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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Q&A With Foley & Lardner's Marty Bishop

Law360, New York (August 10, 2011) -- Martin J. Bishop is a partner in the Chicago office of Foley & Lardner LLP, where he is vice-chairman of the firm's consumer financial litigation practices group. He regularly represents banks and financial services companies in class actions and other litigation involving, among other things, the various consumer protection statutes.

Bishop focuses on a trial practice in complex and general commercial litigation, consumer financial services litigation, class actions, and emergency and other injunctive relief proceedings.

Q: What is the most challenging case you have worked on and what made it challenging?

A: Early in my career, I had the privilege of defending "Debbie" on a pro bono basis against defamation, invasion of privacy and other related torts lodged against her by her brother, "Paul." Debbie was a filmmaker who found catharsis in laying out her most painful personal experiences on celluloid.

Debbie and Paul had experienced horrible tragedy in their life. At a young age, they lost their mother to cancer. Debbie had to fill her mother's shoes by taking care of the house, cooking meals for her dad and brother, and assuming the role of the matriarch in a traditional Italian household. Debbie's brother and father routinely criticized her as not being as good as her mother. They told this to her face, and Debbie would on occasion stumble upon recorded voice messages between her father and brother discussing what a failure she was as compared to her mother.

One day, Debbie's father did not come home from work. He was torn limb from limb in a freak accident on the tarmac at a major Chicago airport. Instead of bringing Debbie and Paul closer, the tragedy drove them apart. Debbie dealt with her emotional scars through films that included pictures of her family and recordings between her brother and father. The films were classic, abstract art house fair that played in libraries and through local film schools.

Paul hated Debbie's films, taking exception to use of family images and story lines. Debbie tried and tried to talk to Paul about their mutual loss, but he would not listen. With significantly more financial means than Debbie, Paul found a lawyer willing to bring suit against his sister and to attempt to force Debbie to stop showing her films.

I fought hard and long for Debbie. While the legal issues were not all that complex, the facts were almost incomprehensible. Debbie and Paul were all that was left of their immediate family. Paul's narrowly traditional views about family and privacy, however, proved to be thicker than blood. Fueled by his lawyer, Paul would not relent.

Litigation scarred these siblings even deeper until it became clear that personal reconciliation was not possible. And there was nothing — nothing — I could do about that aspect. We tried and tried, but Paul would not budge until it was too late. Ultimately the case settled on what I would call very good terms for Debbie; terms, I might add, that we offered early and often. All that I wanted to do was to be a part of healing this family. But I could not. Without a doubt, the most challenging case I have worked on.

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

A: I can point to two areas. First, like most litigation practices, consumer financial services litigation would benefit from reform in the area of e-discovery. Thanks to the success of innovative initiatives like the Seventh Circuit's Electronic Discovery Pilot Program, change is coming. It is no longer a matter of "if," but of "when."

Second, the consumer financial services industry has undergone major reform in the past year with the passage of Title X of the Dodd-Frank Act and the start-up of the Consumer Financial Protection Bureau. But reform to the reform, so to speak, should remain on the table. While I am less troubled about the bureau's leadership and funding than, say, Congress, I am concerned about certain open-ended and amorphous provisions of Title X.

For example, I worry about the application of Title X's virtually shapeless prohibition against unfair, deceptive or abusive acts or practices ("UDAAP"). If I could change something about Title X right now, I would postpone the bureau's use of these provisions in enforcement actions until such time as they are repealed or the bureau issues comprehensive regulations designed to give the industry clear direction about what is and is not acceptable under UDAAP.

Q: What is an important case or issue relevant to your practice area and why?

A: Again, I think UDAAP is a big deal, particularly from a compliance perspective. So-called "fairness" laws, like UDAAP, develop with an element of hindsight. It is very difficult to look at a legitimately useful consumer financial product or service today and gauge how a regulator or a court will view it two years down the road.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Tom Cunningham at Locke Lord Bissell & Liddell. I had the privilege of practicing with Tom during my first couple of years as a lawyer. In fact, one of my very first trials was with Tom. Tom generously allowed me to examine a witness and argue a motion in limine on the Dead Man's Act (lost the motion, won the case).

I watched Tom come in early every day, put his head down and work tirelessly to advance the interests of his clients. Tom always had time to chat and mentor, though. Tom was passionate about the law and the issues facing our clients. Tom was also protective of time with his family, and effectively balanced his work and familial obligations. All that has served him well.

I recently had lunch with Tom, who, even after all these years, remains a devout meat eater. In all candor, I've never seen someone ingest so much beef — at lunch of all meals — and remain so lean and energetic! Professionally, Tom has risen through the ranks at Locke Lord, enjoys a successful practice working for banks and financial institutions, and co-chairs the firm's litigation department. He is a great lawyer and an admirable role model for aspiring attorneys, the same as he was for me many years ago.

Q: What is a mistake you made early in your career and what did you learn from it?

A: A couple of years into my practice, during the heat of a lengthy trial, I prepared a motion to exclude certain evidence. I developed the theory, researched the issue and drafted the motion. It was, as conceived, a straightforward endeavor. Convinced of its weight, I presented the motion to the lead attorney on the case who pressed me about the merits of the motion. I persuaded him and the motion was filed.

Within 24 hours, the opposing side filed a response with an obscure case that was indisputably directly on point and defeated the merits of my motion. Hours later, after more research, I promptly withdrew the motion. The result: some personal embarrassment, but practically speaking, no harm, no foul.

What did I learn? For starters, whenever practical, I test and re-test assumptions underlying research projects. This, I think, is something that comes with experience. The bigger lesson learned is that it is better to have lawyered and lost, than not to have lawyered at all. We are hired to solve problems, sometimes really challenging problems. In this profession, there are always two sides to an argument. If you fail to make an argument, you automatically lose.