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Q&A With Edwards Angell's Patricia Sullivan

Law360, New York (July 28, 2009) -- Patricia Sullivan is co-chair of Edwards Angell Palmer & Dodge LLP's antitrust practice group. As an antitrust trial lawyer, experienced in handling civil and criminal litigation, she represents businesses that are the targets of civil treble damage actions, as well as companies facing civil or criminal investigations.

Sullivan's practice has also included counseling of businesses regarding strategic planning and mergers and acquisitions. She has established antitrust compliance programs in industries ranging from manufacturing to banking and insurance. She has also counseled companies regarding the antitrust issues that arise from a challenge to the viability of a patent, including the antitrust considerations associated with the settlement of patent litigation.

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

A: The most challenging antitrust cases that I have worked on are criminal price-fixing investigations that typically begin with a grand jury subpoena, culminating in treble damage actions. I have found particularly challenging the representation of a small business, whose executives may have been near the edge of cartel activity, where an aggressive defense is likely to result in the marshaling of facts sufficient to demonstrate nonparticipation in the illegal agreement.

The challenge is not only how to marshal the facts and the law, but to do so efficiently so that the "cure" does not kill the patient. The challenge of such matters is exacerbated by cost of data gathering and the complex expert economic work critical in such cases.

Q: What accomplishment as an attorney are you most proud of?

A: While many of my proudest moments as an attorney have come in connection with some of the pro bono projects that I have undertaken (most recently, the representation of detainees at Guantanamo Bay), one of my best moments as an antitrust practitioner

came in connection with the representation of a business consortium that had launched a joint endeavor based on advice from other counsel.

I was asked to evaluate whether the conduct of the consortium might violate the antitrust laws. After an intense factual and legal analysis, I came to the conclusion that the consortium had crossed the line. In an extremely difficult and, confrontational meeting with client representatives, I ultimately brought them to understand how the antitrust laws applied to what they had been doing and to persuade them to repudiate conduct that had already been undertaken.

After the repudiation was accomplished, the consortium learned that it actually was already under investigation by the Federal Trade Commission. As a result of my advice, the investigation terminated with no adverse result.

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

A: The policy underpinning enforcement of the antitrust laws in the United States was conceived with the premise that businesses injured in the market by anti-competitive behavior may seek a private remedy, effectively acting as private attorneys general to ensure compliance with the law. In recent years, partly as a result of trends in interpretation of antitrust laws, but also because of the cost of antitrust litigation, including discovery and the cost of expert economists, business-to-business litigation is rare.

As a result, this mechanism for enforcement has virtually dried up. Instead, what remains of private litigation is largely limited to the class action that is not the result of independent action by an injured competitor, but rather was filed by class specialist who is following on the heels of investigations already initiated by the Department of Justice or the Federal Trade Commission.

Reform is needed to revitalize private antitrust enforcement by civil litigants by making it less daunting and costly.

Q: Where do you see the next wave of cases in your practice area coming from?

A: With the change in administration and the appointment of Christine Varney as the new head of the Antitrust Division of the Department of Justice, and the elevation of Jon Liebowitz to chair of the Federal Trade Commission, I am expecting that there will be significant new enforcement activity, particularly focused on single-firm conduct and exclusionary behavior.

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

A: A trial lawyer whose skills have consistently impressed me is Brendan Sullivan of Williams & Connolly LLP.

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

A: An effective antitrust lawyer must have a thorough grounding in economics -- macro and micro -- as well as an understanding of the competitive dynamics of the marketplace, not just in the United States, but around the globe.