

Supreme Court Specialists, Mostly Male, Dominated Arguments This Term

Tony Mauro , Supreme Court Brief

May 11, 2016

With oral arguments over for this term at the U.S. Supreme Court, Bancroft has topped the list of law firms with the most arguments at eight—a number rarely reached by any outfit other than the U.S. solicitor general’s office.

Bancroft’s leading advocate, former Solicitor General Paul Clement, went to the lectern six times between October and April. Partner Erin Murphy had two arguments.

“We certainly had a busy term, even by Bancroft standards,” Murphy said. “We had a little bit of everything, from an energy case to religious freedom, banking and tribal law.”

Close behind Bancroft’s eight Supreme Court arguments were Jones Day with seven; Jenner & Block with six; Hogan Lovells, Sidley Austin and Wilmer Cutler Pickering Hale and Dorr with five each; four for Kellogg, Huber, Hansen, Todd, Evans & Figel; and four for Mayer Brown. Consovoy McCarthy Park; Gibson, Dunn & Crutcher; Goldstein & Russell; and Kirkland & Ellis each argued three.

The list underscores the continuing concentration of Supreme Court arguments in the hands of law firms with specialty Supreme Court practices. The 56 arguments made by top firms listed above mean they were involved in more than half of the 69 argued cases this term. (In several cases, both sides were represented by lawyers from the leading firms.)

The trend seems to suit the justices. In 2015 Justice Elena Kagan said, “We all hope that it will continue.” Kagan asserted that “good lawyering helps for better decision-making.”

Dearth of women arguing

The tally also points up the fact that few women from private law firms argued during the this term.

Several men—including Neal Katyal, David Frederick, Paul Smith, Carter Phillips, Christopher Landau and Tom Goldstein, in addition to Clement—argued three or more times this term. But Bancroft’s Murphy can boast that she is the only woman outside the solicitor general’s office with two arguments this term. Only seven women not on the staff of government entities argued any cases at all.

Women made 33 Supreme Court arguments this term—23 percent—compared to 142 by men. Of the 33 arguments made by women, 20 were by associates in the U.S. solicitor general's office and six were by lawyers in state or county attorney generals' offices.

Of the remaining seven arguments by women, one was made by a Utah public defender, three were by lawyers appointed by the high court, one was by a lawyer with the Center for Reproductive Rights and two were by Murphy.

Put another way, Murphy and two of the women who were appointed by the court to argue—Helgi Walker of Gibson Dunn and Catherine Carroll of Wilmer—were the only women fielded this term by law firms with long-standing Supreme Court practices. Virginia Villa, the third woman in private practice appointed by the court, is a former public defender now based in St. Croix Falls, Wisconsin.

The dearth of women at the lectern is not new.

Last term, only one woman in private practice—Allyson Ho of Morgan, Lewis & Bockius—argued more than one case. And the number of arguments the specialty firms handle can fluctuate significantly from term to term, depending on the ebb and flow of client matters and the Supreme Court's interest in their cases. In the 2015 term, Wilmer lawyers argued eight times, and Bancroft only three.

As for minorities, Hogan Lovells' Katyal reached a milestone this term with 26 Supreme Court arguments under his belt—more than any other minority lawyer since Thurgood Marshall, who argued 32 cases before becoming a justice. But only a handful of nonwhite lawyers argued this term overall.

"Today the most common path to a Supreme Court argument is through the solicitor general's office and the big law firm appellate practices," said Debo Adegbile, an African-American partner at Wilmer who has argued two Supreme Court cases in the past. "The pipeline to these opportunities, in turn, often comes from Supreme Court and appellate clerkships, where there is not a great deal of diversity."

Murphy said the number of women arguing at the Supreme Court "has always been significantly lower than men." That may in part be the result of "which areas of law women specialize in," she said, but can also be explained by "a combination of circumstances" that just happened to leave veteran female advocates on the sidelines this term.

"There are certainly a lot of wonderful female advocates out there," Murphy said.

Villa, the former federal public defender who argued this term in *Voisine v. United States*, said she was not surprised by how few women in private practice argue before the Supreme Court. Most of the criminal defense lawyers who are women work as public defenders, as she was, and few in private practice are "in a position to argue at the Supreme Court."

Villa said the opportunity to argue before the Supreme Court in February was "amazing," especially when Justice Clarence Thomas asked her adversary a question—the first question he has asked from the bench in 10 years. Thomas asked whether a misdemeanor violation by Villa's client could result in a lifetime suspension of his Second Amendment right to own a firearm.

“He was asking a question that I said in my brief had not been answered,” Villa said. “When I heard it, it was like a huge ocean liner suddenly changing course.” The court has not yet issued a decision in the case.

Contact Tony Mauro at tmauro@alm.com.

Copyright 2016. ALM Media Properties, LLC. All rights reserved.