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Q&A With Loeb & Loeb's Laura Wytsma

Law360, New York (July 02, 2013, 1:24 PM ET) -- Laura Wytsma is a partner in the Los Angeles office of Loeb & Loeb LLP. Her practice focuses on intellectual property litigation in federal court, with an emphasis on appellate and patent litigation. She is also actively involved in pro bono human rights work and has represented refugees seeking asylum in Immigration Court, the Ninth Circuit Court of Appeals and the United States Supreme Court.

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

A: My most challenging case involved a dispute over Marilyn Monroe's right of publicity. I spent three years poring over Monroe's life developing evidence that at the time of her death, she was domiciled in California (which recognized a post-mortem right of publicity) and not New York (which did not). Developing evidence of Monroe's state of mind at her death when any witnesses with relevant information were long since deceased proved quite challenging.

Unfortunately, we never reached a jury. In the first published application of judicial estoppel to third-party statements, the district court estopped our client at the outset of the litigation, then vacated the decision following legislative clarification of California's right of publicity statute and then estopped our client once again at the summary judgment stage.

By the time I stood before a Ninth Circuit panel in Pasadena, Calif., to explain why the district court erred in precluding our client from reaching a jury, the evidentiary record spanned six decades. The appeal addressed judicial and collateral estoppel claims based on probate and tax proceedings in California, Hawaii and New York; right of publicity issues under California, Indiana and New York law; copyright preemption; legislative retroactivity; and other obscure areas of probate and tax law.

The biggest challenge, however, was accepting the ultimate result in the case. The district court estopped our client not based on any statement it made or position it took in any proceeding but based on statements made by Monroe's executor in the early 1960s. Almost a full year after oral argument, the panel decision affirmed the dismissal based on findings that not even the district court made.

I'm still learning how to accept the frustrating losses and not allow defeat to diminish my respect for our judicial system. Over the years, I've represented individuals from around the world who lived under repressive regimes where the rule of law does not exist. Our legal system, though imperfect at times, is still an extraordinary institution that commands respect. I've learned to accept that losing cases — even when firmly convinced the result is wrong — is not a reason to stop believing in the process itself.

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

A: A significant portion of my appellate practice involves patent appeals. There are two areas in this field that need reform: the de novo standard of reviewing claim construction and the application of the "exceptional case" standard in awarding attorneys' fees.

The de novo review of claim construction — which is simply judicial interpretation of disputed patent language — creates significant uncertainty in the resolution of patent cases. It is widely acknowledged that the de novo standard of review contributes to a disproportionately high reversal rate of judgments in patent cases, creating great uncertainty for parties and courts trying to resolve disputes through litigation or settlement. No one benefits from unnecessary "do-overs" in our judicial system.

The de novo standard — including the high reversal rate it engenders — also creates disincentives for district judges and marginalizes their role. During one claim-construction hearing I attended, the district judge referred to himself as a "law clerk" preparing a "first draft" of the Federal Circuit's ultimate findings. Fortunately, the Federal Circuit appears poised to refine the standard of review, agreeing to en banc consideration of the appropriate deference afforded to a district court's claim construction in Lighting Ballast Control LLC v. Philips Electronics North America Corp.

The Federal Circuit's standard for awarding fees to prevailing defendants in patent cases also requires serious judicial or legislative scrutiny. The near-certainty that a prevailing defendant will not recover its fees even in a baseless case, coupled with the exorbitant costs of patent litigation, permits weak or even frivolous patent claims to be pursued until a sizeable settlement is extracted.

Although the patent statute permits an award of fees in exceptional cases, the standard should not be construed as exceptionally frivolous, where only the most egregious conduct results in a fee award. The standard for awarding fees should deter — rather than tolerate or even encourage — the pursuit of frivolous patent claims.

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

A: Clear, concise and compelling writing is the most important tool in appellate advocacy. Oral argument can be exciting, but most appeals are won or lost long before the judges take the bench. Clear writing is particularly important in fields involving technology, such as patent appeals. Yet, briefs in patent cases tend to be overly technical, riddled with acronyms and devoid of a compelling human story.

It is important to remember that appellate judges will not have the benefit of many years of litigation when reading the briefs. Avoid case-specific acronyms — overuse of acronyms necessitates memorization that slows down the reader. Avoid unnecessary technical detail — almost all patent cases turn on just a few claims or defenses that can be distilled down to a simple message without excessive legalese or technical jargon.

Be sure to tell a human story — every patent case has one, and it is often overlooked. Avoid personal attacks on the court or counsel — finger-pointing never persuades a court. Most of the time, it backfires. And finally, avoid footnotes — if you have something worth saying, don't relegate it to a distracting footnote. This is the one piece of advice I hear over and over from appellate judges.

For anyone interested in resources for effective appellate writing, I highly recommend Bryan Garner's books (although I disagree with his use of footnotes for legal citations). I recently came across a great little book, "The Seven Deadly Sins of Legal Writing," that addresses the most common problems in written advocacy: passivity, abstraction, adverbiage, verbosity, redundancy, speaking footnotes and negativity. The book not only identifies and provides a remedy for each "sin" but also offers interesting historical anecdotes. It notes, for example, that legal briefs are long and contracts full of legalese because lawyers were originally paid by the word.

Q: Name an attorney in your field who has impressed you and explain why.

A: As a young associate, I had the good fortune to litigate against Gretchen Nelson, a partner at Kreindler and Kreindler, in a wrongful death suit. She soon became a mentor and then friend. Gretchen is not only committed to pursuing justice for her own clients but also to serving the legal profession. Among her countless bar commitments, she served as president of the Los Angeles County Bar Association and is currently a California State Bar trustee.

For those of us lucky enough to know her, we all marvel at how she manages to successfully practice law and serve the legal bar in so many capacities. She is an extraordinary example for us all, and I am grateful to have the advice and support of such a passionate and committed attorney.

As an appellate advocate, I also stand in awe of the men and women who regularly argue before the United States Supreme Court. It is my hope that someday I may have the privilege to argue in that remarkable tribunal.

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

A: As a new attorney, I made the mistake of believing in my infallibility that if I simply tried harder, worked longer and dedicated more, I could and would win every case. When I lost my first federal trial, I was devastated. I would learn over time that even when the facts and law favor your client, you will not necessarily win. Sooner or later, everyone loses.

As one wise person consoled me after that first trial, anyone who tells you that they never lost a trial is either lying or hasn't tried any cases. Winning or losing is not necessarily a reflection on your capabilities or commitment. Indeed, the Ninth Circuit would ultimately reverse the judgment against our client years later.

Through that first loss and others, I also learned that litigation is not necessarily a win-or-lose proposition and that a successful outcome for a client will often require creative solutions. As attorneys, we often engage in linear thinking — how to march from complaint to victory. But when we set aside our battlefield mentality and engage in creative problem-solving, we can achieve results for our clients that cannot be obtained or enforced in any court of law.

Abraham Lincoln is quoted as saying, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."

I have a rough paraphrase of Lincoln's advice that I share with clients: "Even winners lose in litigation." By the time a case reaches an appellate court, years have passed, and millions have been spent. Not every case can or should be settled — and every case should be prepared as if it will be tried and appealed. But we should be more creative in finding business resolutions for clients and doing so early in the process. We are — or at least should be — advocates for our clients' best interests, not our own personal litigation track records.

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