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Q&A With Foley & Lardner's David Goroff

Law360, New York (September 11, 2009) -- David B. Goroff is a partner with Foley & Lardner LLP and the national chair of its appellate practice. Goroff has extensive experience representing clients before state and federal appellate courts and the U.S. Supreme Court. He also has substantial experience in representing entities in all aspects of the bankruptcy litigation process.

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

A: In In re Dow Corning, 280 F.3d 648 (6th Cir. 2002), we were able to successfully oppose the confirmation of a plan of reorganization in one of history's largest mass tort bankruptcies even though the plan had strong support among the major constituents active in the bankruptcy, including the creditors committee, and even though the bankruptcy court's order of confirmation had been affirmed by the district court on the first tier of appeal.

Our client was one class of Australian tort claimants. A second class of Australian claimants had agreed to the plan. An earlier plan had been rejected on appeal, so the proponents' attorneys were especially thorough in fixing the prior defects and in marshalling their arguments and proof.

The bankruptcy judge presided over a lengthy confirmation hearing and then made detailed findings-of-fact and wrote an extensive opinion in support of plan confirmation. The district judge likewise wrote a detailed affirmance.

When we reached the U.S. Court of Appeals for the Sixth Circuit, we believed that our best argument against the plan was to challenge a channeling injunction that the plan included that provided releases in favor of nondebtors, an issue that federal appellate courts were in conflict about at the time.

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I argued this issue to the appellate court, while other plan opponents argued separate issues. After oral argument, the Sixth Circuit agreed that the injunctions made plan confirmation improper and reversed the confirmation order.

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

A: I try to do a moot court and usually ask several colleagues whom I know will present different viewpoints to ask me the hardest questions they can and to pick apart the organization of my argument. Based on the results of the moot court, I then revise my outline.

I also reread and annotate the parties' briefs, all cited cases, and parts of the record that I think might be at issue. If the panel has been disclosed in advance, I try to research how its members have approached similar issues.

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

A: Generally, I think that the nation's appellate courts do an excellent job. That said, I think that many appeals take too long to be decided. I find that this is especially true of bankruptcy appeals, many of which go to district courts. Such courts are often fully occupied by their trial docket, which causes bankruptcy appeals to be delayed. I have seen some take more than two years. I also believe very strongly in the value of oral argument, but in some appellate courts, oral argument is the exception.

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

A: I (like I believe every other appellate lawyer) try to keep abreast of the current docket of the U.S. Supreme Court (and the SCOTUSblog). Because I practice in Chicago, I also try to follow the Illinois Supreme Court's docket.

In addition, I try to keep track of cases where appellate courts have sanctioned counsel. The more a practitioner can learn about what practices lead to trouble in appeals, the better he or she is able both to avoid such practices and to focus instead on what such courts find most persuasive.

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

A: While I do not know him, I was very impressed with the work that Paul Smith, chair of appellate litigation at Jenner & Block LLP, and his firm did working with Lambda Legal Defense and Education Fund Inc. in Lawrence v. Texas.

In that 2003 case, Paul and his colleagues achieved a rarity — they persuaded the Supreme Court to overrule a decision it had issued just 17 years earlier in Bowers v. Hardwick.

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To achieve this result, the briefs in Lawrence set forth in detail how the Bowers Court had misapprehended not only relevant law but also important history and sociological data. While the specific issue in Lawrence concerned the unconstitutionality of a Texas sodomy law which was directed at same-sex, consensual sexual conduct, the court's ruling, emphasizing both due process and equal protection grounds, affirmed the fundamental dignity and respect that gay Americans — like all Americans — deserve.

The decision led to a sea change in how courts approach and write about issues concerning the civil rights of gay and lesbian Americans.

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

A: Here, I have a lot to say. First, nothing is more important to an appellate practitioner than the ability to write well, and nothing is more important to this ability than practice. A well-written brief should be creative, credible and compelling. It should directly address each relevant issue, make effective use of authority and proof and honestly acknowledge any limits to or weakness in the advocate's position.

Second, the attorney should practice arguing both sides of an issue. I developed this skill from debating in both high school and college. This helps me to anticipate (and hopefully better respond to) questions I am likely to get from judges who may not agree with my position.

Third, if you can, it is an incredible learning experience to clerk for an appellate judge. I was fortunate to clerk for Hon. Richard D. Cudahy of the U.S. Court of Appeals for the Seventh Circuit. He was very generous in sharing insights with his clerks as to how he approached the issues he adjudicated. Also, reading the parties' briefs over that year gave me considerable insight as to what made for good briefs and bad briefs. (For example, a surprising number of attorneys used more space in their brief for making ad hominem attacks against opposing counsel than for addressing opposing counsel's arguments.)

Finally, I think appellate attorneys should have trial experience. Participating in a trial will give one a first-hand view of how issues become part of a trial record and progress on appeal.

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