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Q&A With Dechert's Ben Barnett

Law360, New York (March 06, 2013, 1:59 PM ET) -- Ben Barnett, co-chairman of the Dechert LLP's complex commercial litigation practice, is a trial attorney counseling pharmaceutical, financial and manufacturing corporations regarding e-discovery issues, including developing proactive systems to prepare for and limit the cost of electronic discovery in litigation or investigations.

Prior to joining Dechert, Barnett served as an assistant United States attorney in the District of Columbia and in the Eastern District of Pennsylvania.

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

A: Picking a single case from 20 years of practice is challenging because I have been fortunate to be counsel in a number of great cases. That said, as a young assistant U.S. attorney in Washington, D.C., I had a case that was both challenging and instructive.

My client was very unpopular federal agency in a Rehabilitation Act of 1973 lawsuit brought by a legally blind employee who claimed the agency refused to provide him reading equipment so he could do his job. For a variety of reasons (mostly bad blood), the agency insisted on going to trial, which was fine by me. I had to make some tough and novel calls. For example, did I demand an independent medical examination and run the risk of a report that confirmed plaintiff's visual impairment?

Likewise, deposing the plaintiff was very difficult because he was legally blind, but using technology to speed his review of documents during his multiday deposition would actually undercut the agency's accommodation position. These same issues would likely occur at trial, and I spent days and nights trying to craft a soft cross that would not completely alienate a jury.

I should also probably mention that during the months leading up to trial, my client agency faced multiday congressional committee hearings (covered by national newspapers) regarding interactions between the agency's employees with citizens. On the eve of trial, the judge called and asked to see me and my client in chambers. During that meeting, he held up a copy of a front-page story from a recent Washington Post about the hearings and asked if we thought we could really convince a single juror to vote for our agency and against a long-standing and loyal employee who happened to be blind.

Shortly after that meeting, the client decided to settle the case. I was disappointed to miss a trial, but the client made the right call.

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

A: E-discovery. Discovery was supposed to level the litigation playing field and avoid trial by ambush. With the explosion of computer technology, discovery is now used as a device to try to inflict maximum costs on an opponent and to drive settlement, not trial. Rules committees at the federal and state level are gamely trying to address these issues, and more judges are actively using the new or existing rules to rein in discovery.

The sad reality is that very little has changed in the past decade because there are simply no incentives or disincentives for counsel not to ask for everything in discovery and put the associated costs and burdens of producing millions of pages of documents on their opponent. We need to re-establish the connection between discovery and trial. Fundamental reform is critical because our reliance on technology continues to grow, discovery costs are increasing, and fewer and fewer cases actually make it to a judge or jury.

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

A: This question sounds like it comes from the Katie Couric and Sarah Palin Q&A about judicial decisions: "You know Katie, I've always viewed Marbury v. Madison as the bedrock of an independent judiciary." On a somewhat more serious note — I am a huge fan of the Twombly/Iqbal line of cases. Not only are they fun to pronounce and to drop into casual conversations with nonattorneys ("Iqbal — table for two"), but they also put some much-needed teeth back in Rule 12. Nothing lightens the dark heart of a defense attorney like knocking out a garbage lawsuit on a motion to dismiss.

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

A: Listing just one attorney who has impressed me and made a difference in how I practice is not possible. Instead, here is a longer list of some of the very good people and great attorneys who taught me over the past 20 years what it means to be an advocate (and where we worked together at that time):

- United States Attorney's Office, Washington, D.C. (Criminal Division): Dan Seikaly, who gave me a chance to work on my first significant criminal trial, and Eric Marcy (sometimes, style trumps substance)

- Steptoe & Johnson LLP: Toni Ianniello and Virginia White-Mahaffey, who taught me how to write and manage my time, Mark Hulkower, who could laugh even during the darkest hours, and Roger Warin, who helped me understand how critical it is to always have a plan B

- United States Attorney's Office, Washington, D.C. (Civil Division): (now federal Judge) John Bates and John Birch, who gave me plenty of rope but made sure I did not hang myself

- United States Attorney's Office, Eastern District of Pennsylvania: Peg Hutchinson and Marilyn May, who helped my transition to Philadelphia in ways both large and small, and Cedric Bullock, whose admonition that "you got to eat" saved me from starving during trials

There are many others, but I am particularly grateful for the guidance provided by these attorneys.

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

A: Another tough question — early on, I made plenty of mistakes. Hopefully, I've learned from some of them.
One of my most memorable and public mistakes involved a condemnation action I pursued as an assistant U.S. attorney in Philadelphia. The United States proposed to condemn a parcel of land to expand a migratory bird sanctuary and I (stupidly) thought it would be a good idea to send a mass mailing to all the nearby residents to let them know about our plans.

My carefully crafted but overly legal letter set off a firestorm of protest that led to a demand from local officials for a public meeting. I (again, stupidly) attended a packed evening meeting at a township building and tried to explain to hundreds of angry citizens what we were doing, why were condemning the land and why the expansion of the refuge would ultimately enhance the value of their homes and property. They didn't buy it.

The next day, the local paper (I did not know the press was there) misquoted me as saying, "make no mistake; we will take your land." Lessons learned: Just because you think you wear a white hat, don't expect everyone to agree. Talk and write like a person, know your audience (and make sure you know where the exits are located), and always assume the press is present in high-profile cases.

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