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Q&A With McDermott Will's Miller Baker

Law360, New York (November 17, 2009) -- M. Miller Baker is a partner based in McDermott Will & Emery LLP's Washington office. As a member of the trial department, he co-heads the firm's appellate practice group. His practice focuses on appellate and constitutional litigation. As an appellate lawyer, Miller has represented or advised clients in more than 50 appeals in federal and state courts involving a broad range of matters, including constitutional law, state and federal tax, Employee Retirement Income Security Act, patent, copyright, federal arbitration act, state and federal election law, class actions, administrative law, preemption, federal practice and jurisdiction, antitrust, securities, bankruptcy, and insurance coverage.

Miller has argued before the U.S. Supreme Court as well as before the U.S. Courts of Appeals for the Second, Fourth, Fifth, Sixth, Seventh, Ninth and Federal circuits, and state appellate courts in Maryland and New York. Miller has also appeared in the U.S. Courts of Appeals for the Third, Tenth, Eleventh and District of Columbia circuits, and state appellate courts in Virginia, Louisiana and Texas.

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

A: *Aptix Corp. v. Quickturn Design Systems Inc.*, 269 F.3d 1369 (Fed. Cir. 2001). In this case, the district court applied the doctrine of inequitable conduct to terminate our client's patent due to findings of litigation misconduct by the client, a prominent inventor in Silicon Valley. (McDermott had no prior involvement in the case in the district court – we were retained for the appeal.)

A divided panel of the Federal Circuit agreed with us that the district court lacked authority to outright terminate the client's patent under the doctrine of inequitable conduct, but unanimously affirmed the district court's imposition of "death penalty" sanctions (dismissal of the client's patent infringement suit) and award of full attorney's fees to the other side based on the misconduct findings.

The misconduct findings were so explosive that the Federal Circuit panel was not particularly interested in abstract procedural questions, such as whether there was clear and convincing evidence of misconduct and whether the district court's findings were based on impermissible chains of inferences. Indeed, the misconduct findings so incensed the dissenting judge that he argued that the district court properly extended the doctrine of inequitable conduct to litigation misconduct, notwithstanding the very serious due process and takings clause problems that this result would have produced.

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

A: After reading and rereading the briefs and cases, I reduce my case to a handful of key points. I formulate responses for anticipated questions and practice before one or more moot courts. My benchmark for successful preparation is to walk out of an argument with the feeling that I was over-prepared for it.

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

A: One problem in my view is the practice of some courts of appeals to simply affirm decisions below without either providing any reasoning or expressly adopting the decision of the district court as its own. Although this has never happened in any of my cases, I have seen it happen to others, and I think that it is fundamentally unfair.

In my view, a court of appeals panel should at least provide a one- or two-paragraph summary explanation of the essential basis for its decision, or expressly adopt the decision of the district court as its own. Litigants deserve to know why they lost.

Moreover, it is virtually impossible to obtain review in the Supreme Court if the basis for the decision of the court of appeals is a mystery. Whether intentional or otherwise, a panel's failure to articulate any reasoning for its decision effectively insulates the decision from Supreme Court review.

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

A: The Supreme Court recently granted certiorari in the case of McDonald v. City of Chicago to determine whether the Second Amendment applies to the states. McDonald is an historic opportunity for the Court to re-examine the doctrine of incorporation (by which selected portions of the Bill of Rights have been applied against the states since 1925 as an exercise in substantive due process) and the related question of the meaning of the privileges or immunities clause of the Fourteenth Amendment. McDonald is a once-in-a-hundred-years case.

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

A: Seth Waxman [appellate and Supreme Court litigation group practice group chair at WilmerHale]. I have litigated against and on the same side with Seth. He is a tenacious advocate, brilliant at argument, witty, and a genuinely nice guy.

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

A: Seek a position in the U.S. Solicitor General's office as an assistant to the S.G. The appellate experience in that office for young lawyers is unmatched anywhere.