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Q&A With Foley & Lardner's Jim McKeown

Law360, New York (May 27, 2009) -- Jim McKeown, a partner in the litigation department, heads Foley & Lardner LLP's antitrust practice. McKeown is listed in The Best Lawyers in America and among Law & Politics Media Inc.'s Wisconsin Super Lawyers.

He is an active member of the American Bar Association Antitrust Section and has taught sports law and antitrust at Marquette University Law School.

McKeown received his law degree from the University of Minnesota. He has a bachelor's degree in economics from St. John's University and a master's degree from the University of Minnesota.

Prior to joining Foley, he served as a law clerk to the Judge Harlington Wood Jr. of the U.S. Court of Appeals for the Seventh Circuit.

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

A: In some respects it was my first trial, when the file was given to me about 16 hours before the trial began and I had the opportunity for such cross-examination as "Are you suggesting that this fur coat was not purple when you left it at my client's dry cleaners?" and "Wouldn't you agree that this shade of purple is both unique and striking?"

Since that half-day adventure, the most challenging case would be either a three-month trial defending a foreign company on claims of breaching an IP license and unfair competition or the antitrust litigation brought by American Express against Visa, MasterCard and several banks that issued Visa or MasterCard credit cards.

The IP licensing trial lasted almost three months and was challenging for several reasons, including that the technology was complex, for many of our witnesses English was the second (or sometimes third) language, and my late addition to the trial team (about 90 days before trial).

By the time I joined the trial team, the judge had already granted summary judgment for the plaintiff on a few breach of contract claims, so the trial would address damages for those claims and both liability and damages for plaintiff's remaining claims (for which it was claiming \$700-800 million in compensatory damages, plus punitive damages on the unfair competition claim).

The challenges included presenting the complex technology and damage issues in terms understandable to the jury and explaining our client's position to the jury in a manner that would be consistent from the start of the case to the end. The Amex litigation, in which Foley represented one of the bank defendants, was challenging for several reasons. First, the two credit card networks (Visa and MasterCard) had defended and lost (before the same district court judge) a previous antitrust challenge brought by the DOJ Antitrust Division.

Second, the market issues presented some difficult economic concepts involving two-sided markets, consumer demand and merchant acceptance, so that, as a defense group, we needed not only to analyze the antitrust issues properly but also to determine how to explain the concepts in a manner that could later be understandable by a jury.

Further, the discovery permitted in that case was massive — with approximately 170 million to 180 million pages of documents produced collectively by the plaintiffs and defendants. This quantity of discovery created challenges both in terms of locating and reviewing all the documents (mostly electronic documents) for production and, in turn, locating the most relevant documents from the millions produced by the plaintiff to determine what should be used in depositions.

Q: What accomplishment as an attorney are you most proud of?

A: The opportunity to assist with the creation and early development of MLB Advanced Media (www.mlb.com) is one of my most satisfying roles.

In January, 2000, the owners of the Major League Baseball clubs voted to combine their respective interactive media rights to create a Web site that would be state of the art for the content and features that it offered.

Identifying and resolving the legal issues related to moving the separate club internet operations to one integrated operation for hosting, merchandising, ticketing, statistics and other aspects fell primarily to a legal team consisting of two lawyers from Major League Baseball Properties (Ethan Orlinsky and Mike Mellis) and two lawyers from Foley (Mary Kay Braza and me).

The four of us worked as a cohesive team to identify issues, to consider available options, and to provide practical legal advice to the fledgling company as it became the pioneer for what sports league websites could do. We tried not only to address the issues presented by combining the website operations in late 2000 but also to anticipate where technology might evolve.

Today, MLB Advanced Media is widely recognized for its success, and Mike Mellis serves as its general counsel. I continue to use www.mlb.com as the homepage on my computer both for the best and most current news on baseball and as a real time memento of the project.

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

A: Discovery, and particularly electronic discovery, needs reform. The costs of capturing, processing, reviewing and producing electronic documents is astronomical, and the burden is asymmetrical if the plaintiff is an individual or smaller company with relatively few electronic documents while the defendant is a large corporation with a complex IT system.

What were considered relatively large claims that would be defended and won on summary judgment a few years ago are now being settled because discovery — primarily electronic document production — is so expensive.

Reform is needed on several fronts. First, the bar needs to do a better job of educating judges as to how expensive some of these obligations are. The courts cannot properly evaluate the burden and expense of ordering additional electronic discovery if they do not appreciate the magnitude of the costs.

Second, there needs to be some balancing of what is reasonable, either through some judicially accepted guidelines that put reasonable limits on electronic discovery and/or by adopting a modified “English Rule” for electronic discovery costs. A party that runs the risk of paying for the costs of its opponent’s electronic document production is likely to become considerably more reasonable in the demands made.

Q: Where do you see the next wave of cases in your practice area coming from?

A: Two new waves of cases are likely to occur in the antitrust area.

First, as the recession forces businesses to retrench and to re-examine their sales and distribution policies, I expect that companies that lose business (whether due to termination of supply agreements or due to competitors who have bid more aggressively) may turn to litigation to claim that their losses are the result of improper conduct by their suppliers or competitors.

Second, the U.S. Department of Justice Antitrust Division has obtained over \$700 million in fines in price-fixing cases so far this fiscal year and the criminal cases are always quickly followed by class actions.

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

A: The most impressive lawyer I have ever met is Harlington Wood, Jr., a modest man who had an extraordinary legal career in private practice, as a U.S. attorney, in the Department of Justice, as a district judge and ultimately as a circuit judge on the Seventh Circuit.

His book “An Unmarked Trail: The Odyssey of a Federal Judge” recounts some of the stories of his remarkable career. But more impressive than the accomplishments was the manner in which Judge Wood dealt with people. A man with a wonderful sense of humor and a ready laugh, Judge Wood treated everyone he met with respect and knew by first name everyone who worked in the federal courthouse.

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

A: First, the lawyer should have a good understanding of both economics and antitrust. There are several CLE programs that can help with this, including the “Fundamentals” sessions that are taught each year on the first day of the ABA Antitrust Section’s Spring Meeting.

Judge Posner’s book on antitrust law provides a readable text with good insights and analysis.

Second, become active in the ABA Antitrust Section and your local or state bar antitrust section. These organizations will introduce you to other antitrust lawyers and will provide opportunities to work on projects that will help build your antitrust resume.

Third, handle other types of litigation beyond antitrust. You need to develop your trial skills and, given the relative infrequency with which antitrust cases are tried, much of your trial experience may need to come in other fields.