Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Appellate Group Of The Year: Proskauer Rose

By **Samuel Howard**

Law360, New York (January 27, 2011) -- With a bevy of high-stakes victories, including a clean sweep at the U.S. Supreme Court that recalibrated hundreds of years of copyright law and a Third Circuit win in an antitrust fight over control of the men's professional tennis tour, Proskauer Rose LLP's is one of Law360's Appellate Groups of 2010.

Proskauer's appellate group boasts 17 partners, four senior counsel and 22 select associates drawn from across the firm's extensive ranks. Co-chaired in New York by Mark D. Harris, a partner in the litigation department, and Edward A. Brill, a partner in the labor and employment department, the appellate practice group has surged in recent years to the front of a decorated field.

The group's emergence is largely due to Proskauer's decision in fall 2009 to found a separate appellate group, assembling a multidisciplinary cadre of lawyers with the chops to carry cases beyond the trial courts all the way to the U.S. Supreme Court.

"Proskauer's always done a great number of appeals, but the firm really intensified its effort with the formation of the practice group," Harris said. "Clients are increasingly looking for appellate specialists and we are in the privileged position of having attorneys that are uniquely able to perform at the appeals level."

Including former Supreme Court and appeals court clerks as well as former appellate chiefs at the U.S. attorney's office for the Southern District of New York, Proskauer built up its appellate group knowing that the work requires not only mastery of the record but also more elusive skills, like a feel for judicial panels and a genius for persuasion.

"Our lawyers are leaders in their respective fields, but as veteran appeals specialists they have the rare ability to capture weighty and abstract issues in the form of pure legal argument," Harris said.

Most successful attorneys have a knack for advocacy, but few have the "special ear for appellate argument," and Proskauer's group is built around lawyers with the firsthand experience needed to construct compelling arguments for diverse panels of judges, Harris said.

The group's attorneys have hundreds of appeals among them, not to mention the invaluable edge of having worked on many of the cases before they even get to the appellate level, Harris said.

Proskauer's attorneys also have the persistence and confidence that appellate work requires, the ability to deconstruct an adverse ruling and present particular judges with convincing arguments on behalf of a client.

The perseverance and craft of appellate advocacy was fully displayed in the Reed Elsevier case, when Proskauer's Charles S. Sims won a unanimous decision at the Supreme Court and reinstated an epochal settlement over the republication of freelance newspaper articles.

Sims, who has argued three cases at the high court and filed more than 70 briefs there, confronted not only an unfavorable appeals court judgment but also some 200 lower court cases regarding the jurisdictional requirements of the Copyright Act.

The original $18 million settlement brought together the database industry, the publishing industry and freelance writer trade groups, allowing freelance newspaper articles, including those not registered with the copyright office, to be republished on electronic databases.

The industrywide settlement resolved four class actions and four years of negotiations. However, a faction of writers challenged the agreement, claiming it was unfair to authors of unregistered works.

The U.S. Court of Appeals for the Second Circuit vacated the settlement on a ground not raised by appellants, finding that the district courts lack jurisdiction to approve a settlement compensating authors for unregistered works.

Undaunted by the case law, Sims set out to prove that Section 411(a) of the Copyright Act, which makes copyright registration a prerequisite to an infringement action, was never intended to affect the court's jurisdiction to hear claims involving unregistered works.

"While the registration-before-suing-for-infringement requirement was more than 200 years old, the first decision calling it jurisdictional was less than three decades old, and the word was just thrown in, for no reason. All the other cases just followed suit, like a game of telephone," Sims said.

"There was literally not a single appellate decision where the issue was thoughtfully analyzed pursuant to the prevailing standards for determining what rules are jurisdictional, as opposed to mandatory, important, but not jurisdictional," Sims said.

Sims was overwhelmingly effective, convincing all eight of the justices — Justice Sonia Sotomayor was recused — that Congress never intended the Copyright Act's registration rule to not impede the court's jurisdiction.

The ruling not only rescued the pioneering settlement, which is still being challenged on its merits, but also restored the meaning of jurisdiction in the courts after lax interpretation overstretched the term.

"On a broader, doctrinal basis, the Reed Elsevier decision makes plain that the Supreme Court is really serious about its project of stopping the lower courts' promiscuous use of the jurisdictional characterization, and that's all to the good," Sims said.

Proskauer's appellate group grabbed headlines again in June when the U.S. Court of Appeals for the Third Circuit affirmed ATP Tour Inc.'s right to reconfigure its tournament system for professional men's tennis.

The antitrust appeal garnered particular attention because it was the first major sports business decision since the Supreme Court ruled against the NFL in the American Needle case, curtailing the league's authority to exclusively license products carrying its logo.

Any momentum generated at the Supreme Court, however, dissipated when the Proskauer attorneys' performance faced down the appeal at the Third Circuit.

The firm prevailed against claims brought by the German Tennis Federation that ATP violated the antitrust laws when it restructured the tournament system, downgrading the Hamburg Masters tournament to a second-tier event.

The Third Circuit said the appellants failed to satisfy their burden to prove the existence of any relevant product market within any geographic market. The Supreme Court subsequently denied cert.

Harris stressed that the appellate group's stellar performance was due to the fact that the attorneys are frequently involved with the cases well before they go to appeal and have thoroughly mastered the issues.

Case in point: The Proskauer attorney who successfully represented 14 Penn Plaza LLC at the Supreme Court in the seminal 2009 labor case over the arbitrability of Age Discrimination in Employment Act claims drafted the very collective bargaining agreement at issue.

Continuing the appellate group's winning streak in labor law, the Court of Appeals of New York reversed an appellate court in July and ruled that a former employee of Parade Publications in Georgia could not sue the company for age discrimination under New York law.

In a ringing endorsement of the appellate group's prowess, the American Bar Association is continuing to rely on Proskauer at the D.C. Circuit Court as the Federal Trade Commission appeals the legal profession's exemption from the record-keeping provisions of the agency's Red Flags rule.

While Congress voted in December to amend the Fair and Accurate Credit Transactions Act to restrict the reporting requirements for attorneys, the FTC maintains on appeal that it is not tantamount to the blanket exemption sought by the ABA.

Methodology: In mid-November, Law360 solicited submissions from more than 300 law firms for its practice group of the year series. The more than 400 submissions received were reviewed by a committee of four editors. Winners were selected based on the number of significant wins the group had in litigation or the size, number and complexity of deals the group worked on in 2010.