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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@portfoliomedia.com

Q&A With EpsteinBeckerGreen's Kenneth Kelly

Law360, New York (December 21, 2009) -- Kenneth J. Kelly is a member of EpsteinBeckerGreen and is co-chair of the firm's national litigation practice. He has more than 30 years' law firm and corporate counsel experience, primarily in litigation of complex commercial disputes, banking disputes, defense of employment discrimination claims in the financial industry, and representation of managed care organizations and insurers in disputes between members/insureds and individual and corporate health care providers.

Kelly represents clients in a wide range of industries, including financial services and banking, health care, insurance, and technology. His litigation experience is similarly diverse.

Q: What is the most challenging appellate case you have worked on and why?

A: Merrill Lynch v. Chemical Bank, 57 N.Y. 2d 439, before the New York Court of Appeals in 1982, probably because this was the first appeal I argued in New York's highest court. It involved the interpretation and application of conflicting UCC provisions regarding forged endorsements on checks where there was no precedent even closely on point, but which related to the methods by which millions of checks are processed by banks each day.

I had not done any of the briefing below (and a decisive item in the legislative history had been overlooked and not raised at the trial and intermediate appellate courts), and first had to petition for permission to appeal from an adverse decision at the intermediate level, then incorporate an argument not raised before.

The decision turned on interpreting the statutes in a way that corresponded to commercial practices and did not unduly burden the banking system. I had also just joined Chemical Bank's legal department, which added to the pressure. We obtained a unanimous reversal and principles as to apportionment liability of banks in the collection chain for paying checks over forged endorsements were conclusively determined.

Patrowich v. Chemical Bank, 63 N.Y. 2d 541 (1984), is a close second. Decided in the context of the nationwide "erosion" of the employment-at-will doctrine, it went against the trend and held that personnel manuals are not contracts and senior-level employees have to substantially participate in discrimination to be liable under the state anti-bias statue.

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

A: I try to put myself in the judge's shoes and anticipate what the court will ask, without limiting the questions to merely restatements of the adversary's brief points. I prepare answers to typical appellate questions like, "Where in the record is this?" and have Post-its on the pages, so I can turn immediately to the page and read the evidence to the court. Also, I have answers for "Where was this point preserved for appeal?" and "How do you distinguish this case from a particular precedent?", identify the troublesome cases, and have an honest, nonevasive answer where a case is not easily distinguishable.

I try to be ready to justify, politely, the answer that begins, "No, your honor, I disagree with you…" I also pretend I am writing the opinion and try to be ready to help the court decide by explicitly stating what we want the "definition of x" or the "test for y" to be; I don't leave it to the court to articulate the dispositive point by itself when the opinion is written.

I prepare and memorize a verbatim two-sentence (maximum) introduction that states the essence of our position, and hope that I get a chance to say it before the questioning starts. I set out the points to cover in a two-page outline — never a verbatim script — that I can refer to when answering questions without flipping lots of pages. I get the names of the judges who will be on the panel in advance and do a Lexis search to see if any wrote or joined in decisions we are relying on, in order to work that into the presentation (without being obsequious, of course). It shows you have done your homework. And I always do a dry run with other lawyers and former Appellate Division Judge Barry Cozier in our office, who ask pointed and follow-up questions.

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

A: Inordinate delays due to the volume of cases, the misuse of interlocutory appeals on meritless points in jurisdictions where such appeals are permitted, and some jurisdictions' lack of scheduling orders for completing the briefing process. It is not uncommon for an appeal to take more that a year, at best, from notice of appeal to decision, even when the appeal is required to be perfected with 90 days of the notice (as is fortunately the case in the Second Circuit); simply waiting to get on the calendar can take a full year in certain jurisdictions after briefs are submitted. Some New York state intermediate appellate courts allow the appellant six or nine months to perfect the appeal by filing the record and opening brief. Sixty days is more than sufficient.

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

A: Citizens United v. Federal Election Commission, the so-called Hillary the Movie case. Not only are the practical implications of corporate spending on the political process enormous from a practical stand point, and the First Amendment implications historic, but the uncertainty where some of the Supreme Court justices (including Justice Sotomayor) will line up makes this a court-watchers' delight. Also, it involves lawyering by all-star appellate advocates like Ted Olsen and other luminaries in amicus briefs. Reading the transcript of the argument will be the appellate highlight of the year.

Q: Name one lawyer outside your firm who has impressed you and tell us why.

A: Judge James B. M. McNally, who was a New York state trial and appellate court justice and of counsel to the law firm where I started to practice 35 years ago. "Big Jim" would "moot court" arguments before we went to court, which taught us how appellate judges approached cases. He said that in 90 percent of cases, the judge decides what is the correct result based on the facts. If the fact section of your brief persuades the court that your side should prevail, he said that the court will go out of its way to find the law to support your case. Of course, the law section of the brief should make that easy for the court to do. His other advice for arguments was that judges can see "malarkey" a mile away, and "get to the point."

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

A: First read Justice Scalia's book "Making Your Case: The Art of Persuading Judges," one of the best how-to books ever, then go watch an afternoon's worth of argument at the intermediate appellate level and see how many lawyers do it wrong. Figure out what makes the effective lawyers effective, and try to imitate them.