The Firms That Won Big At The Supreme Court

By **Jack Karp**

Law360 (July 3, 2023, 3:08 PM EDT) -- U.S. Supreme Court arguments returned to something close to normal this term, with the public allowed back into the courtroom for the first time since the pandemic, according to high court advocates. But some pandemic-era changes did stay in place.

Attorneys arguing before the justices were glad to have an audience in the gallery once again, an addition they say had little impact on the arguments themselves but definitely changed the energy in the chamber.

"Once you're up there, you kind of block out everything other than the justices' questions, but it does impact just the feel of it," Williams & Connolly LLP partner Sarah M. Harris, who argued two cases before the court this term and had her parents attend one of them, told Law360.

"There is something to the idea that you are standing up there and members of the public can listen to you," Harris said.

Spectators' presence can have just as much of an effect on the public as on the advocates, say some attorneys.

"While it doesn't affect how we conduct oral argument, it is very important for the people to be able to see court proceedings live," explained Mark C. Fleming, co-chair of WilmerHale's appellate and Supreme Court litigation practice.

But arguments now require more stamina as a result of changes in the questioning process that were instituted during the pandemic, these advocates say.

U.S. SUPREME COURT 2022 TERM REVIEW

Law Firm Scorecard

Firm	Won	Lost	Cases
Williams & Connolly	3	4	7
Hogan Lovells	3	2	5
Latham	2	2	4
Skadden	1	3	4
Arnold & Porter	3	0	3
Jones Day	3	0	3
Clement & Murphy	2	1	3
Consovoy McCarthy	2	1	3
MoloLamken	2	1	3
O'Melveny	2	1	3
WilmerHale	1	2	3

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"It used to be you were always done within an hour. Now, I think it's almost always going to be at least, even for simpler cases, an hour and 20 minutes or so," said Jones Day partner Noel J. Francisco.

But John P. Elwood, who heads up Arnold & Porter' LLPs appellate and Supreme Court practice, said those changes have been good for the court's truth-seeking function.

"It is a trade-off, but it's definitely worth it," said Elwood, who added that "under the new format, there's more of an emphasis on just answering the questions that are asked of you fully."

A firm had to argue before the justices at least three times to make the Law360 Scorecard, and several

firms managed to rack up an impressive number of wins before the court.

Williams & Connolly was the most active firm at the court this term, with its attorneys appearing before the justices seven times. The firm won three of those, all argued by partner Lisa S. Blatt, chair of the firm's Supreme Court and appellate practice.

Blatt's victories included a closely watched case in which the justices agreed with her that pop artist Andy Warhol's portraits of music icon Prince did not constitute fair use of photographer Lynn Goldsmith's original, copyrighted photo.

"I think we had more fun with that brief than any brief I can remember," said Harris, who worked on that case with Blatt.

Harris said the case lent itself to a lot of enjoyable riffing on modern culture.

"I feel like the court had fun with it, too. Lisa obviously had a lot of fun," she added.

Blatt also won a high-profile victory on behalf of Google, when the justices ruled unanimously that companies like it and Twitter cannot be held liable for aiding and abetting terrorism just because the Islamic State terrorist group used their platforms.

That was "an incredibly important case," said Harris, with many court watchers thinking the justices were going to examine Section 230 of the Communications Decency Act for the first time.

"I think that case was just remarkable in terms of how much attention there was on it and how much uncertainty with respect to what the court would do going in," even though the justices ended up sidestepping Section 230 in their ruling, Harris said.

Blatt and her firm scored another unanimous win, this time for Jack Daniel's in an intellectual property case against a company that makes a poop-themed dog toy version of the liquor maker's famous whiskey bottle. That dog toy was not parody protected by the First Amendment, the justices said.

Williams & Connolly partners Harris and Amy M. Saharia argued three of the firm's other high court cases this term, which included disputes over the sovereign immunity of Puerto Rico's financial oversight board, the appeal of purely legal issues not raised after trial, and the discharge of debt incurred by fraud.

They came up short in those cases. So did Blatt in another case over whether the Foreign Sovereign Immunities Act allows other countries and their sovereign instrumentalities to duck criminal charges in the United States.

The justices disagreed with Blatt's main argument on behalf of Turkey's state-owned lender Halkbank that it was immune from prosecution because it has sovereign immunity as an arm of the Turkish government. But the court nonetheless gave Halkbank a second chance to avoid prosecution, remanding the suit for further consideration of its claims of common-law immunity.

Hogan Lovells partner Neal Katyal argued all five of the cases that firm handled at the high court this term, winning three of them.

In what was possibly the most high-profile of those victories, the court ruled that the Constitution's elections clause doesn't give state legislatures exclusive authority to set the rules regarding federal elections.

