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Q&A With Foley & Lardner's Michael Leffel

Law360, New York (October 28, 2010) -- Michael D. Leffel is a partner in the Madison, Wis., office of Foley & Lardner LLP, co-chair of the firm's class action working group, and a member of the firm's consumer financial services and appellate practice groups. Leffel represents clients in cases involving uniform and deceptive trade practice statutes, RICO, the federal securities acts, the Real Estate Settlement Practices Act, and various state and federal financial services acts, among others. He is a frequent author and lecturer on developments in class action law and financial services litigation. He has served as counsel for clients in nine cases before the U.S. Supreme Court.

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

A: I have been fortunate to work on a number of interesting and challenging cases. Few compare to the opportunity to help defend the McCain-Feingold campaign finance reform legislation in the trial court and ultimately in the U.S. Supreme Court, resulting in McConnell v. FEC, 540 U.S. 93 (2003).

The case had multiple parties with unbelievable legal talent on all sides, including several past, current or soon-to-be solicitors general of the United States. While a lot of casual observers overlook this fact, there was also a significant amount of discovery involving the major political parties, members of Congress, various politically active groups and reform organizations, and a large number of experts. It's not often that a case requires you to prepare a U.S. Senator for his deposition, take the deposition of a Representative, and then weave the evidence into a brief for the Supreme Court.

While some of the court's original holdings have been scaled back by subsequent decisions, it was a thrill to be part of this historic litigation.

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

A: One of the most satisfying things in my practice is when a court, confronting an issue for the first time without any binding precedent, is persuaded to adopt the solution or legal analysis I have proposed. That is one of the great things about working on class actions: issues that otherwise might not be litigated, because the stakes would be too small in an individual case, get resolved for the first time precisely because the stakes are often so high in a class action.

When I think of what I am most proud of as an attorney, however, these kinds of victories pale in comparison to helping individuals or neighborhoods in the many pro bono cases I have handled. There is a certain sense of accomplishment when you are able to use your skills to effectively curtail the drugs and violence at an apartment building where the police had responded to calls more than 300 times the prior year, or to help an elderly African-American farmer in a civil rights case obtain the money he is due. These cases may not put any money in my pocket, but they are truly rewarding.

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

A: Several things come to mind, but one is the need for courts to explain how a damages class action could actually be tried. Courts often assume that class actions will never go to trial, and that kind of assumption can lead to inappropriate results at the certification stage. It is true that there are a number of cases where certification of a class action makes sense. But far too often, classes are certified because the plaintiffs and the court are willing to assume they can figure out at some later point how to address the numerous individualized issues that must be resolved before a potential class member is entitled to recovery.

Trial courts that are certifying damages classes should be required to outline, at least in general terms, how any trial would actually proceed and how these individual issues will be addressed in a manageable fashion. As one case I am fond of citing says, if the case will eventually result in thousands of mini-trials, then the case should not be certified. Leaving these important issues for another day simply leads to what Judge Henry Friendly has referred to as "blackmail settlements" because defendants (even those with valid defenses) are afraid to risk the exposure present in a large class action.

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

A: Lawyers for plaintiffs in class actions never seem to have a shortage of new subject areas to pursue, but I think there are several overarching issues that courts are going to continue to struggle with over the next five to 10 years. First, the role of reliance and causation in deceptive marketing cases is rapidly changing under state and federal law, with courts even from the same jurisdiction reaching different results on a weekly basis regarding whether these elements can prevent a class from being certified.

Second, plaintiffs continue to push for certification of "limited issue" classes, which at some level seems to undermine the requirement of a predominance of common issues present in most federal class actions.

Finally, a growing number of plaintiffs are trying to certify injunctive classes in an effort to force defendants to settle what are really damages claims. The courts are struggling with how to address all of these issues while staying true to the class action rules, due process and, in federal court, Article III standing issues.

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

A: Picking one lawyer is tough because I have been lucky enough to work with a number of very talented lawyers. If forced to choose just one, it would be John Pickering, with whom I worked at my former firm, then Wilmer Cutler & Pickering. He was an exceptional lawyer, and he had an exceptional commitment to public service, civil rights and pro bono representation. He always led by example.

He also participated in some of the most significant legal cases of the last century, but remained a humble Midwesterner throughout his life before passing away in 2005.

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

A: I would tell them to find a good mentor and then put in the time to read and write on the subject. Many junior associates are concerned about maximizing their billable hours and they often neglect putting in the investment time that will build the foundation for their career in the long term. A young lawyer can learn so much, so quickly, by taking a few minutes a day to skim the court of appeals decisions and other notable cases that come out in their subject area.

Given the plethora of free internet content providers and blogs that cover virtually every litigation subject area, it is easier than ever to track developments in the law. Offer to write an article with a partner on some of the new cases you review and, before you know it, partners and clients will be coming to you to understand the current trends and developments.