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Q&A With Becker & Poliakoff's Daniel Wallach

Law360, New York (December 08, 2009) -- Daniel L. Wallach is a shareholder at Becker & Poliakoff PA and a member of the firm's appellate practice group. He has significant appellate law experience, and has practiced before a number of appellate tribunals, including the U.S. Supreme Court, the U.S. Court of Appeals, the Florida Supreme Court and the Florida district courts of appeal.

Wallach has handled appeals involving a broad range of subject matters, including civil rights, constitutional law, land use and zoning, municipal law, business law, employment law, tort law, and intellectual property rights.

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

A: Any case where you're representing the "Appellant," because the rate of reversal in most appellate courts is typically low, even where the standard of review is *de novo*. My most challenging case was *Troupe v. Sarasota County*, 419 F.3d 1160 (11th Cir. 2005). It was a Section 1983 "excessive force" case where I represented the families of two young men, one of whom died and the other of whom was severely injured, when a SWAT team opened fire on the moving vehicle in which the two men were passengers, causing the vehicle to crash.

It was a heart-wrenching experience for the victims' families, and for me as an attorney. I had never represented anyone who had suffered such catastrophic injuries. The case itself was challenging, as I encountered hostility and lack of cooperation from opposing counsel at the trial court level, and received an adverse result from the trial judge.

The appeal to the Eleventh Circuit was challenging, as well, demanding the maximum effort to overturn what I believed to be an unjust result. I wrote some of the best briefs that I had ever written as an appellate attorney, and was so completely committed to the cause.

It was on that case that I truly understood for the first time that I had what it took to make it as an appellate lawyer.

Q: What do you do to prepare for oral argument?

A: I reread the briefs several times to get back into the mindset, and then I create successive mini-outlines (each one smaller than the last) until I have hundreds of pages of briefs and appendices distilled to just two or three pages.

I also try to think of the hardest questions that I could possibly be asked by an appellate panel, usually focusing on unfavorable facts and/ or law, and try to come up with credible answers. Knowing your strongest arguments is not enough to win, but you also need to be able to counter your adversary's strongest argument.

I also reread the cases cited in both parties' briefs, just in case I'm asked about a particular case at oral argument. I then do several practice "run-throughs" before at least two partners in my law firm, to get a sense of where I need improvement or greater or less emphasis.

Q: What are some of the biggest problems with the U.S. appeals process?

A: Lack of uniformity among the federal circuit courts, and between the state and federal appellate courts. Each appellate court has its own local rules and unique requirements.

Q: Aside from your own cases, which cases currently on appeal are you following closely, and why?

A: I am closely following several cases involving the Interstate Land Sales Full Disclosure Act, which is a federal statute which has been invoked with increasing frequency by buyers who are looking to cancel their real estate purchase agreements in the face of a down market.

Because there are so many conflicting lower court opinions concerning the scope of the various developer exemptions under that federal statute, practitioners are looking to the federal appellate courts to resolve those conflicts. Since many of these cases were initiated in Florida (the "nerve center" of the condominium building boom), the Eleventh Circuit will be the final arbiter of any conflict among the lower federal courts (unless the Supreme Court decides to weigh in).

There are several ILSA cases that are pending in the Eleventh Circuit, and in which decisions are expected shortly. I am closely monitoring those cases to see how they will impact my developer clients and their active cases.

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

A: Judd Burstein, a sole practitioner in New York City. Not only is he the best legal writer that I have ever encountered, but he has the unique ability of turning around a high-level and sophisticated legal brief in very little time, sometimes in as little as one day. He also has a unique writing style all his own. Without even looking at the signature page, you know right away that it's one of his appellate briefs.

Through my association with Judd, I saw, for the first time, how an excellent brief can often mean the difference between winning and losing. I was inspired to become an appellate practitioner through my association with Judd, and, when writing (even today), that's the standard I try to reach.

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

A: Write, write and write. If you're still in law school, move heaven and Earth to get a judicial clerkship, even if it means moving out of state following graduation. The writing experience is invaluable, and will also help you gain entry into a law firm. Many firms will hire you directly from a judicial clerkship, and, by virtue of your clerkship, will assume that you're a good writer, and start assigning appellate matters to you (particularly, if you ask).

If you cannot get a judicial clerkship, try to work for a state or federal government agency that handles its own appeals "in-house," such as a state attorney general's office. While the salary will not be high, the appellate experience you gain in government will be invaluable, and will put you in a better position to market yourself to a private law firm. Government positions are excellent "feeders" to major law firms.

You should consider these avenues even if you're already a practicing lawyer. It's never too late to re-define your area of specialization. I should know, having made one or two changes myself during my career.