

The Firms That Won Big At The Supreme Court

By **Jacqueline Bell and Annie Pancak**

Law360 (June 27, 2019, 7:19 PM EDT) -- The Supreme Court doesn't take easy cases. The advocates arguing the cases before the high court are grappling with some of the most difficult legal questions of the day, and some of the most divisive.

Supreme Court advocates who appear regularly before the justices all have their own systems, methods and habits to get them through the long hours spent preparing for those high stakes battles. But all the preparation and practice ends with one oral argument where each side has just 30 minutes to make their case.

For advocates, oral argument is a last chance to reach the nine justices, address their concerns, and, ideally sway the justices with a perfectly pitched answer, a new thought, a different frame of reference.

"One of my old bosses at the [Solicitor General's] Office said you just need to pretend like you're having coffee and talking over an issue with your friends," said Nicole Saharsky, co-head of Mayer Brown LLP's Supreme Court practice and a veteran of the Solicitor General's Office.

"It's hard when you're in court, dressed up in front the justices, to pretend like that's what you're doing. But the more that you can think about it as a conversation with your friends — your older friends who you need to be extra respectful to — I think that is a good way to think about it," Saharsky added.

But few cases are won at oral argument alone. Many justices,

U.S. SUPREME COURT 2018 TERM REVIEW

LAW FIRM SCORECARD

Law Firm	Wins	Losses	% Wins
Mayer Brown	4	3	57%
WilmerHale	3	0	100%
Kirkland	3	2	60%
Jones Day	3	3	50%
Hogan Lovells	2	1	67%
Sidley Austin	2	1	67%
Geyser PC	2	2	50%
Williams & Connolly	2	2	50%
Kellogg Hansen	2	4	33%
Jenner & Block	1	1	50%
Gibson Dunn	1	2	33%

including the late Chief Justice William Rehnquist and current Justice Ruth Bader Ginsburg, have acknowledged over the years that, after reading the briefs, it's the rare oral argument that changes their view of a case.

And even with the right mindset and careful preparation, a case can unravel quickly for an advocate once the justices start firing off questions. The current justices — with one notable exception — are particularly avid questioners, and most advocates will barely get through their opening salvo before a justice eagerly jumps in.

These 11 law firms ran that particular gauntlet at least three times this term. And many emerged from the fray with a win rate of more than 50% for the term.

Mayer Brown ended the term with a bang, arguing eight cases over the course of the term, more than any other law firm, and chalking up victories in a diverse array of legal brawls, from employment disputes to environmental tangles.

Supreme Court veteran Andrew Pincus scored a win in the closely watched dispute over arbitration contracts, *Lamps Plus Inc. v. Varela*, when a 5-4 ruling cleared up what arbitration contracts must say in order to block class arbitration.

Michael Kimberly also racked up a win for the firm in disability benefits case *Smith v. Berryhill*, and Timothy Bishop, a former law clerk to Justice William J. Brennan Jr., scored a win for the firm and timber company Weyerhaeuser Co. over the dusky gopher frog in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*.

In a bankruptcy case scored here as a loss for Mayer Brown, the Supreme Court did not affirm the lower court's ruling in their client's favor, but the justices did adopt a standard the law firm backed in briefing and at oral argument.

Law360 did not score one case Mayer Brown argued on behalf of Google, *Frank v. Gaos*, in which the court examined "cy pres" class action settlements. The Supreme Court remanded the case, asking the courts below to instead address whether the plaintiffs had standing to pursue the class action at all in light of the Supreme Court's recent ruling in *Spokeo Inc. v. Robins*.

"We have a deep bench and we have some really incredible younger attorneys," Saharsky said. "I'm pretty excited about our prospects going forward."

Kellogg Hansen Todd Figel & Frederick PLLC was another repeat player at the Supreme Court this term, with veteran Supreme Court advocate David C. Frederick handling no fewer than five oral arguments. The firm scored a resounding win representing iPhone owners accusing Apple Inc. of monopolizing the market for apps in the closely watched *Apple v. Pepper* and laid the groundwork for the court to clarify exactly what "clear-evidence" means in failure to warn product liability cases in a battle over warning labels on Merck's osteoporosis drug Fosamax.

Jones Day also racked up a significant number of oral arguments this term, arguing six cases that covered everything from questions on the establishment clause to an examination of the constitutional amendment that ended Prohibition.

Partner Michael Carvin was among the attorneys who scored a win in the so-called Peace Cross case, with the court ruling that a 38-foot memorial in the shape of a Latin Cross honoring World War I dead does not violate the Constitution's establishment clause, in a defeat for a humanist association.

The firm scored another win in *Dawson v. Steager*, with Jones Day's Lawrence Rosenberg representing a retired federal marshal whom a unanimous bench agreed had been discriminated against under the doctrine of intergovernmental tax immunity.

The firm also scored a win for Merck when the justices found that a judge, not a jury, should interpret ambiguities in U.S. Food and Drug Administration labeling rules in failure to warn cases.

Kirkland & Ellis LLP is often high on the list of law firms arguing the most cases before the Supreme Court in any given term, and this term was no exception.

Paul Clement, a former U.S. solicitor general and former law clerk to Justice Antonin Scalia, argued four of the firm's five cases, including two cases involving political gerrymandering. In *Virginia House of Delegates v. Bethune-Hill*, the court found that the Virginia House of Delegates, represented by Clement at oral argument, lacked standing to appeal a lower court's rejection of a redistricting plan.

