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Q&A With Sheppard Mullin's Don Klawiter

Law360, New York (April 09, 2013, 4:51 PM ET) -- Donald C. Klawiter is a partner in Sheppard Mullin Richter & Hampton LLP's Washington, D.C., office and leader of the firm's East Coast antitrust practice. His practice focuses on antitrust investigations and litigation — criminal and civil. Over the past 20 years, he has primarily defended corporations and individuals in international cartel investigations and prosecutions. Previously, Klawiter served in several senior trial and supervisory positions at the Antitrust Division. In 2005-2006, he was chairman of the American Bar Association's 9,000-member Section of Antitrust Law. He recently was co-chairman of the section's 2012 transition report to the president.

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

A: Because international cartel investigations only started in the mid-1990s, there were several early cases where we were sailing in uncharted waters. Among the most challenging was the graphite electrodes cartel investigation in the late 1990s, where I represented the chairman and CEO of the largest U.S. company in an international market. It brought into focus the delicate issues of corporate decision making when the CEO is a target of a criminal investigation and still head of the company. Should he ever talk to customers, shareholders, analysts? What can the company do to insulate him? What type of resolution was possible for the company and the CEO? Every day, there were challenging corporate governance issues over and above the serious antitrust charges that he faced. We worked out a plea agreement with a short jail sentence with the Antitrust Division and a retirement package with the company's board that successfully concluded the matter.

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

A: In the international cartel area, we have seen many jurisdictions follow the lead of the Antitrust Division in investigating and prosecuting cartel conduct within their own boundaries. A major concern for the future is that with increasing penalties (both fines and prison terms), multiple jurisdictions can pile on — especially when prosecuting smaller companies and their executives. If a series of penalties are assessed, it could financially harm a company and destroy its ability to compete in the marketplace. If that occurs, the mission of antitrust enforcement to preserve and enhance competition will be thwarted — and the exact opposite will result. Jurisdictions need to work cooperatively to avoid the perverse result of reducing and harming competition in the marketplace.

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

A: The growth and development of the Antitrust Division's leniency policy has been remarkable, and leniency programs have spread to an incredible number of jurisdictions around the world. By agreeing to not prosecute the leniency applicant and its cooperating employees, the Antitrust Division and its counterparts have created the most effective means of detecting and prosecuting antitrust violations in history. Leniency applications account for the vast majority of antitrust prosecutions in the world today.

Because of the extraordinary success of leniency programs around the world, and because of the great value of leniency to a company and its executives, enforcers must be careful to interpret their leniency standards fairly — that means that enforcers must not grant leniency to the clear leader or organizer of a cartel or to a company that has coerced others to join the cartel. Such unfairness could undermine this great and successful program.

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

A: For over 20 years at the Antitrust Division and in private practice, I worked very closely with John Shenefield of Morgan Lewis. When I met him, he was head of the Antitrust Division and I was a special assistant in the Office of Operations. I was honored a few years later when he asked me to join him in private practice. Substantively, John is a brilliant antitrust lawyer, but what I learned from him was how the practice law effectively and elegantly and I learned that by the simple eloquence of his example — rigorous preparation of every detail, writing and speaking in flawless prose with a touch of poetry, and treating everyone professionally and kindly. John is the consummate "lawyer-statesman," serving his clients, the bar, his country and his community throughout his distinguished career. He is what we all should aspire to be.

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

A: In the early days of international cartel enforcement when none of us had much experience with enforcers in Europe and Asia, neither we nor our clients understood clearly the limits of attorney-client privilege, especially in the European Commission. Many discovered — the hard way — that inside counsel in most of Europe enjoyed no privilege and U.S. lawyers providing advice to European counsel enjoyed no attorney-client privilege. Early dawn raids by the EC often harvested documents containing antitrust advice or results of internal investigations. I was lucky — the one investigation where a client had U.S. privileged documents in its files during a raid was a "United States only" investigation and the Antitrust Division agree not to review the privileged documents and returned them. As a result, today there is no free flow of written legal opinions and investigative reports to counsel or executives in countries with limited or no privilege. U.S. counsel must be very careful. This is a rigid rule and the reason we need international coordinating counsel in international cartel cases.

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