Supreme Court Spinners

By Bara Vaida

- What's Washington's latest PR trend? It's pitching reporters on Supreme Court cases.
- Experts say that strong media coverage can influence the justices and their clerks.
- Some practitioners shy away from talking about their work.

When Mark Corallo opened his copy of *The New York Times* on March 28, the street-smart Republican spin doctor did a little touchdown dance. The paper had published an editorial supporting the legal position of several of Corallo's clients in a high-tech patent case before the Supreme Court.

The editorial appeared the day before the case was to be argued, and it came after weeks of work by a team of lawyers and consultants that included the 40-year-old Corallo, a former Justice Department spokesman. The many phone calls to reporters and newspaper editorial boards explaining the case—in which a small Virginia company called MercExchange had won a federal appeals court decision in its suit against Silicon Valley giant eBay—had paid off. Corallo's client, a coalition that includes Apple Computer, Intel, Microsoft, Micron Technology, and Oracle, supported eBay's position challenging the appeals court's ruling.

Corallo says his communications firm, Corallo Media Strategies, was hired to explain eBay's position and garner media attention because "the justices read the newspapers." Former Justice Sandra Day O'Connor was the best example of that, he says, noting that during oral arguments she would ask the dueling lawyers, "'Where are the people?' on issues of law."

Corallo's confidence that the nine justices and their clerks pay attention to what the media say about cases challenges conventional wisdom. Justices aren't elected, and ethics rules dictate that no special-interest group can directly lobby them. Famed lobbyist Tommy Corcoran found that out three decades ago when he tried to press Justices Hugo Black and William Brennan into supporting his client, El Paso Natural Energy. His efforts were rebuffed, and the pressure ultimately backfired against his client, as Bob Woodward and Scott Armstrong recounted in their book *The Brethren*.

At the same time, the opaqueness of the Court's decision-making process means that no one can say for certain what influences the justices. "The Court floats on a kind of sea of public opinion," Justice Stephen Breyer said at a recent Georgetown University Law Center conference. That's why the idea of including a public-relations campaign in an overall strategy for winning at the Supreme Court can't be dismissed, say a number of lawyers, academics, and, of course, the spin doctors themselves.

"Since we don't know what makes a difference, if you have enough resources to hire a public-relations consultant, then why not?" says Lawrence Baum, a political scientist at Ohio State University and the author of *The Puzzle of Judicial Behavior.*

Mark Corallo

LIZ LYNCH

"I'm hoping to be the guy that people turn to when they have these cases before the Supreme Court," says the former Justice Department spokesman.

Though Supreme Court-targeted PR is an inexact science, it is a small but emerging part of the established public-relations and litigation fields. While many people are reluctant to talk about it on the record, citing the sensitivity surrounding any legal dispute, signs abound that the practice may be picking up steam.

Linda Greenhouse, the veteran Supreme Court reporter for *The New York Times,* says she has noticed a "new phenomenon, which is the hiring of PR firms to position clients" hoping to get the Court to agree to hear their cases. "I was inundated with calls all summer from PR people saying they wanted publicity for a pending case," she says.

In addition to Corallo Media Strategies, firms that confirmed to *National Journal* that they have worked on Supreme Court cases include APCO Worldwide, the Bork Communication Group, the Brunswick Group, and Ogilvy Public Relations Worldwide. How lucrative the business may be isn't clear. But Corallo, the newest entrant, says he and his team split a fee of $200,000 to $300,000 for their work on the eBay case.

"It's increasingly important for interest groups to build a political case in addition to their Court case," says Jamie Moeller, managing director for public affairs at Ogilvy Public Relations, because Supreme Court decisions have a political impact.

Robert Bork Jr.

RICHARD A. BLOOM

"If a case is getting some notoriety in the press … one can only think that [the information] seeps into the thinking of the clerks and justices."

Here's a look at the business through the eyes of two people—Corallo and Robert Bork Jr., the son of Supreme Court nominee Robert Bork. A former journalist and aide to then-U.S. Trade Representative Carla Hills, the younger Bork specializes in public affairs related to litigation.

