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Boutiques Wipe The Supreme Court Floor With BigLaw Rivals

By **Jake Simpson**

Law360, New York (June 29, 2015, 10:28 PM ET) -- Appellate boutique firms had a banner year before the Supreme Court this term, winning nine of the 11 cases they argued and casting a big shadow over their BigLaw competition.

The four boutiques that most commonly appear before the high court — Goldstein & Russell PC, Bancroft PLLC, Kellogg Huber Hansen Todd Evans & Figel PLLC and Robbins Russell Englert Orseck Untereiner & Sauber LLP — put up a combined .818 winning percentage in their 11 Supreme Court cases this term. The boutiques argued directly against BigLaw firms in eight cases and came away with a partial or total victory six times.

BigLaw firms that argued at least two cases before the court this term lost 23 of 40 cases, a winning percentage of just .425. After going undefeated in four Supreme Court cases last term, Jones Day was winless in three cases this term, including a defeat in the landmark King v. Burwell decision upholding federal health care tax subsidies. Sidley Austin LLP chair Carter G. Phillips personally was winless in two oral arguments before the court this term, while WilmerHale partner and former U.S. Solicitor General Seth P. Waxman won just one of four cases argued.

The most successful lawyer at oral arguments this term was Goldstein & Russell co-founder Thomas C. Goldstein, who won all four cases he argued. Last term, the most successful litigator was Bancroft's Paul D. Clement, who won four of five cases.

Industry watchers say the recent success of litigators such as Goldstein and Clement will interest people or companies pursuing landmark cases before the Supreme Court in future terms. Potential clients also know that because of the relatively small size and client base of appellate boutiques, they are much less likely than a BigLaw firm to be conflicted out of taking on a case.

"Conflicts occasionally arise for our firm, as they do for any law practice, but they don't happen nearly as often as at big firms," said Kellogg Huber partner David Frederick, who won both Supreme Court cases he argued this term. "There's a richer pool of potential clients and potential cases."

Frederick's firm, Kellogg Huber, was born because of conflicts at a BigLaw appellate department. Michael K. Kellogg and Peter Huber were attorneys at Mayer Brown LLP until a telecommunications client asked the firm to stop representing six other telecom companies. They chose to remain counsel to the six companies and start their own boutique, becoming two of the founding partners of Kellogg Huber.

Though boutiques are small enough to avoid most conflicts of interest, their top litigators usually have an appellate track record that any BigLaw firm would envy. Goldstein, who has personally argued 35 Supreme Court cases, said he views the high court as “a local court in front of nine specific people, not gods among men.”

During oral argument in *Los Angeles v. Patel* this year, Goldstein's local court experience helped him secure a fifth and deciding vote for his clients, Naranjibhai Patel and the Los Angeles Lodging Association, from Justice Anthony Kennedy.

“At oral arguments, I'm reacting to the justices' tone of voice, to posture, to how much they're engaged,” Goldstein said. “In the Patel case, it seemed like Kennedy was the one who was most on the fence and least sure he wanted to vote against us. So in the oral arguments, you could hear me talking a lot to him. Just like if you were talking to a jury or local judge you know very well, you could tell from his body language and what he was saying that his vote was seriously in play.”

Kennedy ultimately sided with the court's four liberal justices to rule that a Los Angeles law allowing warrantless searches of hotel registries violated the Fourth Amendment, a decision that surprised many Supreme Court scholars. Justice Sonia Sotomayor's majority opinion directly referenced Goldstein's statements at oral argument in at least two places.

Boutiques can also be less concerned about how much money is coming in for any given case, experts said. Larger firms have to consider profitability across their entire litigation department and more broadly across the whole firm. That's not a problem at a boutique like Goldstein & Russell, which has only four attorneys.

“We can structure fees to match the case or client, and we don't have any responsibility to feed the mouths of younger associates,” Goldstein said. “We can just do the cases we see fit and be less concerned about billing.”

While BigLaw firms struggled overall this term, several did score high-profile wins. Ropes & Gray LLP partner Douglas Hallward-Driemeier was one of two attorneys who successfully argued on behalf of same-sex marriage rights in *Obergefell v. Hodges*. And Waxman prevailed over Clement on Monday when the Supreme Court ruled that states can use independent commissions, rather than their legislatures, to determine congressional districting.

Large law firms also have some distinct advantages over appellate boutiques, most notably their abundance of top legal minds. Morgan Lewis & Bockius LLP partner Allyson Ho said the biggest single advantage to being a BigLaw appellate lawyer is “the easy access to in-house top-flight subject matter experts.”

Before oral arguments last November in *M&G Polymers USA LLC v. Tackett*, Ho worked extensively with the firm's top labor and employment partners in strategy sessions and moot courts. The Supreme Court ultimately overturned a Sixth Circuit decision that had left M&G Polymers, Morgan Lewis' client, on the hook for a class of retirees' lifetime health care benefits.

“We benefited from [the employment partners'] larger strategic thinking and from their review of drafts,” said Ho, who represented M&G Polymers at oral argument. “And I personally benefited from their, shall we say, very sharp and incisive questioning during moot.”

Methodology: Law firms' Supreme Court win-loss record is based on the outcome of cases where a member of the firm argued before the court.

--Additional reporting by Allison Grande and Ben James. Editing by Chris Yates and Brian Baresch.

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