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Q&A With Akin Gump's David Zensky

Law360, New York (June 6, 2011) -- David M. Zensky is a partner in the New York office of Akin Gump Strauss Hauer & Feld LLP. He focuses on commercial litigation, with a concentration in complex bankruptcy matters, partnership/investor disputes, trade secret disputes, franchise/licensing and insurance matters, and general commercial disputes.

Zensky has been counsel to a major cable television programmer in a $1 billion dispute with a satellite television distributor, counsel to a large Russian telecom company in a Delaware appraisal proceeding arising out a recent merger valued in excess of $4 billion and defense counsel in successful dismissal of a consumer class action seeking damages and penalties of $1 billion against an e-commerce website.

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

A: The most challenging lawsuit I have worked on would have to be the Lyondell-Basell reorganization proceedings and fraudulent transfer litigation against, inter alia, the banks who arranged (and the subsequent purchasers of) the $22.6 billion in senior secured debt used to finance Lyondell's leveraged buyout of/merger with Basell in 2007.

The case was one of the largest, if not the largest, leveraged buyout/fraudulent transfer cases ever brought, and combined: (i) a very complex set of facts, (ii) highly complex and novel questions of law and evidence, (iii) enormous stakes for the parties, with billions of dollars of claims against the Lyondell estate at risk, (iv) a mere six months between the filing of the complaint and trial, (v) a highly skilled and aggressive adversary, and (vi) difficult (and perhaps unprecedented) joint defense arrangements between disparate parties whose interests were not aligned on many issues — specifically, the five arranger banks, the subsequent purchasers of the senior debt, Lyondell's current and former directors and officers, and Basell's former directors and officers.

We represented the largest holder of senior secured debt who was the party with the most at risk in the avoidance litigation, but who, as a subsequent purchaser of the debt, had not been involved in the transaction at issue and had little, if any, personal knowledge of the material facts. Thus, out of necessity we had to work closely with and rely on other parties in the joint defense arrangement in order to ready the case for trial, adding an unusual dynamic to what was already an extremely difficult case to litigate.

Q: Describe your trial preparation routine.

A: For me, "trial preparation" actually begins at the outset of a new engagement, not at the completion of discovery. With a practice devoted to complex commercial litigation and restructuring litigation, I repeatedly find myself involved in disputes arising in different industries and different sectors of the economy, as opposed to specializing in cases arising in a specific industry.

For example, in the past few years alone, I have been involved in cases involving industries as diverse as the manufacture and sale of commodity chemicals, specialty chemicals and refined petroleum products, telecommunications, the sale and transport of natural gas, publishing, broadcasting and cable television, community hospitals, the generation and wholesale of electrical power, and the futures and physical markets for precious metals.

All of these cases involved the need not only for multiple expert witnesses who were most often valuation-related, but accounting and industry experts as well. In order to properly try cases like these (and handle everything leading up to it), I need to become steeped in the industry itself; otherwise, there is no possible way I can adequately examine or cross-examine the expert or fact witnesses.

So the most important aspect of trial preparation begins early in the case, and involves a crash course for me and my team on the specific industry at issue. This helps us understand things such as the company's P&L and material drivers of the P&L, the competitive and regulatory environment for that industry and its impact on the subject company, the relevant history and/or future direction of the subject industry, and so on. We will usually have our consulting experts (or non-other testifying experts) come in and spend a week or more doing a "teach-in" on these topics, complete with hand-outs, demonstrations and quizzes.

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

A: Judges keep litigators on their toes in two principal ways: with the questions they ask, and the deadlines they set (and refuse to adjust!). Focusing on the former, federal district judges Robert Sweet and William Pauley III, New York State Supreme Court Justice Charles Ramos, and bankruptcy judges Robert Gerber and Kevin Carey stand out in my mind.

None of these Judges would rank at the top of the list of judges who ask the most questions, but the questions they do ask are spot-on and frequently cut through to the core of the issue being discussed, as well as the later ramifications for the case depending on how the issue is resolved. Further, many of these judges press such questions not just at trial or during formal oral argument, but at status and scheduling conferences as well.

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

A: Virtually all of the litigators I have come up against are quite good in court and are quick on their feet generally. The ones I fear coming up against the most, however, in any given case are those who have thoroughly thought through their case prior to the commencement of depositions. Bill Wachtel of Wachtel & Masyr comes to mind here.

Certainly all lawyers are prepared to find out the basic facts and ask about the key documents in any given deposition, but the best are those that have already developed the theory of the case and strategy for trial at a granular level. Getting answers locked in to half a dozen additional questions in even a single deposition can have tremendous value in a case as it proceeds to trial. That testimony may end up materially constraining a given witness' direct testimony at trial, or facilitate a question on cross that may not have seemed obvious or important two years earlier. The message here, again, is preparation.

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

A: The first mistake I made early in my career was failing to show up for my first deposition, having forgotten what day it was. This was before "Microsoft Outlook" (though not before computers — I'm not that old!), so I learned to have my secretary keep my schedule.

A larger mistake, and one that I think is common in the maturation of many young litigators, was taking certain actions of my adversaries personally. For a several-year stretch, I found myself getting worked-up, if not enraged, over many things that were happening in a given case; i.e., how my adversaries could possibly object to that document request; how they could claim that their bogus complaint states a claim; how their witness would not be available for deposition until next year, etc. This was a mistake because cases marked by acrimony between counsel simply mean more time spent writing accusatory letters rather than advancing the litigation, and can lead one to make less-than-perfect decisions.

I later began to appreciate that the lawyers on the other side were probably sitting around saying the same things about our tactics and decisions; i.e., how they could possibly argue that, how they could claim their client has no responsive documents, etc. Viewed with that additional bit of wisdom, one usually can see the actions of opposing counsel as those of a skilled advocate on the other side doing what he/she needs to do to defend their side of the case.