Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Q&A With Akin Gump's Rex Heinke

Law360, New York (March 08, 2013, 1:59 PM ET) -- Rex Heinke is a partner in Akin Gump Strauss Hauer & Feld LLP's Los Angeles office. He is co-head of the firm's Supreme Court and appellate practice.

Heinke has argued more than 100 appeals in federal and state courts throughout the United States involving many issues, including antitrust, bankruptcy, class actions, complex business disputes, constitutional law, copyrights, domestic and international arbitrations, employment discrimination, environmental law, federal securities, foreign sovereign immunity, fraud, insurance, products liability, tax, trademarks, unfair competition, wage and hour disputes, and wrongful termination.

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

A: Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004 (2012).

It started with a call from one of my partners. She had recently taken over the case and said a trial court had already certified a class action. Was there any appellate remedy? I explained that we could take a writ (the certification order was not appealable until after a final judgment), but that only about eight to 10 percent of civil writs were granted in the California appellate courts and even if it was granted, the appellate court could still rule against us. She got back to me and said the client still wanted to try.

We looked at the issues. With no clear authority on our side and some adverse authority, we were not optimistic, but we worked hard and made what we hoped was a compelling argument. The Court of Appeal granted the writ and stayed all trial court proceedings. After what seemed like endless rounds of briefing and two arguments in the Court of Appeal, we won across the board.

But we were not surprised when the California Supreme Court granted review. Class certification of meal and rest break cases had become the hottest issue in California. There were innumerable similar cases pending, involving billions of dollars. That explains why there were 26 amicus briefs in the Supreme Court, the court granted and held nine other cases pending the outcome of our case, you could not get a seat for the oral argument before the court unless you arrived an hour and a half early, and the oral argument was televised (http://www.youtube.com/watch?v=IJBnSaUt0_M).

The interest in the case was overwhelming. No pressure, right? Fortunately, we won, even though the court scared us by asking after oral argument whether, if it ruled against us, its ruling would be retroactive. Litigation is not for the faint of heart!

We were particularly happy that the court ruled that employers did not have to ensure that employees took meal breaks. Instead, it held that employers only had to provide them. This meant that employees could, after consulting with their employers, leave early to attend a child's soccer game, go to the dry cleaner, or walk on the beach. That was a victory for employers and for millions of employees.

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

A: Deadline to appeal. When does the time to file a notice of appeal end? It seems easy. A court or jury reaches a decision, a judgment is entered, and the time to appeal starts running. If only the world was so simple.

Of course, sometimes it is, but more often than you might expect, it isn't. So what is the deadline to file a notice of appeal? Well, if you don't know for sure, the safe course is to file early. Unfortunately, this has its own complications: does the trial court still have jurisdiction over the case, do I have to move to dismiss the "premature" appeal, when is my cross-appeal due, and so on?

This wouldn't cause much heartburn were it not for the rule that failure to file a timely notice of appeal is jurisdictional, i.e., if it is not filed on time, you cannot pursue your appeal — no matter what. (There are exceptions, e.g., Federal Rule of Appellate Procedure 4(a)(5), but you still have to determine when the appeal is due.)

What is the justification for this draconian result? Finality. When the deadline to appeal has passed, the case is over — for good. The trouble is that calculating the last day to appeal is sometimes not straightforward. If there is any doubt, why not let the trial court set the date? That would provide much more finality, not be burdensome on the trial courts or the parties, and would eliminate any uncertainty and thus any inadvertent loss of the right to appeal.

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

A: Appellate argument is being cut back too much. That is a mistake. Gone are the days of day-long arguments supplemented by true "briefs." No complaint about that, but we have gone too far the other way. Only ten minutes of oral argument per side in federal or state appellate courts is not uncommon.

No doubt some cases warrant no more. And some lawyers have only themselves to blame because they come unprepared, act like an appellate panel is a jury and absolutely fail to answer questions ("I will get to that." They don't.).

Still oral argument is critically important. In briefs, you can slide over tough problems or simply ignore them. At oral argument, there is nowhere to hide, unless you just don't answer, giving up your last chance to persuade doubting appellate judges that your client really should win.

Oral argument cuts through all the clutter and gets to the heart of a case. Oral argument lets the appellate justices probe your weaknesses (and there are weaknesses in almost all cases) and lets the advocate deal with them. That process leads to better-reasoned and more just decisions. It also enhances the public's, clients' and lawyers' confidence in the fairness and careful thought and care that does go into appellate decisions. Longer arguments are essential to facilitate that process.

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

A: Kent Richland (Greines Martin Stein & Richland LLP in Los Angeles) is the consummate appellate lawyer. He is intelligent, thoughtful and highly experienced. He is the kind of lawyer you want to take a complex problem to because he will carefully consider it and give you a well-reasoned analysis of how best to tackle it. He also has great judgment unfettered by any bias or predilections. Couple that with a fine sense of humor and deep concern about treating others fairly and with respect, and you have a great appellate lawyer.

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

A: Early on, I submitted preliminary drafts of briefs that were not something I felt were ready to file. Submitting such tentative drafts means you don't submit your best work because you are not ready to file it. Submitting such work to your colleagues (or worse, your clients) means they are not seeing your best work. They will judge you by that and not by what you could have done. Submit your best. If you are not certain about facts or issues, ask, revise and then submit your best. Your colleagues, your clients and you will all appreciate the extra effort, and everyone will think better of you. And someday soon your draft will get filed with little or no revision.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.