Reflections On a Journey to the U.S. Supreme Court: Hamilton v. Lanning, Case No. 08-998

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On Leaving Kansas

In retrospect, it all now seems like a trip to a foreign country without the benefit of Berlitz or Rosetta Stone. But it mostly has been a blur of paper, extraordinarily long hours, and hard work. Maybe you will end up there one day, perhaps, just as much by accident as I did. Maybe you won't. Nonetheless, a trip to the U.S. Supreme Court is a relative rarity for those of us who are ordinary mortals. I thought that sharing "The Experience" might be of some interest. For me, it was the most incredible experience of my legal career.

The Record

I should note that although this article is not particularly about the merits of the case, for those interested, the entire history of the case can be found at SCOTUSblog.com. All briefs and decisions, including a transcript of the oral arguments, can be found with a single click.[1]

"We're Gonna Do What?"

I suppose I should say that this didn't start out to be a U.S. Supreme Court case; maybe they never do. Appellate advocacy has not been my stock in trade; although, over the years, I've ended up in the higher courts, here and there. So, I must confess that prior to November 2, 2009 (the day certiorari was granted on my case), I likely would not have scored a passing grade on reciting the names of the Court justices, let alone their perceived judicial bent. My staff attorney, Teresa Rhodd, without whom this case could not possibly have been properly prosecuted, put their pictures on the wall of my office, by the light switch, along with their names and seating positions. By the end of this "Mr. Toad's Wild Ride," the pictures and I were old friends. When I stepped up to the podium on March 22, 2010, I knew the names of the justices, where they sat, and quite a bit about each of them. Addressing these almost mythical figures by name was not only required, but now, seemed almost natural.

By the Numbers …

The case of *Hamilton v. Lanning* is unusual in many respects. First, the sheer odds of a case actually being decided by the Court are not good, to say the least. Only about one out of 100 petitions for certiorari is granted.[2]

Since the Judiciary Act of 1925 ("The Certiorari Act" in some texts), the majority of the Court's jurisdiction has been discretionary. Each year, the Court receives approximately 10,000 petitions for certiorari, of which approximately 100 are granted plenary review with oral arguments, and an additional 50 to 60 are disposed of without plenary review.[3]

Westlaw searches suggest *Hamilton v. Lanning* is just the ninth case since 1950 upon which the Court has granted a petition for certiorari filed by a Topeka attorney.[4]

Although I can't take much of the credit, really, I am the only Chapter 13 trustee to obtain a writ of certiorari in the history of modern bankruptcy law. Only one other Chapter 13 trustee has ever argued a case before the U.S. Supreme Court.[5] Certainly, without the involvement of the solicitor general, *Lanning* would never have shown up on the Court's radar. Once again, we proved that it is always better to be lucky than smart.

In The Beginning, Was the New Law — Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

It all started in 2005, when Congress amended, or I should say appended to, the Bankruptcy Code of 1978. The changes were many, but central to these modifications was the means test. That year, at the National Association of Chapter 13 Trustees (NACTT) Convention in Orlando, Fla., many suggested that Chapter 13 trustees should endeavor to obtain circuit level authority as quickly as possible in order to resolve apparent interpretative anomalies. Teresa and I took these admonitions to heart. We really didn't know what we were getting into, but nonetheless, we started down the path.

What WERE We Thinking?

Our central thought was messy facts make messy law. So, we carefully selected a case where the facts were simple and clear. We wanted them to be at least uncontroverted, if not stipulated to. Additionally, we narrowed the issue by choosing a case implicating only the income side of the means test, as we thought the expense side issues were markedly different and needlessly complicated the equation. We also chose facts that appeared to be outrageously anti-debtor, as it appeared conventional wisdom was that the means test was debtor-oriented. We believed this wisdom to be incorrect. Our thought was that the new law

cut both ways. We sought to illustrate that point with our case selection.

And the Issue Was?

