

# Orrick's Big-League Push

**MARCIA COYLE**

The ingredients for building a marquee U.S. Supreme Court and appellate practice include a deep bench, diverse cases, high-profile clients and a presence in the nation's highest court. By that measure, Orrick, Herrington & Sutcliffe is swiftly mastering the recipe.

Over the past decade, many law firms tried to create first-rank Supreme Court and appellate practices. But without a long-range plan, many fell short. Orrick has a plan, and judging by its practice group's recent rapid growth, the last Supreme Court term and a number of important victories in the U.S. Court of Appeals for the Federal Circuit, its commitment is paying off.

"We are growing by leaps and bounds," said E. Joshua Rosenkranz, head of Orrick's Supreme Court and appellate practice.

Rosenkranz, who joined the firm five years ago, was commissioned from the start to build a marquee practice—"the place where clients come when they simply have to win an appeal," he said.

A year ago, the practice consisted of two partners and three associates. Two other associates split their time between his group and another practice group. Today, there are four partners, including recent hires, Robert Loeb, former acting deputy director and special appellate counsel of the Civil Division appellate staff in the U.S. Department of Justice, and Eric Shumsky, formerly an appellate partner at Sidley Austin. Four additional associates were hired for the group and another four split their time with Rosenkranz's team.

The practice group includes three former Supreme Court clerks—not counting Rosenkranz—and two recent high court clerks, one for Justice Stephen Breyer and the other for Justice Sonia Sotomayor, who will join the group this fall.

Mark Davies is the fourth partner; he left O'Melveny & Myers for Orrick three years ago. Richard Bierschbach of the Benjamin N. Cardozo School of Law is special counsel "who spends every discretionary hour he has doing our appellate work," Rosenkranz said.

"Since I went into private practice, every single major litigation firm has said it's going to create an appellate practice," he said. "But there are widely divergent approaches to what they're doing. On one extreme are the firms that seem to be creating appellate practices defensively because they see clients with major cases going up on appeal and the clients start asking, 'Don't we need an appellate expert?' They want to point to that person in their firm. They tend to be smaller groups and don't have plans to have key practices.

"At the other extreme are firms that want to be a marquee appellate destination," he continued. "Orrick from the start wanted that type of practice. They thought it would be a loss leader, which it never turned out to be. We're building



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accordingly. That only works if you become a magnet for clients in the firm and clients start coming over transom hiring you to do appellate work. We set out a goal of being one of the dominant appellate firms in the country in 10 to 15 years. We set out a very, very ambitious five-year plan and we've satisfied the five-year metrics, even though we're about a year away from that mark."

Rosenkranz's vision, partner Davies said, includes the "notion of a constellation model." He explained, "We really want to have a deep bench. We have Bob Loeb, who has argued over 100 cases, and Eric has had amazing experience with Carter Phillips at Sidley."

Davies himself has had a stellar year so far. He argued and won three cases in the Federal Circuit on behalf of Nintendo, Dow and Nvidia. He and Rosenkranz are handling Oracle's copyright appeal in its legal battle with Google over who owns Android. And Rosenkranz will argue for Apple in the so-called Posner appeal against Google.

"Those are industry-defining cases," said Rosenkranz, adding that the practice group is handling a number of Apple cases in the smartphone wars.

"If you want to distinguish the firm as a destination appellate practice, my view is you've got to be diverse," he said. "When I first recruited Mark, he said very few law firms created diverse appellate practices. My docket is really diverse. The most high-profile cases have been IP cases, which is more an accident of history and the client base of Orrick, which is very prominent. But I've argued in the last year probably a dozen cases, and less than half have been IP.

He successfully represented Morgan Stanley in a pre-emption case in the Ninth Circuit; high-stakes commerce clause cases for DIRECTV and DISH Network; tort law appeal for Union Carbide; a tax dispute for Tracfone; an arbitration case for Microsoft and an aviation case for L3 Communications, among others.

"One of our metrics is being a presence in the Supreme Court," Rosenkranz said. "How will we know we're one of the best appellate shops in the

country? I firmly believe [Supreme Court work] is not an end in itself, but rather a measure of how you're succeeding in the marketplace. There's a perception that if you can play in the major leagues, then you're in a position to handle any case anywhere.

"I will never argue six Supreme Court cases in a year. The truth is, some of the most important appeals in the country are happening not in the Supreme Court—and a lot of the cases the Supreme Court ends up deciding the court itself will say are not hugely consequential, but there is an issue of law on which the circuits have split."

A case or two a year before the high court as the practice grows, he said, is the goal. "Every Supreme Court case we've had at Orrick came in at the Supreme Court level. So they weren't homegrown."

Last term, Rosenkranz argued and won one of the top cases of the term: *Kirtsaeng v. John Wiley Publishing*, a 6-3 decision holding that the "first-sale" doctrine applies to all works, including those made overseas. Senior Associate Robert Yablon, a former clerk to justices Ruth Bader Ginsburg and Sonia Sotomayor, argued *U.S. v. Davila* on behalf of a criminal defendant; the justices vacated and remanded to the 11th Circuit. Loeb has filed an amicus brief for the U.S. Chamber of Commerce in the new term's case *Sandifer v. U.S. Steel Corp.*

Hiring former Supreme Court clerks is part of the recipe for success but not an end in itself, he said.

"You want to have and be able to attract and retain the best talent," said Rosenkranz, a former clerk for Justice William Brennan. "Supreme Court law clerks do not have monopoly on the best talent. And the truth is, the very best court of appeals law clerks can go toe to toe against the population of Supreme Court law clerks. But there is a higher concentration of superbly talented clerks in the Supreme Court and we want to dip into that pool. We did not give offers to everyone who came through this year. We like the idea of succeeding in that market place, but if there is a year when we don't have any, that's also okay."

As he looks down the road at what he wants the practice to become, Rosenkranz said, "I think about how big the job is and what more we would need by way of personnel. My sense is it would be hard to achieve the vision we describe without about doubling from where we are at this moment, to eight partners, mostly coming up through the ranks, and another five to six associates."

Contact Marcia Coyle at [mcoyle@alm.com](mailto:mcoyle@alm.com).