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Orrick's Josh Rosenkranz: The Man Who Makes 10-Digit Verdicts Go Away

By Ross Todd

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Since **Josh Rosenkranz** of **Orrick, Herrington & Sutcliffe** had already been named The American Lawyer's Litigator of the Year twice and a finalist another time prior to this year, we set the bar a little bit higher for him.

Once again, he's crossed that bar, and with room to spare.

During a six-month span last year, Rosenkranz twice helped clients erase billion-dollar verdicts on appeal. In February 2024, Rosenkranz secured a win at the Fourth Circuit wiping out a \$1 billion damages verdict record companies won against his client Cox Communications. The 2019 verdict held the internet service provider vicariously liable for customers' music piracy.

That July, Rosenkranz scored an even bigger win at Virginia's Court of Appeals. There, he nixed the largest verdict in Virginia history—a \$2 billion verdict against software client Pega-systems in a trade secrets challenge from rival Appian Corp. Having won that appeal on four separate grounds, Rosenkranz and his team set up Pega well for arguments at the Virginia Supreme Court, which he handled in late October. He is set to argue on Dec. 1 at the U.S. Supreme Court, which granted cert on the remaining willful contributory infringement claims



Courtesy photo

E. Joshua Rosenkranz of Orrick.

facing Cox, but declined to take up the record companies' appeal.

Litigation Daily sat down with Rosenkranz recently to discuss his approach to securing appellate work in these sorts of high-stakes cases and his method for working up an effective appeal once the assignment is in-hand. Rosenkranz, who was unaware that he'd been tapped for a third time as Litigator of the Year when we spoke, emphasized the importance of collaborating with trial teams to get their impressions of what went wrong at trial. But he said that it's his own fear of failure that kicks in as a major motivator once he starts working on a case—a process that ultimately leads to repeated drilling with flashcards covering details central to any case he's arguing.

Courtesy photo



Flashcards used by Josh Rosenkranz of Orrick, Herrington & Sutcliffe to prepare for an appellate argument for client Pegasystems.

“One of the things I’ve said to clients in cases like this is, ‘I’m the lawyer who’s going to lie awake at night, not just worried about how we’re going to win your case, but worried about how we’re going to lose it,’” he said.

Rosenkranz is careful to document his impressions when he makes his first pass through case materials. That initial perspective, which starts as notes on a legal pad, is as close as he’s ever going to be to the appellate judges who will decide the case and come to the issues cold. Rosenkranz distills those impressions about the strengths and weaknesses of his client’s position into a document he refers to up through the morning of oral argument. “I am constantly consulting that document because I never want to be the lawyer who loses sight—who is so ‘drank the Kool-Aid’ that they lose sight of their own vulnerabilities,” Rosenkranz said.

Both Cox and Pega were new clients for Orrick. Rosenkranz said that in a pitch meeting he wants potential clients to get an idea of what it’s like to work with his team. “We jump in and we are more well prepared, more conversant with the motions practice, more conversant with what’s been filed than any other lawyer they’re going to speak with,” he said. “We are brimming with ideas about the story: how the story hits us, how the legal issues hit us, how

we think they will strike the court, how we would reposition them.”

“Honestly, I say at the beginning of every pitch, ‘You’ve got my biography. ... I’m way more interested in talking about your case than I am in talking about ourselves.’ I think that’s the pitch.”

Rosenkranz doesn’t see himself as inheriting cases from the trial team or replacing them. “These are people with huge investment and huge knowledge about the record and about the law and about the story and tapping into that and making them both be and feel a part of a team effort is, I think, critically important to success,” he said. “No one likes to lose, but when a client and a trial team have lost a billion- or multi-billion-dollar case, it can be traumatic. It can be disruptive, and so, so much of what you need to do as an appellate lawyer is about tending to that psychological dynamic.”

He added that a good appellate lawyer needs to listen as much as he or she talks, especially at the outset when people have a lot to share about what went wrong. “The vast majority of it isn’t going to make it into the brief. But there are nuggets and kernels that are just rich with detail and passion,” he said. “That stuff is just gold dust for an appellate lawyer.”

Rosenkranz said there’s an “occupational hazard” among appellate lawyers who start to believe they’re the smartest people in the room. “Their attitude toward the trial counsel, and frankly, even the client also is: ‘Thank you for your service. We’ll take it from here,’” he said. “I think lawyers who think that they will intuit and come up with all the great pieces of the record and all of the pieces of the narrative and the right legal answer ... they’re missing out on a rich resource that is right there at their fingertips and ready and eager to be tapped into.”

After capturing his initial impressions and getting input from the trial and in-house teams, Rosenkranz said he and his team spend a lot of time selecting the right issues to focus on

in the appeal and working on the narrative they intend to tell about any mistakes that contributed to the verdict. Rosenkranz said that the appeals that he's handled that involved billion-dollar verdicts all involved "multiple things that went wrong."

"You've got a target-rich environment, but you've got to narrow it and refine it and keep iterating the narrative with the legal issues," he said. In the Cox case, the memo outlining all the potential issues came in at 70 pages. In the Pega case, the memo stretched to 130 pages. The team ultimately settled on six issues to raise on appeal in the Pega case—a number that was still about twice as many as they normally raise.

Rosenkranz said that when he finally sits down to write the brief, the goal is to tell a story that will have the judges wanting to rule his way by the time they finish the statement of facts. "Part of that story is what went wrong. How did this happen?"

"When a company has been hit with a billion-dollar verdict, there's a narrative out there that they did something terribly wrong," he said. "Part of the job of the appellate lawyer is to say, 'Look, we get it. There's a jury verdict. We can't fight the facts.' But we can reframe the narrative and temper some of the worst pieces."

He said that it's best to think in terms of rifle shots aimed at the heart of the matter rather than a buckshot blast.

"Appellate courts have limited bandwidth and limited attention," he said. "If you convey a sense that it's a kitchen sink, they will respond to it like it's a kitchen sink. But if you grab them with specific, powerful legal issues that really resonates with them in a way bigger than just the one client, you have a greater chance of winning."

Rosenkranz said that he tries to limit the number of cases he takes on at any given time. Part of that is because he considers drafting the appellate brief as an integral part of the preparation for oral argument. "As I'm drafting the brief, I'm thinking about the opinion that I want the court to write," he said. "I'm thinking backwards from that."

When the moment to argue a case finally comes, Rosenkranz said what he needs more than anything else is confidence. "For me, the confidence comes from knowing I have, and the team has thought through every possible question that could ever come up, and I have an answer for it," Rosenkranz said. The flashcards he puts together have the best one-sentence and three-sentence answers to those questions, as well as relevant facts and holdings from any cases that are likely to come up during argument. He drills the cards repeatedly. The stack of cards climbed two feet high for the Pega case.

Before every argument, he goes through three moot arguments that can stretch up to four hours. He often asks local experts to be mock judges and invites them to interrupt him should he do or say anything out of place. Part of his pre-argument checklist includes checking in with expert practitioners in the local jurisdiction to ask a range of questions: "What do I call the judges? What do I call my opposing counsel?"

"Time is so precious in an appeal, you want every word you say to be something that the judges or justices are focused on," he said. "Anything that you know that distracts them is a net negative."

"When I sit down after each argument, the first thought that comes to my mind is 'Sigh of relief. I didn't screw that one up.'"

Chalk up two more on that front.