The issue, simply put, was whether courts should follow the plain language of the new statute or whether courts might adjust the means test formula for changes in circumstances. The briefs turned this simple proposition into a fairly complicated one, but at the core, that was and is the true issue. The debtor, Stephanie Lanning, had unusually high income in the six months prior to bankruptcy filing. This event skewed what the means test required her to pay. In fact, she couldn't pay it. We sought to demonstrate that if the law was interpreted properly, the means test could still be used. The subtitled agenda was if the statute doesn't work, it is up to Congress to fix it, not the courts.

The position we took was the simplest, although not the most supportable, of the positions.[6] We chose the textualist or plain reading view of the statute because it made it easier for us to articulate a position, stake out our territory, and defend it. At the time we started, we had no thought of winning, only to assist in getting clarification, at the circuit level, of a portion of the statute that seemed destined to be a petri dish for litigation. Bankruptcy Judge Janice M. Karlin obliged us with a finely researched and written decision. Although not stated, the subliminal message was "Appeal me!" We needed to lose at both the bankruptcy and appellate levels, or there would be no Tenth Circuit decision. (Don't think for a moment that we tried to lose. We stepped into the shoes of the textualist position and never took them off.) As of this writing, we don't know if we will win or lose or even if our efforts will result in resolving this important interpretative issue. However, we really thought the end of this road would be a Tenth Circuit decision.

The Bumpy Road Up

So. We lost at the bankruptcy court level.[7] We lost at the bankruptcy appellate level.[8] And, we lost at the circuit level.[9] So far, so good … but … then events we hadn't planned on occurred.

First, we became enamored of our position and became convinced the losing side we had picked to take up had considerable merit. We didn't know if this was a result of good advocacy or denial. Second, a clear split in the circuits developed.[10] I can remember the morning we became aware of the split. Teresa and I looked at each other and said the word we were then unable to spell, "certiorari!"[11]

The petitioner in *Frederickson* filed his petition on January 23, 2009. Of course, we thought ours was a more appropriate case: our facts were simpler, the legal issues were narrower, and naturally, we thought our presentation was better from a bankruptcy perspective.

Filing the Petition for Certiorari

We quickly educated ourselves on the process. It was relatively straightforward, except for the extremely technical briefing requirements at the U.S. Supreme Court level. Our petition for certiorari was as carefully prepared as we were capable of doing. We focused on clear and simple sentence structure with paragraphs that followed the same formula. Sample certiorari petitions were reviewed to see what made sense to us. We endeavored to avoid complicating the issues which we thought would compound the felony of BAPCPA. Nonlawyer friends were actually asked to read the finished product to see if the petition made sense, in an ordinary, plain reading sort of way.

We Filed Our Petition for Certiorari on February 9, 2009

Of course, we had no idea if the petition actually mattered, but we sure tried to make it matter. We hoped that a combination of uncomplicated, attention-getting facts, and a plainly written petition for certiorari would catch someone's interest. We didn't really know how hard that would be. But for the solicitor general's involvement, this was about like trying to flag down a freight train.

Who is the Solicitor General and Why was She Involved?

The Office of the Solicitor General, an agency of the U.S. Department of Justice, supervises and conducts appellate litigation on behalf of the U.S. government.[12] Often referred to as the 10th justice, the soilcitor general is involved in approximately two-thirds of all the cases the Court decides on the merits each year. Here, the solictor general's involvement was quite by happenstance. As the debtor chose not to defend the appeal to the Bankruptcy Appellate Panel, I notified the U.S. trustee for this region that perhaps the government ought to consider being involved. This was an important issue and the other side would not otherwise be defended. The office of Richard A. Wieland, U.S. trustee for Region 20 (Kansas, Oklahoma, and New Mexico) briefed the matter at the Bankruptcy Appellate Panel level. At the Tenth Circuit level, the solictor general took over. But for the debtor's non-participation, the solicitor general would likely not have been involved. Consequently, but for the solicitor general's involvement, certiorari likely would not have been granted, as I am not sure we would have been spotted.

Reading the Directions

There are many books and articles on appellate advocacy. Given the time constraints, we concentrated on a few resources that appeared promising. Of course, starting with the information available from the Court seemed particularly appropriate. Time devoted to those in-house publications was well spent. The Guide for Counsel in cases to be argued before the Court and the Rules of the United States Supreme Court were the cornerstones of our research on what it was, exactly, we were supposed to be doing.

