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# Q&A With Morrison & Foerster's Deanne Maynard

*Law360, New York (May 20, 2013, 3:53 PM ET)* -- Deanne E. Maynard is a partner in Morrison & Foerster LLP's Washington, D.C., office. She chairs the firm's appellate and U.S. Supreme Court practice group and is a former assistant to the solicitor general at the United States Department of Justice. She has argued 13 cases before the Supreme Court of the United States, and filed more than 100 briefs in that court. Maynard has also argued and briefed many significant cases in the federal courts of appeals, running the gamut from patent appeals in the Federal Circuit to appeals in the other federal courts of appeals on antitrust, securities law and other intellectual property issues.

**Q: What is the most challenging case you have worked on and what made it challenging?**

A: One of the most challenging cases on which I have worked recently is a bankruptcy case I argued last term in the Supreme Court, RadLAX Gateway Hotel LLC v. Amalgamated Bank. The case involved whether a Chapter 11 plan that provides for a sale of a secured creditor's collateral free and clear of liens must afford that secured creditor the right to credit bid what it was owed at the sale. In practical terms, what was at stake was whether a secured creditor could protect the benefit of its bargain either to be repaid in full or to take possession of its collateral, by preventing the debtor from stripping the creditor's lien for less than the creditor thinks the property is worth.

The case was challenging in part because of its significance. Not only was it touted as the most closely watched bankruptcy case in a decade, it was of great significance to the financial industry. The morning of the argument, an experienced real estate lawyer walked up to me in the hallway of the Supreme Court and said something to the effect of, "I hope you are ready. This case is hugely important." No pressure.

Another reason the case was challenging was that, at least by the count of the federal courts of appeals, we seemed to be on the losing end of the argument. The other side claimed support from the Third and Fifth Circuits, which based their decisions on their view of the plain language of the statute. And the Supreme Court had granted review from MoFo's victory in the Seventh Circuit. Even one of the amici briefs supporting our side disagreed with our reading of the statute's language. Nevertheless, we believed we had the better of the textual argument. And our argument was supported by the purpose and history of the Bankruptcy Code, as well as by practical realities. In the end, we were vindicated: the

Supreme Court held the statute entitles the secured creditor to the right to credit bid in any plan sale that proposes to sell its collateral free and clear of liens.

**Q: What aspects of your practice area are in need of reform and why?**

A: Motions practice in the federal courts of appeals probably could stand a close review. Each circuit tends to handle motions practice differently, both as to process and timing. These differences can have a significant impact on how an appeal will proceed. For example, the outcome of a motion to dismiss a cross-appeal as improper affects the timing, length and number of briefs. Yet at least in some circuits, such motions can remain pending for quite some time, delaying the progress of the appeal. And at times, resolution of such substantive motions may be deferred until resolution of the merits. That deferral sometimes is warranted, as a motions panel rightly may not want to decide issues that are too intertwined with the merits. But other times, such deferral is effectively a denial of the motion because by the time of the merits decision, any relief that could be given is essentially moot.

**Q: What is an important issue or case relevant to your practice area and why?**

A: A case important to those handling patent appeals in the Federal Circuit is the recent grant of en banc review in Lighting Ballast Control LLC v. Philips Electronics North America, No. 2012-1014, -1015 (Fed. Cir. March 15, 2013). The en banc order puts into play the standard of review given to district court claim construction rulings, which the Federal Circuit currently reviews de novo. Specifically, the Federal Circuit has requested briefing on whether it should afford deference to any aspect of a district court's claim construction and, if so, which aspects should be afforded deference. The en banc briefing should be completed in the next several months, with an en banc oral argument to be set at some point thereafter.

**Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.**

A: I have long been impressed with the current U.S. Solicitor General, Donald B. Verrilli Jr. He is the consummate appellate lawyer. Don thinks through a case from every angle and is always willing to question and reconsider his initial views. He is exceptionally smart. He continually strives for excellence, believing a brief can be made better up until the moment it is filed. And Don has unwavering integrity.

Yet beyond all these qualities of an excellent advocate, Don also is a great mentor and colleague. Many of us (both within and outside the appellate bar) count him as one of the key influences in our legal careers and strive to emulate him.

**Q: What is a mistake you made early in your career and what did you learn from it?**

A: When I was a junior associate, I was given responsibility by the partner in charge of a very important appeal with ensuring that our briefs and appendices did not get bounced by the court. This was no small task, as the record was large and the appendix included videotapes in the days before the rules provided for such media. The paralegal and I spent many long hours pulling everything together and ensuring

everything was in compliance with the rules. We then overnighted everything to the court (this also predated e-filing).

The next morning, I called the clerk's office to confirm that all was in order. The clerk said, "I have good news and bad news. The good news is that I've received your packet; the bad news is I am about to bounce your brief for noncompliance with the rules." "Which one?" I asked, full of dread. "The rule that your brief can be no longer than so many pages," he said. "But the court granted us leave to file an overlength brief," I replied. "I am so glad you called," he said, "how embarrassing if I had bounced it for that reason." Indeed.

From that I learned, if you've been given leave to do something that is different than the rules, it is wise to make that clear somewhere on the face of the filing itself. (Also, it never hurts to call the clerk's office to make sure everything is OK.)

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