

Q&A With McDermott's Joel Chefitz

Law360, New York (April 13, 2011) -- Joel G. Chefitz is a partner in the Chicago office of McDermott Will & Emery LLP and head of the firm's securities litigation group. Chefitz has taken the lead at trial and on appeal for clients as diverse as the Chicago Bulls, Wyeth Pharmaceuticals Inc. and the state of Illinois.

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

A: My representation of the Chicago Bulls in their antitrust suit against the National Basketball Association challenged me on three levels — the high stakes on both sides, the experience and dedication of the opposition and the legal tightrope we had to walk.

First, the stakes. For the Bulls, who had assembled a team with great potential around a young Michael Jordan, moving their telecasts to WGN-Ch. 9 in Chicago was essential to building a long-term fan base. In the days before widespread cable TV penetration in Chicago, WGN was the preeminent local sports station. The Bulls had doubled their viewership the first year they moved to WGN even though their won-lost and playoffs performance remained unchanged. As the Bulls (and White Sox) chairman observed, WGN was so powerful in Chicago that it made a bad team — the Cubs — popular.

For the NBA, WGN's significance was that it was not only a local over-the-air TV station but also a superstation, retransmitted nationally over cable. From the league's perspective, the Bulls' move to WGN threatened the member clubs' agreement to allocate the national market to the league collectively, while preserving local markets to each competing club.

Second, over the course of three trials and two appeals, the NBA went to its bench and called three different first-chair trial lawyers into the game, all good lawyers. And Bob Bork filed their unsuccessful petition to the Supreme Court. Presiding over the NBA legal team was Commissioner David Stern, a reformed antitrust lawyer.

The commissioner not only directed the strategy of the NBA's defense but called in favors to bring in a parade of impressive trial witnesses — NBC executives, the president of ESPN, the NHL commissioner, NBA team owners and one of the leading antitrust economists in the country. The cross-examinations were fun to say the least.

Third, as a member of the joint venture they were suing, the Bulls walked a legal tightrope. Antitrust law was evolving to favor restraints on competition ancillary to the legitimate purposes of the venture, even if they limited economic competition among members. We navigated the tightrope safely. The Bulls not only stayed on WGN but increased the number of games telecast each year as the case progressed.

After six years of litigation, improvements in cable technology permitted a long-term settlement. The Bulls remain on WGN today.

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

A: In *Doe v. Small*, the American Civil Liberties Union sued to ban the display of religious paintings in the park across from city hall in downstate Ottawa, Ill. Every year from Thanksgiving until after New Year's, 12 eight-foot-tall paintings depicting scenes from the Gospels were erected in the park. The city was poised to agree to the ACLU's demand so it could avoid liability for attorneys' fees. A private group of local citizens, who had taken over responsibility for the display, asked me to represent them pro bono to intervene as defendants and to oppose the ACLU.

The ACLU contended that, by permitting an unattended and extended religious display on public land, the city had violated the establishment clause of the First Amendment. Court decisions at the time evaluated the constitutionality of Christmas displays in public places by counting the number of Santa Claus and creches and weighing whether the display was more religious or commercial. By that measure, the ACLU was right. A federal district judge ruled for the ACLU and banned the display. A divided panel of the U.S. Court of Appeals for the Seventh Circuit affirmed.

But I argued the courts were focusing on the wrong clause of the First Amendment. The park in Ottawa was an historic public forum, the site of the first Lincoln-Douglas debate, a long list of private events and several permanent monuments. Permitting private citizens to erect a display in a public forum without interfering with others' equal access could not amount to an establishment of religion. And banning private speech based on its content — whether pro-religious, anti-religious or otherwise — would violate the First Amendment's guarantee of free speech. The ACLU, I argued, was on the wrong side of the case.

The full Seventh Circuit agreed, granting a rehearing en banc and reversing its panel decision and that of the district court by a vote of 11-0. The ACLU chose not to appeal to the U.S. Supreme Court. *Doe v. Small* was the first ruling in the country by a full federal court of appeals to recognize that a private religious display in a public forum raised a question of free speech rather than establishment of religion. Other circuits soon agreed, as did the Supreme Court. My clients' and all our free speech rights had been vindicated, and the First Amendment analysis had changed for good.

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

A: The cost of unlimited pretrial discovery, as practiced in the U.S. today, is dead weight dragging down the system of justice. Judges and litigants should use Rule 16 more creatively to limit the scope, duration and expense of discovery. And the rules themselves should be amended.

I've gone to trial as both plaintiff and defendant with no more discovery than the exchange of trial exhibits; I've also tried cases after broad discovery. The quality of justice at either extreme is equivalent. Trying a case with no or limited discovery certainly is more challenging for the lawyer. But broad discovery is a safety net we cannot afford.

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

A: Mergers and acquisitions are back. So too are the inevitable shareholder class actions challenging the fairness of the price and sales process. Unless and until the Delaware Chancery Court calls a halt to the nuisance-value settlements that provide a quick payout to the plaintiffs' bar, these shareholder suits will continue to be a growth industry.

Along with corporate deals come stock registrations and initial public offerings. And they in turn attract class actions under Section 11 of the 1933 Securities Act alleging misstatements in registration statements. Plaintiffs need not plead fraud or causation under Section 11 so it will continue to serve as their weapon of choice.

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

A: David Boies, for his talent and skill in the courtroom, the breadth of his practice and his risk taking in leaving Cravath Swaine & Moore LLP to build his own firm. He is the gold standard.

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

A: First, "always be learning": use every encounter in and out of court to observe what works and what doesn't for others and to assimilate the good practices that work for you. Second, "just say yes" to requests for your help: you never know which assignments might lead to opportunities for growth, and you can usually sort out conflicting time demands later, if they materialize. Finally, "embrace the challenge": we all feel the same fear, and it is only by reaching for the new and difficult that we improve.