The Clerk of the United States Supreme Court — The Way Government Should Work

As an aside, Teresa and I were very impressed with the clerk of the Supreme Court, William K. Suter, and his staff. The office was easily accessible. We were able to speak to live and knowledgeable court staff who were courteous and really helpful. The process was quite fluid and forgiving, for the most part.

Immediately preceding oral argument, Suter, dressed in traditional morning suit, gave us a short explanation as to how things would work, and then, even asked us to advise if we had any comments on how they could improve their operation!

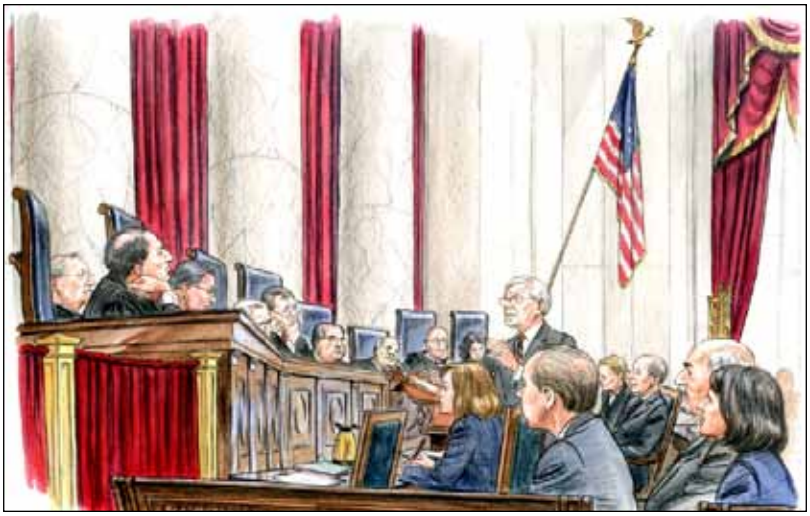
A Pleasant Surprise

The find of the year was Justice Antonin Scalia and Bryan A. Garner's "Making Your Case: The Art of Persuading Judges" (Thompson-West 2008). We felt this appellate primer was spot-on with simple, yet detailed, explanations of what would be expected of us. (Well, we thought, Justice Antonin Scalia should know …) This work is a must read for any lawyer involved in an appellate case.

Bed Time Reading … Bankruptcy and the Supreme Court

I must confess that when I first looked at Kenneth Klee's "Bankruptcy and The Supreme Court" (LexisNexis 2008) my eyes glazed over. This is not an exciting area to any but the most hardcore bankruptcy enthusiast. Some would even say using bankruptcy and enthusiast in the same sentence is the ultimate oxymoron. However, once we found ourselves donning gladiator gear, this most excellent resource material suddenly became an exciting, if not riveting, piece of work. It gave us a good feel for how bankruptcy law had developed in the Court over the years.

Professor Klee suggested that the Court might appreciate hearing from experienced bankruptcy counsel. We took that notion to heart in making our final decision to not farm out the case to experienced appellate counsel.



A Waiting Game

The Court denied the *Frederickson* application for certiorari on March 23, 2009; we waited for the other shoe to fall. Week after week went by. A month turned into months. Finally, the Court asked the solicitor general, "What do you think?" The solicitor general said, "Well, *Hamilton* is wrong, but you should decide the case." Again we waited and waited. Finally, on November 2, 2009, certiorari was granted.

In The Trenches

For the better part of five months, Teresa and I worked nights and weekends, in addition to our day jobs. The amount of reading necessary just to get started writing was nearly overwhelming. In addition to all of the Court cases, there were literally dozens of lower court decisions implicated. Researching the legislative history presented a special challenge for us because of the number of years it took for the legislation to pass. The time and energy commitment was far greater than that of any jury or bench trial in which I have been involved.

Opening Briefs

Organization of the opening brief was challenging. I am sure I spent the better part of two days trying to construct a syllogism that made sense. Some would say I never accomplished that goal, I am sure.

