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Courtside

Fewer firms are arguing more and more of the Court's shrinking docket. Plus: Stephanopoulos' coup and 'dreary' ERISA.

By Tony Mauro

Court Aces

The last time Kenneth Geller argued more than two cases before the Supreme Court in a single term was 1985, when he was working in the solicitor general's office representing the government.

But Geller argued three cases in the term that has just ended for the summer, and his partners at Mayer, Brown, Rowe & Maw argued three more. That total of six, says Geller, is unprecedented in the history of the firm, which was one of the first to specialize in Supreme Court appellate work 21 years ago.

"I can't recall a term when we've been to the Supreme Court this much," says Geller. "It's good for morale."

With typical understatement Geller adds, "I attribute it to chance. We didn't set out to say we need six cases at the Court this term."

Chance may have helped Mayer, Brown roar back to the highest levels of high court practice, but an increasingly important trend seems just as influential: Fewer and fewer firms are handling more and more of the Supreme Court's shrinking number of cases.

Clients are turning to reliable veterans at Mayer, Brown and Wilmer, Cutler & Pickering, which also had six arguments this term, as well as Jenner & Block and Sidley Austin Brown & Wood, both of which argued five cases. Two upstart firms—Robbins, Russell, Englert, Orseck & Untereiner and Goldstein & Howe—also had a good year and have established themselves as serious Supreme Court players.

"The ascendancy of the repeat players is continuing," says Roy Englert Jr. of Robbins, Russell, which argued three cases. "General counsel are becoming more consistently comfortable with the idea of hiring a repeat player to present their Supreme Court arguments. But there are also firms trying to get the cases and aggressively selling their credentials as repeat players. It's a two-way street."

Traffic was busy on that street this term, with key lawyers getting in and out of Supreme Court practice and some firms scrambling to keep pace. Somewhere in the shifting matrix

STACEY CRAMP

ARGUMENTATIVE: Kenneth Geller argued three high court cases this term. His partners at Mayer, Brown, Rowe & Maw argued three more. "It's good for morale," he says.

also lies opportunity for newcomers to grab a piece of the prestigious action, some veterans say.

"This would be a great time for new talent to break

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through," says E. Barrett Prettyman Jr., of counsel at Hogan & Hartson, a longtime Supreme Court practitioner and watcher.

"The barriers to entry, so to speak, are there, but not necessarily extreme," says Glen Nager of Jones Day, which had three arguments this term. "The solicitor general's office produces a new group [of potential private-sector Supreme Court advocates] every few years."

Both Hogan and Jones Day are dealing with the recent departures of two leading Supreme Court advocates: Hogan's John Roberts Jr., now a judge on the U.S. Court of Appeals for the D.C. Circuit, and Jones Day's Jeffrey Sutton, who now sits on the 6th Circuit after a contentious confirmation process.

Meanwhile Gibson, Dunn & Crutcher's Thomas Hungar, who was working to build up the firm's high court practice after Theodore Olson left to become solicitor general in 2001, has himself followed Olson into that office, as deputy solicitor general.

"Two of my former co-chairs have been plucked away,' says Theodore Boutrous Jr., co-chair of Gibson, Dunn's appellate and constitutional law practice. "But Miguel [Estrada, nominated to the D.C. Circuit,] is still practicing with us, and many others, so we are a strong group. Sooner or later, turnabout is fair play, and we will steal people back." Gibson, Dunn argued no cases this term.

Hogan is said to be hunting for a top name to replace Roberts, but partner Jonathan Franklin won't confirm that. "Judge Roberts' extraordinary talents will be missed, but we still have some incredibly talented attorneys in the appellate practice." Franklin adds cryptically, "We will be looking to expand the talent with other talent."

As big names left this term, others returned to the scene in a big way—most notably Clinton administration Solicitor General Seth Waxman, now at Wilmer, Cutler, who argued four cases this term. In one, Beneficial National Bank v. Anderson, the counsel of record was Arnold & Porter—not exactly a novice—but the bank went to Waxman to take on the argument. He might have argued more cases this term, others say, but lost some coin tosses with co-counsel.

"Seth is the dominant force in the Supreme Court Bar, without question," says Goldstein & Howe's Thomas Goldstein, who argued two cases this year. Lawyers recruited from the solicitor general's office and other parts of the Justice Department often work with Waxman—Edward DuMont, Jonathan Neuchterlein, Randolph Moss, Paul Wolfson, and David Ogden, among others.

Jenner & Block also came on strong this term with what Englert describes as the "dynamic duo" of Paul Smith and Donald Verrilli Jr., who argued two cases each and are two of several co-chairs of the firm's appellate and Supreme Court practice. Partner David DeBruin argued another. The firm had been perceived to be in somewhat of a stall after the death of its widely admired Supreme Court advocate Bruce Ennis Jr. in 2000.

The biggest Jenner win of the term was the gay rights case Lawrence v. Texas, destined to be a landmark of the decade if not the century. Smith, who argued the case, was gratified by the victory and by the fact that the firm had argued five cases—with at least three more lined up for next term. "You sort of worry that it's a bubble, but now I think we are on the map again," he says.

Mayer, Brown's strong year was also marked by a landmark case, American Insurance Association v. Garamendi, in which Geller argued successfully that a California law aimed at helping Holocaust victims' families recover overseas insurance claims interfered with the president's conduct of foreign policy.

"It was the only case I've ever argued where I handled it at the district court, appeals court, and Supreme Court level," says Geller. "There was a real feeling of accomplishment."

Most of the time, Supreme Court cases come to the firm at the appeals stage, Geller says. "Clients are becoming much more sophisticated. There is a perception that when you are heading to the Supreme Court, you need someone who knows his or her way around," he notes.

Timothy Bishop, another Mayer, Brown partner who argued this term and who has had five straight certiorari petitions granted in recent years, agrees. "Most lawyers do not have a lot of experience with the Supreme Court," he says, "and they recognize that there is an art to getting cert granted, an expertise that helps you get there and [helps you] once you are there."

This term, several justices fed that perception, perhaps unwittingly, when they repeatedly referred to a key amicus curiae brief in the University of Michigan affirmative cases as "the Phillips brief," referring to Sidley Austin high court veteran Carter Phillips—even though he was not counsel of record on the brief, and clients like retired Gen. Norman Schwarzkopf and former Defense Secretary William Cohen were arguably better-known. The oral arguments, which were widely broadcast right after they took place April 1, sent an unmistakable message to lawyers and clients who picked up on the reference to Phillips: having the name of one of the Supreme Court's tight club of advocates on the face of your brief makes a difference.