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Q&A With Kirkland & Ellis' Jennifer Selendy

Law360, New York (July 16, 2009) -- Jennifer M. Selendy is a partner in the litigation group in Kirkland & Ellis LLP's New York office. She has a broad trial and appellate practice in state and federal courts, as well as domestic and international arbitration. She focuses on antitrust, and also handles intellectual property, securities and other complex business litigation matters.

Selendy was a 1995 graduate of Harvard University Law School; received her undergraduate degree in international relations from Tufts University; and was a Marshall Scholar at St. Antony's College, Oxford University, from 1990 to 1992, where she completed her M.Phil. in international relations.

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

A: Hands down, it was Discover Financial Services et al. v. Visa USA et al., Discover's private antitrust action against Visa and MasterCard that followed the successful Department of Justice suit against the two network behemoths.

A large combination of factors made this my most challenging case, but two stand out.

First, it was "no holds barred" antitrust litigation, so the discovery process was just a bear. By the end, we had over 200 million pages of party and nonparty documents in our database, and during the last month of fact discovery in May 2007 there were over 100 depositions taken.

Second, with so few network players in the industry, it was extremely challenging to model the "but for" world for damages purposes. Given the limited number of players in the industry and the fact that Discover had been completely blocked from entering the network services market, the traditional models were not well-suited. Luckily, we had brilliant economists working with us and we finally got it right.

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

A: I am most proud of the pro bono work that I do in the areas of education and poverty, and that I am at a firm that supports this work so generously. I am on the board of the National Center for Law and Economic Justice, and I have partnered with the center on several occasions to bring litigation that directly improves the lives of the most disadvantaged people in this country.

I also represent New Leaders for New Schools, Inc., and I am a founding trustee for a new independent school in New York City for children who are developmentally advanced and will benefit from a highly differentiated and accelerated curriculum.

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

A: A few come to mind. In our new world of e-discovery, the costs for both plaintiffs and defendants involved in antitrust litigation are excessive, if not prohibitive.

I also think that the rule of joint and several liability for all antitrust co-conspirators is one that needs to be re-examined because it frequently leads to “hold up” tactics that can, with the prospect of treble damages, create overwhelming pressure for any defendant to settle regardless of culpability. This is a particularly acute issue in the context of class action cases where the mere fact of a government investigation can trigger a wave of litigation.

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

A: Anyone who follows antitrust issues will not have missed the Obama administration's promises of greater enforcement of the antitrust laws, or then-Sen. Obama's references to the health care and pharmaceutical industries. As a result, the FTC is now very focused on agreements between branded and generic pharmaceutical companies.

In addition, Christine Varney's recent references to Aspen Skiing and Lorainne Journal as providing good guidance on Section 2 policy, and her rescinding the Bush-era Section 2 report, make it likely that we will see a DOJ monopolization case sometime in the near term, possibly in the high tech/Internet area where Varney has great experience.

Finally, in this economy, I would not be surprised to see price-fixing cases proliferate as desperate companies may resort to coordinating with their competitors.

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

A: I am most impressed by Henry Freedman, the executive director of the National Center for Law and Economic Justice (NCLEJ) since 1971, because he is a brilliant lawyer whose selfless dedication to helping those most in need is truly humbling.

Under his leadership, the center has used a coordinated strategy of impact litigation, policy analysis, advocacy and support for community organizations to effect systemic reform in the delivery of human services to low-income families and to safeguard the legal and constitutional rights of the poor.

Among the seminal cases of his career, he successfully argued *Califano v. Westcott* before the U.S. Supreme Court in 1979, establishing that benefits designed for unemployed parents cannot be withheld on the basis of gender.

Henry stands out as a great example of what a dedicated attorney can do to make the world a better place.

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

A: When I was in law school, I once heard antitrust professor Phil Areeda (now deceased), say something like: “The whole statute is just a few sentences, what could be so difficult?”

My advice to young aspiring antitrust litigators is to focus on being a good trial lawyer first, and then worry about being a good antitrust trial lawyer, but it also help to take a good antitrust class in law school.