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Q&A With Hodgson Russ' Kevin Kearney

Law360, New York (December 04, 2009) -- Kevin M. Kearney is a partner in Hodgson Russ LLP's appellate practice. His practice areas include complex federal litigation, securities, class actions, antitrust and corporate governance.

Since joining the firm in 1994, Kearney has focused on federal court litigation, including RICO and civil and criminal antitrust cases. He has defended clients in securities and antitrust class actions, and litigated a number of corporate governance disputes.

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

A: Every appeal presents its own difficulties, but a case involving an unsettled issue under the federal sentencing guidelines may have been the most challenging. The question involved calculating the volume of commerce in an antitrust case, and the court had no precedent to work with. On the initial appeal the Second Circuit vacated and remanded for resentencing, and after resentencing the government appealed again.

On the second appeal the court needed to be persuaded that even though the government's position appeared better on the law, that it had failed to meet its burden on certain factual issues. Including the remand, we wound up with three different sets of briefing, and three different oral arguments. It was quite clear that most of the panel did not agree with the district court's calculations, but ultimately deferred.

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

A: My typical routine is to read the briefs about two weeks before argument, and to read the portions of the record cited. My experience, both as a clerk and in practice, is that the lawyer's greatest service to the court, and ultimately to his or her client, is to clarify the record, both as to what is there, and what is not. I try to be in a position not only to cite to the record, but to have the testimony, or evidence, available to quote during argument if necessary.

I next talk with colleagues at Hodgson Russ in an effort to determine the most difficult questions I might face, and how best to respond. Those conversations hopefully are a rough precursor of the conversation with the court during argument. The most compelling rhetoric will be undermined by two things: the inability to clarify the record, and the unwillingness to directly address the difficult questions. These are the two points I want to make sure I am ready for.

A day or two before argument I write out a long outline of my anticipated presentation. I rewrite the outline several times, editing it down to a single page. I take the final version with me to the podium, but rarely look at it during argument.

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

A: Appeals face the same difficulties found in all litigation: The process is expensive, takes a long time, and is difficult to explain to many clients.

For federal appeals, I would welcome uniform rules for preparing the record, and for briefing, across all the circuits. Local rules are well-intentioned, but add an unnecessary level of detail.

But overall my experiences have been very positive. Lawyers who show proper respect to the court — by being prepared, listening to questions from the bench, and answering them — are treated with respect, and judges genuinely want to reach the correct outcome.

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

A: I probably should not admit this, but right now I have not been focused on many cases other then my own. Over the last year I spent quite a lot of time considering cases decided after the Supreme Court's Twombly decision [Bell Atlantic v. Twombly, 550 U.S. 544 (2007)], but the court clarified the broad reach of Twombly last May in Ashcroft v. Iqbal [(556 U.S. ___ (2009)].

I still check on cases applying Twombly: for a commercial litigator, the opportunity to obtain an early dismissal is a great benefit.

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

A: I was privileged to clerk with an exceptional group of young lawyers, and I continue to be impressed by their achievements, and would not try to single one of them out. Nearly 20 years ago my wife and I decided to live in Buffalo, and among the roster of extremely able and collegial western New York lawyers Larry Vilardo, of Connors & Vilardo, is among the very best. He is very smart, writes exceptionally well, and expresses difficult concepts in a straightforward and understandable way. I have worked with and against Larry, and think he embodies the way law ought to be practiced.

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

A: I consider myself to be a corporate litigator, with an emphasis on appeals, and my first piece of advice is make sure you learn and understand the basics of litigation practice. If you do not fully understand how the case reached the appeals stage, you will miss many of its important nuances.

Next, I am a firm believer that 95 percent or more of well-briefed appeals are decided on the papers. Oral argument is important, but it is vital that you learn to write clearly and persuasively. Keep a copy of “The Elements of Style” by Strunk and White handy, and take a seminar with Bryan Garner if you can. Edit your writing constantly; an effective brief should look very different then its first draft.

Finally, read books and articles by authors who write well: clarity, precision, and persuasiveness are the hallmarks of great writing, and you can best improve your legal writing by exposing yourself to more than just briefs and legal opinions.