When Corallo left Justice in early 2005 after three years as chief spokesman for then-Attorney General John Ashcroft, he took a Rolodex filled with the phone numbers of editorial writers, cable and broadcast news producers, and print reporters who had called him with questions. "I was good at translating legal issues to reporters," he says. He's also well connected to Washington's political establishment. Before going to Justice, Corallo handled press at the House Government Reform and Oversight Committee under then-Chairman Dan Burton, R-Ind., who investigated the Clinton White House on various issues. Corallo was part of George W. Bush's team in Florida during the 2000 recount, and he has represented Karl Rove during the government's investigation into the leak of former CIA operative Valerie Plame's identity.

In early March 2006, Corallo got a call from Makan Delrahim, a lawyer with Brownstein Hyatt & Farber and a former deputy assistant attorney general for antitrust. Delrahim, who had worked with Corallo at Justice, was representing high-tech companies lobbying on patent reform; his clients were interested in MercExchange's suit against eBay. Like many aspects of the legal system, patent law has been under stress as the result of new technology, and the case offered an opportunity for the Court to clarify a murky area of the law.

At issue was whether judges should automatically enjoin companies that infringe upon another firm's patents from continuing to engage in business related to that patent, or whether awarding monetary damages is a sufficient penalty. A federal district court had found that eBay had infringed upon MercExchange's patent on a method for conducting fixed-price auctions. The court ordered eBay to pay damages, but didn't grant MercExchange's request for an automatic injunction, ruling that MercExchange wouldn't suffer "irreparable injury" without an injunction, because it didn't have a business using the patents.

The U.S. Court of Appeals for the Federal Circuit, which hears patent appeals, reversed the district court, saying that a permanent injunction should be issued when infringement has been found. Lawyers for eBay appealed that decision to the Supreme Court, charging that the appeals court ignored existing patent law, which gives judges leeway to weigh the circumstances in making a decision.

High-tech companies thought the case could have far-reaching effects because of a trend in the patent world called "patent trolling." It's a pejorative term to describe patent holders whom some accuse of abusing the legal system to extract money from alleged patent violators rather than using patents to create products. The companies, fearing that the MercExchange ruling might accelerate the trend, filed an amicus curiae brief in support of eBay.

To write the brief, they hired former Solicitor General Ted Olson and former Independent Counsel Kenneth Starr. Delrahim reasoned that drumming up some media attention on the brief would help to foster an environment favorable to his client's policy goals. Congress has been considering changes to patent law, and the Court's decision was likely to have an impact on lawmakers' decisions. Delrahim also thought that the attention might help in his effort to persuade Solicitor General Paul Clement to submit a brief to the Supreme Court in support of eBay's position. "I think the solicitor general's policy position can be animated by public opinion—[that is] colored and enlightened by the public debate, once a legal error has been found," he said, when asked whether he thinks that Clement pays attention to news stories.

Delrahim knows the process that leads the solicitor general to write a brief. At Justice, he searched for interesting lower-court rulings that he thought the Bush administration might want to support at the Supreme Court and then coordinated with other government agencies to develop a comprehensive argument that Justice should take a position in a case. As the government's lead attorney, the solicitor general carries so much weight with the justices that whoever holds that

position is regarded by Court observers as the "10th justice."

Corallo, who hopes to write a novel someday, is passionate about intellectual-property issues. He quickly signed onto Delrahim's team. He called Noam Neusner, a former domestic-policy speechwriter for President Bush who describes his talent as writing opinion editorials that "boil complex arguments down to their core." Corallo, Neusner, and Delrahim went to work promoting the eBay case to the media.

Fortunately for Corallo's team, patent infringement already had reporters' attention. Weeks earlier another patent dispute, this one involving the popular BlackBerry wireless device, was headline news; in early March, BlackBerry's maker agreed to pay $612.5 million to settle a patent dispute that also raised questions about the clarity of the law.