After constructing a comprehensive outline of our argument, Teresa and I each picked sections and wrote them. We relied heavily upon Justice Scalia's book as to how to approach the writing of the brief. We were not sorry for accepting this guidance. We exchanged drafts, rewrote each other's sections and eventually tied it all together. Only then were we able to write the summary of the argument and the statement of the case. True or not, we assumed as true the street wisdom that often times only the summary and the statement of the case were read. Avoiding duplication was difficult as the various argument points often intersected. Finally, we locked ourselves in my office for a couple of days and read the brief aloud, correcting errors, editing sentence structure, and reorganizing paragraphs. We shipped it off to the printer and waited for reactions. To our relief, the feedback from other bankruptcy professionals was overwhelmingly positive. We had, apparently, not missed the mark.

We were even more relieved after reading the opposing and supporting briefs. We had not missed any significant cases; our arguments had been dead on. The fine attorneys on the other side were not invincible and had shown their underbelly on many of the finer points of bankruptcy law. At this point, who knows if those hair splits will prove germane? I am sure they might have similar thoughts about our appellate efforts.

In addition to the solicitor general's brief, Tom Goldstein of the firm Akin-Gump, who specializes in U.S. Supreme Court advocacy, filed an opening brief for Lanning. He was quite the gentlemen and helpful. We attempted to reciprocate. The entire process was much more civil than the rough and tumble trial advocacy common here.

Our reply brief took as much, or maybe even more time than our opening brief. We now had four briefs to respond to in fewer than 6,000 words. Never play the other person's game. We reorganized the oppositions' arguments into our framework and attempted to turn their game into our game. At least we entertained ourselves with this scholastic endeavor.

Printing The Briefs

Gutenberg would not recognize modern printing. Certainly, *we* didn't recognize what U.S. Supreme Court printing was all about. Upon the recommendation of others who had been before us, we hired an outside printing firm, Cockle Printing, out of Nebraska These folks were wonderful. They did the fine proofing, i.e., consistency in punctuation, citation, etc. They also made sure we followed the briefing rules. This turned out to be a technical area we could not have hoped to command

while trying to write the briefs. Although our printing bill would eventually reach about $13,000, this was money well spent, but it does point out how a case of this nature may be beyond the means for many. When all was said and done, we likely had $17,000 or so in out-of-pocket expenses. The thought of what it would have cost to hire outside counsel made us shudder when we considered the hours we put in multiplied by $750 or more per hour, even discounting our time for the learning curve.

Moot Court

We lucked out and obtained a moot court session at the Georgetown University Law Center Supreme Court Institute. Two professors and a practicing appellate lawyer raked me over the coals for close to an hour a few days before the actual oral arguments. This free service was absolutely invaluable. It gave me confidence in believing I would actually survive oral arguments. It also permitted us to fine-tune some of the points we thought relevant.

Oral Arguments

While we waited for the opening and amicus to come in, we worked on the oral argument. This preparation was detailed and time consuming. There would be no winging it here. While the allotted time to speak was only 30 minutes, I had to be prepared to answer nearly any question relative to the case, the facts, the law, and the lower court and the Court cases. I read and reread the statutes and pertinent decisions, first creating detailed outlines, then summaries, and finally, brief Post-it note references. I took very little to the podium and used none of what I had prepared. Not unexpectedly, I spoke for only a short period of time before being interrupted by the Court, first, by Justice Ruth Bader Ginsberg. The remainder of my time was spent responding to tag-team questions. The focus was the actual statutory language and how the pieces fit together. We were on my home turf. Regardless of the result, I was going to survive. I was able to intertwine much of my argument into the answers to the questions. At least I was going to have, as they say on the BBC, my say. I spoke for 28 minutes and reserved two. The time flew by quickly, and the white light turned red before I knew it. The exhilarating ride was nearly over.

