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Q&A With Edwards Angell's Sander Rikleen

Law360, New York (October 22, 2009) -- Sander A. Rikleen is a partner in Edwards Angell Palmer & Dodge LLP's Boston office. Rikleen's practice includes a wide variety of commercial trial work, with considerable experience in securities arbitrations, real estate litigation and appellate work. He has more than 30 years of trial experience in the state and federal courts and in the Financial Industry Regulatory Authority and AAA arbitration forums. Rikleen is frequently called upon to solve business problems through the development of strategies to avoid litigation as well as the use of litigation as part of a broader strategy to obtain business objectives. He has experience handling such sensitive matters as the investigation of suspected employee dishonesty and is particularly skilled in matters involving substantial mathematical detail.

Q: What is the most challenging case you've worked on, and why?

A: My most technically challenging case arose out of the serial bankruptcies (a completed reorganization and a subsequent liquidation) of a shopping center subtenant. I represented the shopping center in a series of cases and appeals which included disputes about: whether the subleasee could complain about alleged breaches of the overlease; whether the bankrupt subtenant was bound by rulings on overlease interpretation in a case involving the tenant; whether the parties could change their litigation positions based upon the court's rulings in the case involving the tenant; whether a judicially approved settlement in the reorganization was binding in the subsequent liquidation; and who was entitled to the proceeds of a judicially approved assignment of the sublease. At any one time, there were multiple cases and appeals pending in multiple courts in the First and Second Circuits.

My most emotionally challenging case involved representation of a family facing foreclosure on their home during the S&L crisis of the early 1990s. I won two Federal Court jury trials which set aside a foreclosure sale and then prevented the lender from foreclosing on the house for a second time. But the lender appealed, and the emotional toll on the family was excruciating. More than once, the wife called me to express concern that her husband's heart could not take the strain and that she would prefer to

lose the house than to lose her husband. We ultimately settled the appeal, on terms that allowed the family to remain in the house.

Q: What do you do to prepare for oral argument?

A: In the week or so prior to oral argument, I Shepardize or KeyCite all citations in all of the briefs to identify any authorities decided subsequent to briefing. I also refresh my recollection of the briefs, and particularly the record. Rather than merely preparing to reprise the briefing, I attempt to view the case as the panel might, to anticipate court questions (whether or not they were briefed) and to identify parts of the record I will need at my fingertips in order to substantively respond to panel questions.

I reread all of the key cases and attempt to distill my planned remarks to one page of outline notes. I find that I rarely get to follow my outline, but having distilled my arguments to bullet points enables me to be nimble when the inevitable panel questions take me away from my planned remarks. I also find that the most difficult questions relate to the panel's understanding of the facts of the case, so the better my knowledge of the appellate record, the better my oral argument.

If possible, I visit the court a few days prior to my oral argument and watch several appeals. In addition to reminding myself of the basics, like which counsel table I sit at and what the courtroom looks like, no matter what type of cases are being argued, I invariably notice something in the questions of the panel or in the answers of the advocates which helps me formulate my own presentation.

Q: What are some of the biggest problems with the U.S. appeals process?

A: Delay and dwindling resources can be a significant problem, with the severity depending upon the court and the state. As significant, is a general lack of public understanding about the role of an appellate court — what it does and should do — a challenge which contributes to dwindling resources and thus appellate delays.

The recent Supreme Court confirmation hearings did not contribute to improving that understanding. For example: How can an appellate judge “just apply the law” or “call balls and strikes” on a novel legal issue? How can an appellate judge apply “original intent” on a question involving new technologies which the Founders could not have imagined? How can an appellate judge both “respect and apply the law” and overturn long-standing precedent? If the courts must apply the law to protect the rights of those with unpopular positions, why is public dissatisfaction with a court decision relevant to judicial confirmation, re-election or recall?

These are not easy questions for which there are clear right and wrong answers. Until there is better civic education and understanding about the role of the Courts as a co-equal branch of government, court budgets will be in jeopardy, judicial salaries will be controversial and appellate judges will be criticized for doing their job.

Q: Aside from your own cases, which cases currently on appeal are you following closely, and why?

A: We try to follow cases of interest to our practice groups and our clients. At any one time, there are several different cases pending around the country which are of interest to our practice.

Q: Outside your own firm, name one lawyer who's impressed you and tell us why.

A: The two lawyers involved in appeals who most impressed me were each U.S. circuit judges before whom I appeared, and both are now on the U.S. Supreme Court. At the time, I do not recall either being discussed as potential Supreme Court justices, but I distinctly recall how impressed I was with their command of the facts and issues presented by my appeal, as if they had spent as much time preparing for oral argument as I had.

My experiences arguing in front of Justice Stephen Breyer (a warranty case when he was on the First Circuit) and Justice Sonia Sotomayor (a bankruptcy case when she was on the Second Circuit) were similar. Both appeared to be intimately familiar with the briefs and the record. They could each articulate my position better than I, and could likewise articulate my opponent's position better than he. Their questions were polite but pierced to the heart of the legal question before them, and challenged the underpinning of the arguments being made by each side.

Q: What advice would you give to a young lawyer interested in getting into your practice area?

A: There is no substitute for scholarship (good, solid analysis, research and writing), but that is not enough.

Clerk for an appellate court if you can, but clerking experience is not a prerequisite. Ask to work on appeals in your own firm or volunteer to do amicus briefs for bar groups or advocacy groups — there is no shortage of opportunities for pro bono appellate work and no substitute for experience. Sit in on appellate arguments to improve your ability to predict what will be of interest to an appellate panel.

When you are working on an appeal, learn the record inside out, and read the cases you intend to rely upon yourself — do not rely upon summaries created by others, whether they be junior or senior to you. For most appeals, the devil — and the outcome — is found in the details of your case.