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High court sweep for Jones Day

Firm wins all four of its cases; two Chicago rookies each prevail

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Over the past two decades, advocates appearing before the U.S. Supreme Court have increasingly shared two things in common.

They practice in Washington, D.C., and they've argued there before — or, in many cases, over and over again.

Brian J. Murray and Lawrence C. DiNardo, two partners in Jones Day's Chicago office, were happy to buck that trend. Murray and DiNardo each made their first-ever appearances before the court last term — and the Chicago rookies came out 2-0.

Murray and DiNardo, at least for now, are exceptions at a time when the Supreme Court podium has become largely reserved for a high-profile, select group of Beltway barristers.

During the term that ended with Monday's opinions, SCOTUSblog, which tracks the court, said 71 percent of advocates who appeared before the court were considered "experts" — having argued before the court five times or working in an office where the lawyers have 10 arguments on their collective resumes.

And last term, 64 percent of the appearances before the court were by lawyers based in the nation's capital.

Like any good teammates, there is a healthy competition between Murray — who leads the Chicago office's issues and appeals practice and argued on behalf of CTS Corp. in *CTS Corp. v. Waldburger* — and DiNardo, who represented U.S. Steel in *Sandifer v. United States Steel Corp.*

"Larry won his case 9-0. Ours was a 7-2 result," Murray said. "I take the position that in our case, reasonable minds could have gone the other way. So that shows advocacy mattered."

DiNardo's response: "I love Brian and congratulate him on his attempt to secure a unanimous decision."

Jokes aside, Jones Day's real competition is the Washington-based group of experts who typically operate in an entirely different manner than DiNardo and Murray.

Supreme Court lawyers are known to reach out to clients and lawyers whose cases are en route to Washington. They often pitch clients on their expertise appearing before the court — and making an appearance on that client's behalf is usually a condition for the experts to take the case.

However they procure their arguments, a short list of lawyers have piled up gawky Supreme Court stats.

Paul D. Clement, a former solicitor general and now a partner at Bancroft PLLC, appeared before the court five times last term — the most of any private attorney.

Among lawyers in private practice, the current record holder for Supreme Court appearances is Sidley, Austin LLP's Carter G. Phillips, who has argued there 78 times, according to his website bio. Phillips, who works out of Washington and Chicago, argued nine of those cases on behalf of the government as assistant to the solicitor general.

Jones Day takes an approach that its lawyers said may not result in any one particular lawyer collecting a long list of Supreme Court appearances. Its appellate lawyers are spread throughout the country, and they try to represent clients through the entirety of the appeal process — however high it goes.

"Most cases get decided before they get to the Supreme Court, and so it makes sense to have local experts in all the circuits who know those judges and know those court practices and are able to go into court and be effective advocates there," Murray said, "but also be just as good as the others in Washington when it does come time to go upstairs."

Brian J. Murray

Lawrence C. DiNardo

That strategy worked last term. The firm represented four clients before the court, four lawyers made the arguments and all four clients won their cases.

The other two Jones Day lawyers were Noel J. Francisco, who successfully argued on behalf of Noel Canning Corp. in its challenge of President Barack Obama's recess appointments to the National Labor Relations Board. Michael A. Carvin argued for the petitioner in *Susan B. Anthony List v. Driehaus*. Francisco and Carvin are based in Washington.

"In all four of our cases, we had different Jones Day lawyers arguing, which I think is a real testament to how I think the firm views its resources," Murray said.

DiNardo began representing U.S. Steel in the U.S. District Court for the Northern District of Indiana about five years ago. He handled the case — concerning whether employees should be paid while putting on and taking off protective gear — through the 7th U.S. Circuit Court of Appeals.

The client stuck with him and the firm for the Supreme Court argument, he said, because of his experience in employment litigation. Another factor in his favor: He is a seasoned appellate litigator, having argued about 40 cases in various appellate courts and two arguments in state high courts.

"All together, (it was) a compelling case for the client to stay with our combined Jones Day team in the Supreme Court," DiNardo said.

Jones Day lawyers had handled the CTS Corp. case from trial through the appellate stages. Murray got involved with writing the petition for certiorari.

"We're able to put together the best team for the case," Murray said.

"In Larry's case, I was on the team as the appellate guy, but Larry argued it because it was a case that required really in-depth knowledge of labor law. In (the CTS) case, it was a pure legal question, and that's my domain."

A 2008 study by Harvard Law School's Richard J. Lazarus shows how drastically the Supreme Court bar has changed in the past 30 years.

In 1980, the court agreed to

hear 102 cases, 6 percent of which were brought by "expert" practitioners who had appeared before the court five times or worked in an office with 10 cases argued collectively. In the 2008 to 2009 term, 56 percent of the cases were brought by such experts.

In the court's 1980 October term, 76 percent of oral advocates were rookies, according to Lazarus' study, "Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar." By 2007, that number was down to 43 percent.

While fewer lawyers get to experience a Supreme Court argument, that doesn't mean it's less enjoyable for those who do.

When Murray, a former clerk for Supreme Court Justice Antonin G. Scalia, finished his 20 minutes before the court in April, he asked his 10-year-old son what he thought of the argument.

He said his son responded: "Justices Scalia, Kennedy and Ginsburg all said they didn't know the difference between statutes of repose and statutes of limitations before they read your brief. I'm only 10. How should I?"