Sundry Items that Don't Fit Anywhere Else

- We got free quill pens.
- Twenty-eight lawyers represented other parties. There were two of us for the petitioner.
- I received 7,203 emails referencing *Lanning* from January 1, 2007, to the date of oral arguments, March 22, 2010. During that same period, I sent 4,576 emails on the same subject.
- I took at least one of my dogs with me to the office at night, when working on this case. I often tried out my sentences and paragraphs on them. They generally looked confused during those endeavors.
- Staying well was a worry and a priority. I took more vitamin C during those five months than I have in the rest of my lifetime.
- Dark suits – charcoal gray, black, or dark blue – are encouraged for oral argument. We joked about showing up in light blue seersucker suits and straw hats.
- Teresa bought a new suit. I bought new shoes and a belt. We both got haircuts.
- The justices were well prepared. They were courteous and respectful. There was no mean spiritedness about them.
- I took an extra suit and shirt, just in case, and packed most of what I would take a month before we left.
- We checked our clothing and suitcases and carried all legal materials on the plane. We thought it would be easier to buy new clothes than to replace the books. We also had most of what we need stored on external drives and on drives at the office we could access.
- The podium is very close to the justices; maybe 10 feet away. Had we not been warned, this could have been disconcerting.
- Making mistakes in oral arguments in front of a bankruptcy judge with a room full of sleepy lawyers is a lot different than making mistakes in a large courtroom packed full of friends, non-friends, and U.S. Supreme Court groupies.
- There is almost no way to really prepare for oral arguments, except to know your argument as well as you know your family.
- Patient spouses were necessary and appreciated. Most days, I wasn't sure what month it was.
- Did I tell you we got free quill pens?

Epilogue

And when it was over, the pressure of the months of hard work faded, and relief washed over me. I could see Teresa was experiencing the same. After a post-mortem with Tom Goldstein and some of his Harvard law students, we walked toward the exit on the lower level. A small group of Chapter 13 trustees stood to one side. As we approached, they smiled broadly and began to clap. We heard "Bravo," "Good job," and "Excellent!" We smiled and waived. Regardless of the outcome, we knew we really had done our best, and it was time to go back to Kansas, where we belong. ■

About the Authors

Jan Hamilton *has been the Chapter 13 trustee for Topeka since 1998. Hamilton is a graduate of Washburn University and Washburn University School of Law. He is a 2009 inductee as a Fellow in the American College of Bankruptcy.*

Teresa L. Rhodd *is a cum laude graduate of Washburn University and a summa cum laude graduate of Baker University. She has been a staff attorney for Jan Hamilton since 2006.*

ENDNOTES

1. http://www.scotuswiki.com/index.php?title=Hamilton%2C_Chapter_13_Trustee_v._Lanning .
2. http://www.scotuswiki.com/index.php?title=Glossary_of_Supreme_Court_Terms.
3. http://en.wikipedia.org/wiki/Certiorari.
4. Of the previous eight cases where a Topeka attorney filed a petition for certiorari which was granted, two involved *Oliver L. Brown et. al. v.*

ENDNOTES (cont.)

Board of Education of Topeka et. al., four were state of Kansas appeals, and only two were private party appeals. None involved bankruptcy issues. These cases are as follows:

Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668 (1996) (Donald Patterson, Topeka, Kansas Attorney for Petitioner Wabaunsee County);

Kansas v. Marsh, 548 U.S. 163 (2006) (Phillip D. Kline, attorney general; Jared S. Maag, deputy attorney general; and Kristafer Ailslieger, assistant attorney general; Topeka, Kansas, for Petitioner, State of Kansas);

Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) (Phillip D. Kline, attorney general, Topeka, Kansas; John Michael Hale, special assistant attorney general; Counsel of Record, Legal Services Bureau, Kansas Department of Revenue, Topeka, for Petitioner, State of Kansas);

Kansas v. Crane, 534 U.S. 407 (2002) Carla Stovall, Attorney General, Topeka, for Petitioner, State of Kansas;

Kansas v. Hendricks, 521 U.S. 346 (1997) Carla Stovall, attorney general, Topeka, for Petitioner, State of Kansas;

Board of Education of Topeka, Shawnee County, Kan., v. *Brown*, 503 U.S. 978, 112 S. Ct. 1657 (Mem) (1992) (Westlaw does not state who attorneys were);

Barker v. Kansas, 503 U.S. 594 (1992) Kevin M. Fowler, Topeka, for Petitioner, Pauline Barker;

Oliver L. Brown et. al. v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294, 75 S. Ct. 753 (1955) (Westlaw does not show Topeka lawyers for petitioner although the Scott lawfirm was involved, but not of record, apparently at the Supreme Court level.)

