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Q&A With Choate's David Attisani

Law360, New York (March 15, 2013, 2:20 PM ET) -- David Attisani specializes in insurance and reinsurance coverage issues, including errors and omission, directors and officers, variable annuities, clergy abuse and 9/11 losses. He was named one of Law360's "10 Most Admired Insurance Attorneys in America" for 2010. He is co-chairman of the American Bar Association's Reinsurance Subcommittee and editor of the 2012 Appleman reinsurance treatise.

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

A: The most challenging case I can recall was my first experience as an expert witness in a London arbitration. I was engaged to provide a report and hearing testimony concerning insurance coverage issues under U.S. law. At the time, I was unaccustomed to the English practice by which experts are required to confer in advance of submitting their evidence to the tribunal in order to seek — and eliminate from their respective reports — areas of agreement.

Although I initially found the practice unusual and cumbersome, it did serve both parties well. In fact, speaking with the other side's experts about their positions helped me to develop more refined responses to key questions. That case was also my introduction to a cross-examination style we typically do not practice in the U.S. — questions in which a protracted statement of the opposing party's case is followed by a request that the witness agree. Although I didn't find this style entirely effective, I did learn a great deal from the lawyers in that case.

My expert assignments — I have since been engaged by different parties to serve as an expert witness in several cases — have been challenging for another, unrelated reason. After 21 years of serving as trial and arbitration counsel, I found that I needed to adjust to the styles of effective lawyers on our side of these cases. Being an "expert witness" is completely different from serving as "trial counsel," and I've become more adept at knowing my role and fully supporting trial counsel without attempting to do his or her job.

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

A: There is widespread agreement that reinsurance (and other forms of industry) arbitration is in need of reform for several reasons. First, arbitrator and umpire disclosures require further scrutiny in the wake of a spate of lawsuits involving the conflicts and other disclosures of panel members in which U.S. courts themselves appear, in various appellate reversals and elsewhere, to be confused by the prevailing ethical and aspirational standards.

In fairness to the arbitration community, I believe that its members require more highly refined guidance according to standards that acknowledge the tension between a salutary mercantile interest in getting hired and the need to provide full and fair disclosures to support the integrity of the process. For example, prospective panel members need to know whether it is sufficient to disclose that they know a lawyer or another panel member "socially" or whether specific interactions must be described in order to satisfy our ethical standards.

Second, although some arbitrators are highly proficient when it comes to the rules of evidence, others continue to struggle with the hearsay rule, evidence concerning each counterparty's dealings with third parties, leading questions on direct examination and other fundamental concepts. The ARIAS Education Committee, of which I am a member, and other trade organizations are addressing this issue.

Third, there is a disappointing divide between the promised efficiencies of a svelte process under the stewardship of industry experts and the reality of protracted and expensive arbitration proceedings. Increased use of summary adjudication practice has helped, but we still have a long way to go.

Finally, the interplay between courts and arbitrators is fraught with inefficiency and, sometimes, tension. Although the rules surrounding judicial involvement in arbitration have mostly been established by case law, many judges view arbitration matters with an automatic disdain, and court proceedings sometimes can amount to an expensive road to nowhere. The best judges seek to support the arbitration process without circumscribing a panel's authority.

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

A: Years after the peak of asbestos, pollution and health hazard (APH) liabilities, there is currently no "next asbestos" in the immediate offing (i.e. no single risk emerging to dominate the insurance landscape). In recent years, my work has become far more diverse — variable annuities, 9/11 losses, clergy abuse, Hurricanes Wilma and Katrina, the Big Dig (a major Boston construction project), fraudulent inducement to property programs, E&O coverage, etc.

Contenders for the "next big thing" include: climate change, insurer class actions, large storm (i.e., Sandy-type) risk management and risk control measures/teams and hydrofracking. We have been active in all of these areas and recently co-authored a white paper on hydrofracking with our client Swiss Re.

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

A: For more than a half decade, I've worked with Cindy Koehler, vice president and assistant general counsel of Liberty Mutual's complex and emerging risk claims unit. Cindy brings a unique mix of personal attributes and professional skills to the job. She is blessed with a highly organized mind, uncommon determination, strong testifying witness and negotiating skills and, above all, good business sense. I deeply admire Cindy's professional attributes, but I'm most impressed with her personal qualities.

Cindy's sound judgment is rooted in an uncommon ability simultaneously to appreciate the details while taking a longer view of issues and relationships. All of which is most certainly tempered by my favorite quality of all — a sometimes derisive, and often self-deprecating, wit.

I would be remiss if I failed to mention the other half of the CERC reinsurance team. Alex Furth, senior corporate counsel, serves as Cindy's alter ego but also shares many admirable traits with Cindy. Alex is both ensconced in the details and mindful of the need to take a broader view of the book. She truly excels at amplifying the best qualities of her outside advocates.

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

A: I learned a valuable lesson from a reinsurance arbitration I handled more than 15 years ago for the first client I could call my own. Our evidence went in smoothly at the evidentiary hearing, and I was confident that our cross-examinations would be highly effective. My client, however, determined independently that our case would be deficient, for the absence of one element of proof, if we did not put an expert we had retained on the stand.

During the hearing week, I reviewed the expert's testimony with him and concluded that he would materially damage our case, rather than aiding it if he were to testify, and I told my client as much. The client disagreed; we put the expert on the stand; and, he was ineffective on cross. Our own crosses were effective, and my client was awarded a complete recovery, plus interest.

In retrospect, however, I should have more thoroughly detailed my reasons for recommending that we withhold expert testimony, and I should have done so more than once. At the end of the day, of course, it is the client's case, and the client's decision, but I do wish that I had taken a different tack in the "negotiation" over expert testimony. We were fortunate to obtain an outstanding result, and I learned a lesson without paying for it.

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