Q&A With Crowell & Moring's Jennifer Romano

Law360, New York (May 26, 2011) -- Jennifer S. Romano is a partner in Crowell & Moring LLP's Los Angeles office and is a member of the litigation group. She focuses her practice on defending companies against unfair competition claims and consumer class actions, and representing major retailers in litigation matters. Romano represents clients as both plaintiffs and defendants in state and federal courts as well as in arbitration and mediation. Her clients include major retailers, Internet companies, financial services and health care companies.

Q: What is the most challenging lawsuit you have worked on and why?

A: I represented two rental car companies in two consolidated putative class actions brought against all of the major rental car companies. The plaintiffs alleged that the rental car companies violated their Equal Protection, First Amendment and Commerce Clause rights as well as their civil rights under Section 1983 of Title 42 of the United States Code, by charging nonlocal renters a fee for a "tourism commission assessment" at California airports and paying the assessment funds to the State of California for the purpose of promoting tourism to California.

The plaintiffs argued that the rental car companies' conduct was "under color of state law" and therefore subject to the constitutional claims because the rental car companies had worked with the state to draft, enact and implement the legislation providing for the tourism commission assessment; were the parties who charged the nonlocal renters the assessment; and paid the assessment funds to the state for the promotion of tourism. The plaintiffs also argued that the rental car companies were acting "under color of state law" because they had representatives on the commission with authority to spend the tourism assessment funds.

These consolidated cases were coordinated with a third putative class action against the same rental car companies alleging antitrust violations arising out of the same statutory scheme. We had to coordinate our defense with our co-defendants and work with multiple plaintiffs' lawyers in the three cases. We also had to evaluate how positions in the constitutional case would affect the posture of the antitrust case.

With respect to the constitutional cases, I argued on behalf of all of the rental car companies that none of the rental car defendants' alleged conduct converted them from private parties to parties acting "under color of state law." Their lobbying of the Legislature to enact the legislation and assisting in its implementation was protected activity under the Noerr-Pennington doctrine. Their decisions to charge the renters for the tourism assessment were independent, private decisions — not required by the state — and thus, could not be attributed to the state. And, their payment of the funds to the state was no different from a private party paying sales tax to the state after collecting it from consumers. Finally, having a few representatives on a much larger commission designed to promote tourism did not give the rental car companies the authority to act as the state.

We won the day with the court that these private parties were not acting "under color state law" and thus were not proper defendants to the plaintiffs' constitutional claims. The case was dismissed with prejudice and the dismissal was affirmed by the Ninth Circuit.

Q: Describe your trial preparation routine.

A: Trial preparation for me begins the moment that I am retained by the client. The first thing I do is sit down with the client and work to identify the client's goals. The goals may be as simple as just winning at trial, or they may be as complicated as helping the client maintain an ongoing business relationship with the opposing party, minimizing exposure, managing public relations and meeting a tight litigation budget — all at the same time!

Once I establish the goals with the client, I develop the strategies for winning at trial, as well as satisfying the client's other goals. We develop our trial themes and include them in every step of the litigation. Every witness interview, every document review, every discovery request, every motion and every court appearance is part of trial preparation.

If the task is not going to help us win at trial or accomplish the client's other goals, I do not believe it is worth doing. I am not one of those litigators who will spend months fighting over written discovery simply because that is part of the litigation. I may fight tooth and nail over certain discovery requests, but only after deciding with the client that it is the right tactic to prepare for trial or to accomplish one of the client's other goals.

Q: Name a judge who keeps you on your toes and explain how.

A: I currently am defending a putative class action before Judge Emilie Elias in the Complex Division of the Los Angeles Superior Court. I never go to court unprepared, but when I am appearing before Judge Elias, I know my preparation must be exhaustive.

Judge Elias closely manages the complex cases in her courtroom, and she uses status hearings to probe the attorneys about what they are doing, what evidence they have, and what their plan is for moving forward in the case. If we cannot articulate why we need to take the next step, she will not let us do it. I look forward to appearing before Judge Elias because I know she will be prepared at hearings, will ask thoughtful and pointed questions, and will keep cases moving in her courtroom.

Q: Name a litigator you fear going up against in court and explain why.

A: I look forward to being up against smart and tough opponents. It makes litigating a case more interesting and it certainly makes the win even sweeter. Plus, respect for the other side can be a great motivator.

One litigator who I deeply admire is a former partner of mine, Tom Laffey, who is now the General Counsel for Enterprise Rent-A-Car. Tom is an excellent trial lawyer, and he was my mentor when we were practicing together (and he continues to be a great sounding board). Once, after I finished a jury trial with Tom, a juror approached him and said, "I am an actor, and when I get a chance to play the role of a lawyer, I will model myself after you." That may be the ultimate compliment for a Los Angeles trial lawyer!

Q: Tell us about a mistake you made early in your career and what you learned from it.

A: Early in my career, a partner at my firm gave me a complaint and asked me to draft the motion to dismiss. I diligently researched each cause of action and made a long list of about 10 arguments to challenge the complaint. I then converted that list to a memorandum of points and authorities and proudly brought the brief to the partner. His response was to ask whether I really thought all of the arguments were winners. I told him that only a small number of the arguments truly mattered. He handed the brief back to me and told me to go back to the drawing board.

The lesson was obvious: Focus on the issues and arguments that really matter. Don't just litigate — be a strategic litigator.