5. *Fidelity Financial Services Inc. v. Fink*, 522 U.S. 211, 118 S. Ct. 651(1998). Richard V. Fink is the standing Chapter 13 trustee for the Western District of Missouri.
6. *See Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008); contra *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652 (8th Cir. 2008).
7. *In re Lanning*, 2007 WL 1451999 (Bankr. D. Kan. May 15, 2007).
8. *In re Lanning*, 380 B.R. 17 (10th Cir. BAP 2008).
9. *In re Lanning*, 545 F.3d 1269 (10th Cir. 2008).
10. *See In re Kagenveama* and *In re Frederickson*, *supra*.
11. Author's confession: Teresa could always spell certiorari and I still can't.
12. http://www.justice.gov/osg/index.html.

Lawyer Thoughts, Introspectively (cont.)

opposition lawyers that are good, kind, decent people, in my experience, far, far, far out number the ones that are not.

3. I've learned that "lawyers" as a group have a sketchy reputation. Does it seem to you that most news involving lawyers comes with a mandatory salacious storyline? Aren't some of the lawyers you know genuinely good people? And what's the deal with legal fees? Have you ever noticed that consultants, appraisers, and insurers charge pretty handsome, non-itemized fees for their service, and are considered by the consumers of those services to be vital to the business community? It seems to be the case with most consumers of legal services that there is no such thing as reasonable attorney fee – not even one dollar's worth. What's up with the bad rep that comes with being a lawyer?

Reputation – one's character or worth as perceived by other people. As a guy that actually makes a living in the legal trenches, I am glad to report that a vast majority of the lawyers that I have worked with and known over the years have exceptional character and worth. In fact, most of the lawyers I know make a living fighting other people's fights, turning wrongs into right. I admire and respect what they do. Ours is a burdensome job that generally means putting our own troubles on hold, while pouring ourselves into the causes of other human beings. Many of the lawyers that I know – including the debtors' lawyers of the bankruptcy bar – make a living providing a voice to people that, without a spokesperson, might simply vanquish into the financial abyss. A number of the busiest lawyers that I know also serve with non-profit organizations, such as Kansas Legal Services; contribute personal time to charity, such as Let's Help; are active in their church; have raised or are raising families; coach little league baseball; or work in businesses that literally exist to serve people, such as Kansas Children's Service League or Disability Rights Center. I know a bunch of lawyers that give and give all that they've got – and for whom the fee at day's end is relatively meaningless.

So why the shortfall in public esteem? Because we are the players of the game, the visible difference makers. And some portion of the spectator base will always grouse. That's just the way it is. More importantly, those selfless lawyers, the one's doing those selfless things, understand the essential nature of service – that service should be done humbly and quietly, for the exclusive benefit of the one being served. Sure, it bites that there seems to be no positive PR to be had for the hard-working, do-good lawyers. Still, it makes me appreciate being one of us even more.

So, based on what I've learned and what I know now, yes I would. Yes, I would choose this crisis oriented, deadline driven, insanity causing career again. Crazy as it might seem, I enjoy the exhilaration, mental stimulation, and excitement of the job. I like knowing normal guys that find time, notwithstanding overwhelming legal careers that generally have us pitched as enemies, to hand build toy boats for their grandchildren or to serve as a youth leader in their church – guys who I know I would never have met except for my job. And I feel privileged to be part of a professional group of men and women that is consistently willing to fight to solve another's problem, even when it means neglecting their own; and who seem to collectively understand the importance of service to community and humankind, whether or not that service is ever recognized. Given what I know now, I am indeed glad to be one of you.

By the way, I am honored to be able to serve as the President of the KBA Bankruptcy and Insolvency Section. ■

About the Author

Tim Girard *has practiced law since 1988 and has been with the firm of Woner, Glenn, Reeder & Girard, P.A. since its inception in 1991. Tim's recent practice is primarily in the areas of bankruptcy (creditor representation), commercial loan and business workouts, and commercial/banking litigation.*