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Q&A With Foley & Lardner's Bill McKenna

Law360, New York (May 25, 2011) -- William J. McKenna Jr. is a partner with Foley & Lardner LLP in the firm's Chicago office. A vice chairman of the firm's bankruptcy and business reorganizations practice, as well as a member of the firm's business litigation and dispute resolution practice, he is a Fellow of the American College of Trial Lawyers and has more than 30 years of experience representing clients in a variety of commercial litigation.

McKenna has conducted numerous commercial trials (jury and nonjury) in circuit, federal district and bankruptcy courts around the country. He has prosecuted or defended many civil appeals. His experience has focused upon insolvency proceedings; financial institution and lender-liability litigation; real estate litigation; construction litigation; and energy-related litigation.

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

A: I am currently working on a case in which I have been in almost every court, state or federal, you can be in the State of Illinois. The case involves extended litigation between the horse racing and casino boat industries in the State of Illinois. In particular, the case involves a challenge to the constitutionality of a state statute passed which imposed a 3 percent tax on adjusted gross revenues of casino boats for the benefit of the race industry and an extension of that statute. I represent several of the horse racing tracks.

The case began in the state court system with a circuit court (trial court level) challenge to the constitutionality of the statute. After the statute was declared unconstitutional by the trial judge, the case went directly to the Illinois Supreme Court, which then sustained the constitutionality of the law. The casino boats unsuccessfully tried to obtain review by the U.S. Supreme Court on a variety of theories, supported by approximately a dozen amici.

After the case returned to the Circuit Court, Governor Rod Blagojevich of Illinois was indicted by federal authorities. The charges included charges accusing the former governor of having extorted campaign contributions from one of my clients in return for signing the extension of the statute at issue.

Based upon these explosive allegations, unsuccessful efforts were made by the casino boats to reopen the original trial court decision to allow litigation of their “pay for play” allegations in the state court. A new front in the war was also begun with the filing of a federal RICO complaint, including a request for an injunction freezing funds generated by the tax.

Further litigation in both state and federal courts ensued. An injunction was granted, then vacated by the district court. The Seventh Circuit reversed the district court’s ruling and the case remains pending there. Challenges faced in the lawsuit include multiple forums, difficult legal issues and a great deal of public attention to some of the more explosive issues.

The legal issues, both constitutional and RICO-related, have been challenging. The opposition from the casino boats has been fierce. For all these reasons, and most especially, because the case after three years remains hotly contested and not fully resolved, the case is perhaps the most challenging lawsuit I have worked on in my career.

Q: Describe your trial preparation routine.

A: The first thing I do when preparing for trial is to prepare my opening statement. I do that after the close of discovery but well before preparation of a pretrial order. I do that to organize my thoughts, develop my theory and outline my presentation.

Following the preparation of my opening argument, I work with my trial team to divide up responsibility for the preparation of outlines covering both direct and cross examination of all expected witnesses. I then prepare cross examination for the witnesses allocated to me for purposes of cross examination.

Only after those two steps do I work on direct examination or jury instructions. Throughout this process, I work on trial graphics. I view them as extremely important in any jury trial and their preparation requires the greatest lead time.

Q: Name a judge who keeps you on your toes and explain how.

A: Senior Federal District Court Judge Milton I. Shadur of the Northern District of Illinois is a judge I have practiced before for 30 years who always keeps me on my toes. Judge Shadur reviews every complaint filed and assigned to him and frequently issues opinions relating to the sufficiency of the complaint sua sponte before the parties ever appear in his courtroom.

Once you appear in court before Judge Shadur, you must always be prepared and be aware of the implications of the latest Seventh Circuit and Supreme Court precedents on your case because Judge Shadur will always be ready to ask about such issues at even the most routine status conferences. In particular, Judge Shadur keeps me on my toes because he is a master of the most arcane points of federal jurisdiction and you must be familiar with them should you wish to avoid disaster in the eyes of your client.

Q: Name a litigator you fear going up against in court and explain why.

A: As a young lawyer, I was a member of a team of attorneys litigating a sprawling case which was in a number of courts simultaneously, but had its geographic center in southern Illinois. On the opposite side of the case was an extremely well-known plaintiff's attorney from southern Illinois named Rex Carr.

At the time, Rex Carr was at the peak of his game as a trial lawyer. He was deferred to by state court judges, other nonjudicial personnel, and basically had his way with a jury. He was a great trial lawyer who used his home court advantage magnificently and always was aware of the need to create a good record on appeal.

We fought Carr to a standstill in the case, with considerable help from a now deceased federal district court Judge (J. Waldo Ackerman) and the Seventh Circuit, neither of which was swayed by Carr's skills as an advocate and both of which were more focused on correctly applying the law. I feared Carr as an adversary but learned from the experience that every fearsome advocate has an Achilles heel, and methodical preparation and attention to the applicable law often serves to level the playing field.

Q: Tell us about a mistake you made early in your career and what you learned from it.

A: As a young lawyer, I was involved in a fairly rancorous case pending before a now deceased chancellor in the Circuit Court of Cook County, Illinois. The chancellor was a legendary jurist, Arthur "Moose" Dunne, so named because of his six-foot, four-inch height. My client insisted that I file an emergency motion for a temporary restraining order on a matter of what the client believed was of utmost importance in a trade secret case.

I spent the afternoon and well into the evening drafting the necessary papers and filed them the next morning. I then called the clerk to advise him I had an emergency that absolutely needed to be addressed by the court. The clerk told me to come over at 10:00 a.m. and wait until the judge was free.

I served notice on my opponent and the next morning marched over to court. When I stood up in front of the judge and began my argument, he stopped me. In his hands were three inches of documents which I had filed that morning, including my emergency motion, memorandum of law, and affidavits. He said to me, "Counsel is this really an emergency?" With my client looking on from the gallery, I said, "Absolutely your honor, it is."

He proceeded to stand up from the bench to his full six-foot-four height and in front of a courtroom full of lawyers ripped my three inches of paper in half and threw them loudly into his garbage can. He then said to me, "Alright, since it is such an emergency you will not give me time to read what you have written, go ahead and tell me what your issue is."

What I learned from that hearing is to be extremely respectful of the time of judges and be extremely judicious in characterizing any matter as a matter that constitutes an emergency.