesson she learned from Justice John Paul Stevens about how to get past the legalese to the real ramifications of a case.

Melissa Arbus Sherry

At the heart of the case is a dispute over whether the federal government has misinterpreted a disproportionate-share hospital — DSH, pronounced "dish" — payment formula, a calculation that determines how much safety net hospitals receive based on how many patients are eligible for Supplemental Security Income.

At the Nov. 5 hearing, Sherry will argue on behalf of Advocate Christ Medical Center and more than 200 other hospitals asking the high court to resolve a dispute mired in statutory interpretation but with real-world implications for patients and doctors.

"The real impact of this case is on the hospitals themselves but also on the community surrounding them," she said.

Sherry served as an assistant to the solicitor general during Justice Elena Kagan's short stint in the role from 2009 to 2010, before she was nominated to the top court by President Barack Obama.

The Latham partner also clerked under Justice Stevens, whom Justice Kagan later replaced. She just missed the chance to argue before Justice Stevens, because a case headed to the court settled and the justice retired.

"But then I got to have my first argument with Justice Kagan in his seat, and so that felt like, I don't know, at least nice symmetry in that respect, in terms of my experience and my history," she said.

As an appellate advocate, she's drafted over 100 briefs and argued some notable cases. Her last argument in the solicitor general's office was in a 2014 Lanham Act case about pomegranate juice labeling.

"I always laugh because John Oliver, I think, covered it on his very first episode, so it's always a more fun one to talk about at a cocktail party," she said.

Sherry talked to Law360 Healthcare Authority about her time in the solicitor general's office under

Justice Kagan, the lessons she's learned from Justices Kagan and Stevens and how one in particular applies to the hospitals seeking relief in Advocate Christ.

This interview has been edited for length and clarity.

What do you see the justices considering in this Advocate Christ case?

Two things. Most significantly, and this probably goes without saying, but the statute and the text and the structure and all the things you'd normally look at in a statutory interpretation case.

In addition, they decided a case two years ago, Empire Health, that involved the same language and the same statute in the same sentence, and it was a 5-4 decision. And so I think it's kind of impossible to look at the question in this case without looking at their Empire Health decision and really starting from there.

You served as an assistant to the solicitor general from 2009 to 2014. The first solicitor general you worked with was Elena Kagan, now a Supreme Court justice. Did you learn any lessons from her that you bring to cases you've worked on before the Supreme Court?

Yes, she is an incredibly hard worker and has such a quick and insightful response to everything. Even just working with her for a year taught me to really think through every angle and every follow-up question and make sure that I have an answer to it because she would never leave anything at the first step.

There were always multiple questions that followed down the line. It taught me to go through that process on my own, both in writing and getting ready for arguments.

You also clerked for Justice John Paul Stevens. Do you have any takeaways from that clerkship that you use in arguing or briefing?

Yes, many. I think maybe the two that stand out the most are he always really cared about the facts and the people and the stories behind the case. I think sometimes, it's really easy to get lost in the legal question and forget why it matters or who it matters to. After a year with Justice Stevens, I now remember to think about that, as well, as I get ready to argue or brief a case.

He used to do his first draft of opinions. The thing I take away from that is just how important it is to figure out on your own what you think the right answer is and what the right way to get there is, even if you're going to get help developing it along the way. That independent thought process is something I've taken with me as well.

Since your time in the solicitor general's office, how has arguing or briefing cases before the Supreme Court changed?

The biggest change, I think by far, has actually been the emergency docket during my time in the office. That was not a large part of what we did. In fact, I don't know if I could think of even one occasion in which I had to work on an emergency docket petition. Maybe there was one, but it was just very uncommon and rare.

From everyone I've spoken to and just what I've seen from the outside, I think that has been a really

fundamental change in the day-to-day in the office.

Has the solicitor general role in relation to the justices changed?

I don't think so. In its best form, the SG and the office have always been — I don't know if I really like the 10th justice explanation — a trusted voice for the court and has served a really important institutional role. I think that's still the same. I hope it's still the same.

You said that one of the lessons you learned under Justice Stevens is not just remembering the legal principles but also the people and stories behind them. How does that principle apply in the Advocate Christ case?

I think in two respects. One is the clients, the hospitals. What this case comes down to is when you get rid of the statutory interpretation and legalese and everything like that, they should receive a disproportionate share of the cost of treating low-income individuals.

I think it has a really significant impact on their ability to provide the services that are needed for low-income patients, and then even beyond that, for the low-income patients themselves.

Part of the reason that Congress established this adjustment many decades ago was the recognition that it costs more money to incentivize hospitals to provide these additional services and treat these populations, whether it's rural hospitals or safety net hospitals and the like.

--Editing by Haylee Pearl.

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