In another victory, a divided court ruled that Katyal's client was wrongly denied a chance to raise due process concerns in an appeal of his death sentence, and that Arizona justices had made a "novel and unforeseeable" interpretation of the state's rule governing post-conviction appeals.

Katyal's third win came when the court backed cryptocurrency exchange Coinbase Inc. in its argument that it shouldn't have had to move forward with discovery in California district court while it challenged rulings denying it arbitration.

Katyal and his firm lost two cases, including one in which the court unanimously ruled that Hennepin County, Minnesota, overstepped its taxing power by keeping $25,000 more than homeowner Geraldine Tyler owed in property taxes after the county seized and sold her condo.

Another unanimous decision went against the firm when the justices ruled that Delaware couldn't keep about $300 million in abandoned MoneyGram checks since the checks are governed by federal law.

Hogan Lovells did not respond to a request for comment.

Skadden Arps Slate Meagher & Flom LLP's Shay Dvoretzky was also busy at the high court this term, arguing three of that firm's four cases before the justices. They included disputes between Arizona and the Navajo Nation over the tribe's water rights and the Internal Revenue Service's notice requirement when seeking banking records.

Dvoretzky ended up on the losing side of those three cases. His colleague, Parker Rider-Longmaid, scored the firm's win this term, when the justices ruled that a man convicted of murder must have a new chance to request DNA testing of evidence he says will prove his innocence.

Skadden didn't respond to a request for comment.

Latham & Watkins LLP attorneys argued four cases at the high court this term, winning two of them.

Partner Roman Martinez scored a victory when the justices ruled unanimously that a deaf student could seek damages from his school for allegedly failing to provide him with adequate education.

But Martinez came out on the losing side in the dispute over Andy Warhol's use of a Prince photograph.

Partner Gregory G. Garre, global chair of the firm's Supreme Court and appellate practice, earned the firm's other win, representing one of the parties in two consolidated cases in which the justices found constitutional challenges to the structure of the U.S. Federal Trade Commission and U.S. Securities and Exchange Commission can be brought in federal court without first going through administrative appeals.

Partner Samir Deger-Sen didn't fare as well in the firm's fourth case of the term, when the justices ruled that the government can retry a defendant whose conviction is overturned on appeal because of an improper venue.

"Our unmatched breadth of talent was on display once again this term, where we had three different lawyers argue four cases before the Supreme Court. We're proud to have had five different Latham lawyers argue nine cases before the court since December 2021 and win six of them," Garre told Law360 in a statement.

Jones Day attorneys argued three cases before the high court this term and won all of them.

Francisco successfully convinced the justices that concrete company Glacier Northwest could sue Teamsters Local 174 for failing to take reasonable precautions to safeguard the company's property during a labor strike.

That case was important because it addressed the issue of Garmon preemption, which blocks most labor disputes from being litigated outside the National Labor Relations Board, according to Francisco.

"It comes up all the time, and the court doesn't take a ton of cases on Garmon preemption," said Francisco.

The case was also challenging because "you had both the body of federal case law and the body of NLRB administrative jurisprudence, all of which was relevant and which you had to essentially try to reconcile," Francisco added.

Partner Larry Rosenberg won his case before the court as well, when the justices unanimously ruled that criminal defendants convicted of certain federal gun crimes can serve concurrent sentences if they were also convicted of other crimes.

Partner Yaakov M. Roth scored his own win when the justices sided with Joseph Percoco — once an aide to New York Gov. Andrew Cuomo — that as a private citizen, he didn't owe a fiduciary duty to the public when he was convicted for wire fraud.

"It is in line with the court's general trend in the white collar area to really push back against the United States on their very aggressive interpretations of federal criminal law," Francisco said of the justices' ruling in that case.

Arnold & Porter won all three of the cases its attorneys argued before the justices this term as well.

That success was due to the ability of the firm's attorneys to frame the issues in a way that's appealing to the court and to their "obsessive, no-stone-unturned preparation," said Elwood, who pointed out that when the arguments go on for two hours, "there really is no place to hide."

Elwood convinced a five-justice majority to rule that speech must be reckless to be considered a true threat, reversing a lower court's decision upholding a defendant's 4½-year sentence for stalking a Denver singer-songwriter.

Elwood had "the world's most realistic moot court" for the case, having argued another case before the court dealing with the same issue in 2014, he said.

"And the thing that struck me was how the intervening time has made the overall legal culture less pro-free speech," Elwood said.

Senior associate Andrew Tutt won both of the high court cases he argued this term.

One of those victories came when the justices allowed a nursing home resident's family to sue an Indiana care home under the Federal Nursing Home Reform Act for allegedly negligent care.

Another came when he convinced the court to rule unanimously that litigants can appeal purely legal issues they lost at the summary judgment stage without going through the technicality of raising them again after trial.

"It's not real sexy and it didn't lead the evening news, but it's an important bread-and-butter issue for civil litigators," Elwood said of that case.

