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Q&A With Kirkland & Ellis' Granta Nakayama

Law360, New York (July 22, 2009) -- Granta Y. Nakayama is a partner with Kirkland & Ellis LLP in the firm's Washington, D.C., office and a leader in the firm's environmental and energy practices.

From 2005 to 2009, he served at the U.S. Environmental Protection Agency as the Assistant Administrator for the Office of Enforcement and Compliance Assurance. At the agency, he led the 3,400 employee, \$560 million national enforcement and compliance program for all media (air, water, waste, toxic chemicals, pesticides) located at over 40 facilities across the nation.

Prior to joining Kirkland & Ellis, Nakayama was recruited into the U.S. Navy's nuclear service by Admiral Hyman G. Rickover after graduating from M.I.T. and served as an engineer and manager responsible for quality control operations in the U.S. Navy's nuclear service.

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

A: American Electric Power is the most challenging case that I have worked on because the environmental stakes were so high. Crafting an acceptable resolution that had eluded the parties in a case that had dragged on for years was a formidable challenge.

Attorneys at the DOJ and EPA handled a large portion of the proceedings — my responsibility was the great challenge of managing all of the pieces that needed to come together on the government side to resolve the issues.

The settlement involved annual reductions of 1.6 billion pounds of SO₂ and NO_x emissions when fully implemented, making American Electric Power the largest stationary air pollution case in history. The SO₂ emission reductions alone were greater than the total SO₂ emissions inventory for New York, New Jersey and Connecticut combined.

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

A: Helping students appreciate the law and perform well in law school — I guess that means teaching. Every fall I give a presentation to the 1Ls in their fall semester at the George Mason University School of Law entitled “How to Study for Exams.”

The title gets them to attend — but the real aim is to explain that thinking like a lawyer is different from their prior life as a scientist, engineer, writer or doctor. It is always a revelation that there is no “right” answer in a law school essay exam, that one is not searching for an answer of “1/2” or “-2.” It’s a joy to see the light bulb come on when the new students realize that ambiguity in a law school exam is not a problem but a gift, because it presents a legal issue that can be discussed and analyzed.

When new students who are unfamiliar with law school exams learn better strategies to approach these exams before their first semester, their performance is greatly improved. The students are less likely to be discouraged or unfairly foreclosed from career opportunities where they can really blossom. It is especially gratifying to see students who have had little experience writing in their prior occupations overcome this lack of experience.

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

A: Two areas of environmental law are in need of reform. The Clean Water Act is sorely in need of clarification regarding the extent of federal jurisdiction. A clear and accepted understanding of the current statutory text as interpreted in the Rapanos decision does not exist. The uncertainty and differing interpretations have resulted in inconsistent results and wasted resources by both the regulated community and the regulatory agencies.

The second area that needs reform is the ability of federal agencies to allow Supplemental Environmental Projects (SEPs) as part of a settlement. SEPs were accepted for years by EPA because they allowed a settling party to perform a project that mitigates or redresses harms that occurred as a result of the alleged violation.

SEPs might include a stream restoration project, a diesel bus emission reduction project, a community health center, asthma screening or other beneficial projects. SEPs are always voluntary on the part of the settling party; EPA may not require a SEP.

Recently there has been a reluctance to allow SEPs for fear of potentially running afoul of the Miscellaneous Receipts Act, which prohibits using settlement funds for programs that are operated under appropriations from Congress.

Under one of the broadest interpretations of the Miscellaneous Receipts Act, almost all SEPs would be prohibited since there can usually be found some program in the federal government which addresses the same environmental issues as a proposed SEP. The

loss of SEPs hurts the environment and presents another obstacle that prevents communities from being made whole.

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

A: Climate change will potentially bring a wave of activity depending on whether Congress enacts the sweeping legislation currently under consideration. The compliance, enforcement and permitting challenges facing the regulated community will be enormous.

The scope of the proposed requirements could result in millions of facilities, buildings and activities being regulated for the first time. Financially, the costs will exceed that associated with any environmental regulation ever enacted. Given the financial stakes, the number of new regulated parties and the novelty of the questions that arise when regulating a gas as common as carbon dioxide the potential volume of litigation is staggering.

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

A: Win Whittaker. Win was my first law school instructor — he taught legal writing. Win walked into that first class and mesmerized the students. He started at one end of the chalkboard and explained why the plaintiff would win the case we were to argue in moot court. He had us convinced, and dejected if you were assigned to represent the defendant.

Then, upon reaching the end of the chalkboard, he turned around and walked back through the arguments he had just made, rebutted each argument and convinced us that the defendant would triumph. He later admitted that he had prepared for that class harder than for many D.C. Circuit arguments because it was his first law school class.

The next year, Win Whittaker sponsored the first student from George Mason to argue a case in a federal circuit court. He chose the student from that year's writing class based on the best brief submitted. Although gravely ill, he worked with the students to prepare them for oral argument, never letting his illness prevent him from maintaining the highest standards. He cared deeply about students and remembered his own struggles through law school.

Unfortunately, Win passed away during my last year at law school. In three short years he had devoted his all to teaching and had a huge following of admirers. His widow spoke at our law school graduation, where George Mason University posthumously honored Win with its award for the university's best teacher, an award never before given to a law school faculty member.

Today, the moot court room at George Mason is named the Win Whittaker Memorial Courtroom in his honor. And his love of teaching is honored by recognizing the law

school professor of the year with the annual Win Whittaker Award for Student Development.

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

A: It has to be interesting. Successful environmental lawyers are deeply interested in some aspect of the environment. Whether it is the technology involved with protecting the environment, the business and financial calculations associated with environmental risk or the public policy issues, the successful environmental attorneys are personally interested and excited about their specialty.

Personal curiosity, that genuine interest in some aspect of environmental law, will serve you well. Personally, I love cars, so automotive emission regulations and the technology to meet the regulations has always interested me. That is what initially drew me into environmental law.

The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.