WilmerHale

Firms Seek to Share The Wealth of Supreme Court Oral Arguments

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Some Big Law firms made room for more junior partners at the Supreme Court lectern this term as part of a bid to diversify who gets to argue before the justices.

Mel Bostwick, for example, will be the third attorney from Orrick Herrington & Sutcliffe LLP to argue when she makes her high court debut on Tuesday in George v. McDonough, a veterans' benefits case. WilmerHale has sent five different attorneys to argue cases this term while Latham & Watkins has had four, and Williams & Connolly three.

That's a shift in the "superstar" model that's come to dominate Supreme Court practice, in which the highest profile attorney handles all the cases in front of the justices. The handful of elite firm lawyers who argue the bulk of cases before the high court tend to be disproportionately white and male.

"Our pool of available talent is now multiplied and we ought to do everything we can to encourage that—both for our own benefit and for the benefit of what the country aspires to be," said former U.S. Solicitor General Seth Waxman, who now heads WilmerHale's Appellate and Supreme Court practice group.

Waxman was one of five different WilmerHale attorneys to argue cases this term, three of whom are women.

Making Room

Waxman notes that having a single attorney argue all of a firm's high court cases hasn't always been the way it's done.

Up until the past several decades, there wasn't really a "Supreme Court bar," Waxman said. Lawyers would often handle cases from the trial courts all the way up to the nation's highest court. But as the court shrunk its docket—from hearing upwards of 100 cases in the 1980s to around 60 now—firms began setting up dedicated Supreme Court and Appellate practices to tout their superstars.

"For many groups, the norm still seems to be that Supreme Court arguments are made by the head of the practice," said former U.S. Solicitor General Greg Garre, who heads Latham & Watkins Supreme Court and Appellate practice.

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But he added that “there appears to be a welcome trend towards expanding argument opportunities.”

Firms do so a number of ways, said WilmerHale’s Catherine M.A. Carroll, one of the five attorneys from her firm to argue at the court this term. Often, though, its about working with attorneys who will put those younger lawyers in front of the client throughout the life of the case. So when a case eventually got to the Supreme Court, the client “already knew me and already had some confidence in me based on the prior relationships,” Carroll said.

Women Attorneys

And if the goal was to get new, diverse attorneys in front of the justices, the strategy appeared to work—at least when it came to one measure.

Women argued approximately 23% of the total cases this term, more than half of whom were government lawyers. That’s slightly better than years past, which has varied between 12-21%.

Of the attorneys from firms that sent more than one to argue, 36% were women. The group also included the only Black lawyer to argue during the term.

In contrast, six firms with multiple cases before the court sent just one lawyer, with Paul Clement of Kirkland & Ellis arguing the most with four cases.

Of those, all were male and Kannon Shanmugam of Paul Weiss was the only attorney of color.

‘Particularly Unfair’

Bostwick agrees that having a strong team behind you is important for developing Supreme Court work. But she said the case she’s set to argue grew out of her clerkship in the U.S. Court of Appeals for the Federal Circuit, an appellate court known for reviewing patent and other IP cases. It also handles veterans’ claims.

Bostwick “saw the obstacles that veterans face and just kind of the difficulties with the system in been obtaining the benefits that they’re supposed to get in exchange for the service to our country. So I came out of the clerkship really wanting to make this veterans work a part of my practice.” And she’s been able to do that, appearing before the Federal Circuit numerous times.

The matter she’ll argue Tuesday deals with a federal statute designed to allow veterans to reopen their cases if they can show they were denied benefits because of a mistake by the judge or an agency.

Even if in other legal contexts, such mistakes “might be something we tolerate for the sake of finality,” Bostwick said that Congress has been clear that a different baseline is needed for veterans given the “fundamental notion underlying our veterans benefit system—that these men and women have have put their lives on the line, their health, their ability to earn a living.”

So denying benefits based on legal error “stands out to me is particularly unfair,” Bostwick said.