WilmerHale partner Seth P. Waxman, co-chair of the firm's appellate and Supreme Court litigation practice, argued two of the firm's three high court cases — and two of the most watched cases of the term — over affirmative action and social media companies' liability for terrorism.

In one of the term's most controversial disputes, Waxman came out on the losing side when the justices ruled that Harvard violated the Constitution in using race as a criterion in its admissions decisions.

Waxman did earn a victory for Twitter, however, in another highly anticipated case over whether the tech company could be held liable for a terrorist attack because the Islamic State group posted on its social media platform.

"This was the first-ever Supreme Court decision interpreting the federal anti-terrorism act and one of the few Supreme Court decisions defining the requirements for civil aiding and abetting," said partner Ari Holtzblatt.

"So we think it will be a very important decision both in the many other cases involving anti-terrorism act claims and for other statutes that authorize claims for aiding and abetting," Holtzblatt added.

Fleming fell short in his own case when the justices ruled that crimes involving obstruction of justice are deportable, even when no law enforcement investigation is in progress or no court case is pending.

But Fleming had a positive take on why WilmerHale was tapped to handle so many high-profile cases at the court.

"We have an appellate bench of unmatched depth, including multiple lawyers who have argued in the Supreme Court, who have subject-matter expertise in numerous substantive areas, and who work very closely with our colleagues in other practices," Fleming said. "We have a winning combination."

Attorneys at O'Melveny & Myers won two of their three cases before the justices this term.

Partner Michael R. Dreeben earned one of those wins when the high court disposed of the "right-to-control" theory of fraud and found for the defendants in two sister cases arising out of Manhattan federal prosecutors' crackdown on corruption in New York state government.

Special counsel Jeffrey L. Fisher landed the firm's other victory, convincing the Supreme Court to adopt a narrow view of what constitutes identity theft in the context of health care fraud and to reject a two-

year sentence enhancement for a man who used a patient's name on a fraudulent Medicaid claim form.

Partner Mattie F. Hutton wasn't as successful, however, in the case she argued over the definition of obstruction of justice in the context of deportation proceedings.

O'Melveny & Myers didn't respond to a request for comment.

MoloLamken LLP's founding partner Jeffrey A. Lamken argued two of the firm's three cases before the justices, winning a high-profile dispute on behalf of the Humane Society of the United States when the court upheld a California ballot initiative that banned in-state sales of pork born of sows kept in confined housing.

Lucas M. Walker also won the case he argued on behalf of Hetronic Germany over the question of when federal trademark law can be applied to foreign conduct.

Lamken was less successful arguing on behalf of Amgen Inc. in its patent dispute with Sanofi. The justices ruled unanimously that Amgen's patents on the cholesterol drug Repatha are invalid because broad patents covering anything that can perform a certain function are not allowed.

MoloLamken declined to comment.

The three cases Consovoy McCarthy attorneys argued at the court this term were among those with the highest profile, with partners Patrick Strawbridge and Cameron T. Norris representing Students for Fair Admissions in its two cases challenging the use of affirmative action in college admissions.

The firm won both of them when the justices ruled late in the term that Harvard and the University of North Carolina violated the Constitution's equal protection clause by relying on race as a factor when admitting students.

Partner J. Michael Connolly came up short in the third case, however, when the justices ruled that the borrower plaintiffs he represented lacked standing to sue over President Joe Biden's plan to forgive some student loan debt.

Consovoy McCarthy did not respond to a request for comment.

Founding partner Paul D. Clement argued all three of Clement & Murphy PLLC's cases at the Supreme Court this term, winning two of them.

One of those victories was on behalf of Sanofi in its patent row with Amgen, and the other was on behalf of Axon Enterprise in its challenge to the constitutionality of in-house enforcement proceedings by the FTC.

Clement came up short, however, when the justices ruled that his client Helix Energy Solutions Group Inc. violated the Fair Labor Standards Act by classifying an oil rig worker as an overtime-exempt executive, yet doling out his six-figure pay as a day rate instead of on a salary basis.

Clement & Murphy did not respond to a request for comment.

All of the attorneys who argued before the court this term found themselves returning to a more pre-

pandemic normal as well as dealing with longer arguments that demanded more of them, they say.

But on the whole, what changes have outlasted the pandemic have been positive ones, and both the justices and the advocates had successfully adjusted to them by the end of the term, according to advocates.

"This term it really did feel much more back to normal, with an audience in the courtroom," said Williams & Connolly's Harris.

"I feel like the court by the end of this term really hit its stride in terms of a balance between wanting to make sure everyone has their say with the round-robin format, but also — other than the really big cases — navigating how to make the arguments go briskly," Harris added.

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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 2022 term, regardless of the outcome.

As a general matter, if the Supreme Court affirms the lower court, the petitioners lose. If the Supreme court reverses or vacates 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.