Whether it was fortuitous timing or the work of Corallo, Neusner, and Delrahim, more than 150 stories on the eBay case appeared in March, including editorials in *The New York Times* and *The Wall Street Journal*. The solicitor general weighed in on the case, arguing that although eBay had violated MercExchange's patents, the appeals court didn't apply the correct legal test in considering whether to issue an injunction.

On May 15, the Supreme Court sent the case back to the district court, noting that an injunction doesn't have to be issued if an infringement violation has been found, and ordered the court to reconsider MercExchange's request for an injunction. "I think the editorials had an impact," Corallo says.

Bork has employed a similar strategy in terms of reaching out to editorial writers and reporters. He described an effort to get a case reviewed by the Supreme Court. The Court grants a review, "a writ of certiorari," to only a small percentage of the petitions filed each term. For example, when the Court's current term began on October 2, the justices denied certiorari to 1,900 cases and agreed to hear 37. As part of the process of "getting cert," lawyers file petitions outlining their argument, and some Supreme Court lawyers believe that if they can convince the Court that the case is of broad national interest, they stand a better chance that the justices will hear it.

"It's helpful to create an information environment apart from a cert petition," Bork says. "One doesn't know how much influence it has, but if a case is getting some notoriety in the press, then it's an important case, and one can only think that it seeps into the thinking of the clerks and justices. It won't make a difference in itself, but it might provide that little extra help." Carter Phillips, a managing partner at Sidley Austin who once served as a law clerk to then-Chief Justice Warren Burger, agrees. "When you are seeking Supreme Court review, you can cite it [an article] in a petition," he said.

Even better is the news story that spurs a group to file an amicus brief in support of a client's request for a Supreme Court hearing, because so few petitioners combine their request with an amicus brief. "It's a solid indication that this is an issue of greater significance," Phillips says. Bork represented Festo, the U.S. unit of a German magnetic cylinder manufacturer, in a 2001 patent dispute involving SMC, a Japanese-owned cylinder maker. Festo wanted the Supreme Court to review its case, and the company turned to Bork for help.

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>
> —*New York Times* reporter Linda Greenhouse

"Everyone said we wouldn't get cert, so what we tried to do was position it as the biggest patent issue known to mankind with important implications, whatever the outcome," Bork explains. His work led to numerous stories in the business press and several editorials, including one in *The Wall Street Journal*, "which is rare, because people don't like to write about cert petitions," Bork says. The Court agreed to hear the case in June 2001.

Getting the Supreme Court to hear a case is difficult, and Corallo is discovering that getting pre-cert publicity is hard as well. In June, Microsoft hired the Corallo-Neusner team to work on a patent case that the software company hopes the Supreme Court will hear. AT&T has sued Microsoft's non-U.S. operations over software code shipped abroad that allegedly violates a U.S. patent. The suit raises questions about the scope of U.S. patent law.

Corallo says he's been calling his usual sources in the media, and although they express interest in the case, "they say it isn't news." Call back when the Court agrees to hear the case, they say. Corallo also has to try to persuade journalists who are already busy writing about cases the Court has agreed to hear. *Times* reporter Greenhouse said she won't write about a case until the Court grants cert. "I understand that these public-relations people want publicity for a pending cert, as there are so few cases that the Court takes," she says. "But I say to them, 'I don't want to be used that way.' "

Corallo and Neusner keep making calls to the technology and legal press, as well as to business-related publications and television shows. Neusner has made some connections in a new realm of litigation public relations where he hopes to create some buzz: Internet blogs. He argues that the AT&T suit involves "economic nationalism," because the outcome of the case could encourage U.S. companies to send their design and manufacturing processes overseas rather than face potential litigation in the United States. The PR duo hopes to spark interest by tying the case to national policy. "We are knocking ourselves out with this, and it's been the lowest yield" in terms of the number of stories published for hours worked, Corallo says.

At the end of September, Solicitor General Clement recommended that the Supreme Court review the AT&T-Microsoft case because of its broad patent implications. The recommendation makes it more likely that the Court will grant cert, a decision that could come by the end of October.

"I really like sinking our teeth into this work," Corallo says. "Little by little, I'm hoping to be the guy that people turn to when they have these cases before the Supreme Court." ■

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