And on the final day of the term, he brought in a final win for the firm in *Rucho v. Common Cause*, when the court ruled that partisan gerrymandering is "beyond the reach of the federal courts."

But those hot-button cases were far from the only issues the firm grappled with over the course of the term. In *Parker Drilling Management Services Ltd. v. Newton*, Clement notched a win for the drilling company when a unanimous bench ruled that state wage-and-hour laws don't apply to drilling workers off the coast of California.

Another Kirkland win came from attorney George Hicks in *Herrera v. Wyoming*, in which the court ruled that the Crow Tribe's treaty right to hunt didn't end when Wyoming became a state.

The firm has logged cases on a such a broad range of complex legal issues that clients — both from the Kirkland platform and outside of it — often turn to the firm for help with high court dramas, Hicks said.

"I think that we have been doing this long enough that we've gained the trust of people on a wide variety of issues," Hicks said. "We're not shy about the headline cases, but we're also very eager to dive into the law geek cases."

WilmerHale, Sidley Austin LLP, Jenner & Block LLP, Hogan Lovells and Gibson Dunn & Crutcher LLP all argued three cases this term, scoring wins in cases such as *Tennessee Wine & Spirits Retailers Association v. Thomas*, which was argued by Sidley's Carter G. Phillips, a former clerk for Justice Warren E. Burger, and *American Legion v. American Humanist Association*, argued by Hogan Lovells partner and former acting Solicitor General Neal Katyal.

WilmerHale went three for three, with wins in cases tackling trademark licenses and bankruptcy law, state sovereignty, and maritime law.

Jenner & Block's Adam Unikowsky continued his winning streak, scoring a victory for a Yakama Nation company over a state fuel tax. One of the three cases Jenner & Block argued, *Carpenter v. Murphy*, will be reargued next term, the court said Thursday.

Sidley's Robert Hochman said that while every advocate has a different approach to preparing for oral arguments, it undoubtedly helps to have access to other experienced advocates who can help prepare for the full range of questions an advocate is likely to face. In other words, an appellate practice with a deep bench can't hurt.

"I think the key thing is to get intelligent, experienced people who are new to the case to look at the case, to look at the brief, to look at the papers with care and tell you what struck them about the case, both good and bad," Hochman said.

In addition to being a year of big cases for the term, it was also a year of changes to the roster for many storied Supreme Court practices.

Williams & Connolly LLP's former appellate practice leader, Kannon Shanmugam, logged four arguments before departing for Paul Weiss Rifkind Wharton & Garrison LLP in January to create an appellate practice there. Williams & Connolly lured Lisa Blatt from Arnold & Porter to take over Shanmugam's spot as practice chair.

Daniel Geysler, who until the end of last term was chair of the appellate practice at the litigation boutique Stris & Maher LLP, argued four cases this term from his newly established Geysler PC, a new Supreme Court and appellate boutique. Geysler, a familiar face at oral arguments, covered a lot of ground this term, with cases involving everything from bankruptcy law to arbitration agreements.

"Any term with even a single argument is a special term, so this term was particularly exciting," Geysler said in an email. "And while you can't always control the outcome, you can control doing everything possible to maximize the client's odds of winning."

Jeffrey Fisher joined O'Melveny & Myers LLP's appellate practice last spring, joining as special counsel while still continuing to work as co-director of Stanford University Law School's Supreme Court Litigation Clinic.

In the October 2018 term, he continued to be one of the courts most frequent advocates, arguing one case solely as co-director of the Stanford clinic and two other cases jointly on behalf of the Stanford clinic and O'Melveny & Myers, according to the firm, including one case that turned on the meaning of the word "burglary" and another that examined the immunity international organizations have from U.S. lawsuits.

Mayer Brown also had some changes to its lineup as the current term came to a close. In early June, appellate attorneys Paul Hughes and Michael Kimberly left Mayer Brown to lead McDermott Will & Emery LLP's appellate practice, which until their arrival had just one partner.

With so many law firms growing their Supreme Court practices and building up their bench strength, clients have a new wealth of choices for law firms with experienced Supreme Court practitioners and dedicated practices.

Past performance is of course no guarantee of future results, but as Justice Sonia Sotomayor told Law360 in 2017, the methods and practices of these experienced members of the Supreme Court bar are well developed.

“They’re usually very, very well-prepared,” she said.

--Editing by Jocelyn Allison, Pamela Wilkinson and John Campbell.

Methodology: A law firm’s Supreme Court win-loss record is based on the outcome of cases where a member of the firm argued before the court.

The scorecard includes all law firms with three or more attorney appearances at oral arguments over the course of the term.

As a general matter, if the Supreme Court affirms the lower court, the petitioners lose. If the Supreme court reversed or vacated the lower court ruling, in whole or in part, the petitioners win. Cases that are dismissed as improvidently granted after oral argument are recorded as a win for the respondent.

There are, of course, exceptions. In cases where there is not a straightforward ruling, Law360 sometimes had to weigh a range of factors, including how much of the parties’ arguments the court adopted and the likely impact of the ruling, when selecting the winning side. In some extremely rare circumstances, both sides might record a loss or a win.

Cases that are reargued in a single term are for the purposes of the scorecard counted as one argument.

Law360 did not score Frank v. Gaos, because the court did not address the question at issue in the case, but instead remanded it for review by the lower courts in light of Spokeo v. Robins.