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## Q&A With Lowenstein Sandler's Douglas Eakeley

*Law360, New York (December 10, 2009)* -- Douglas S. Eakeley chairs Lowenstein Sandler PC's practice groups focusing on antitrust and trade regulation and class action and derivative litigation and co-chairs the firm's appellate practice group. He has extensive trial and appellate experience in complex commercial litigation, including securities fraud, antitrust, consumer fraud, class actions, products liability and derivative litigation.

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

A: I was retained as appellate counsel by Merck & Co. Inc. in connection with appeals from jury verdicts in two cases that were tried together, involving Vioxx, a prescription drug manufactured by Merck. These cases were the first two to reach the appellate court, and they were among approximately 16,000 cases then pending in a consolidated proceeding in the New Jersey Superior Court (a majority of which were filed in the wake of Merck's voluntary withdrawal of Vioxx from the market in September 2004, when newly available clinical trial data suggested that the drug might increase the risk of heart attacks for some users).

In one of the two cases, the jury found for the plaintiff on his personal injury claim, awarding him \$3 million in compensatory damages and \$9 million in punitive damages; the jury also awarded him almost \$4,000 on his consumer fraud claim. The trial court awarded plaintiff's counsel over \$1.6 million in legal fees on that consumer fraud claim.

In the other case, the jury denied the plaintiff recovery on his personal injury claim, but awarded him \$45 on his consumer fraud claim. The trial court awarded over \$2 million in legal fees, based on the consumer fraud claim. In a 126-page decision, the Appellate Division upheld the personal injury verdict but reversed the consumer fraud verdicts and awards of attorneys' fees in both cases, holding that the consumer fraud claims were barred by the New Jersey Product Liability Act. The Appellate Division also reversed the punitive damages award, holding that plaintiff's punitive damages claim was preempted by the Federal Food, Drug and Cosmetic Act.

The appeals were challenging because of the length of the trial (28 days), the complexity of the issues, and the enormity of the potential consequences.

**Q: What do you do to prepare for oral argument?**

A: I spend a good deal of time reviewing the record and controlling law. I also outline my presentation, try to anticipate my adversary's arguments and the questions the appellate panel may pose, and — depending upon the appeal — recruit a panel of former appellate jurists to serve as a moot court.

**Q: What are some of the biggest problems with the U.S. appeals process?**

A: One of the biggest problems is the unavailability of interlocutory appellate review (in noninjunction cases) unless a federal district court certifies its decision pursuant to 28 U.S.C. § 1292(b) as involving "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The 1998 amendments to the Federal Rules of Civil Procedure added a permissive interlocutory appeal provision to Rule 23, thereby providing an important opportunity for appellate review of orders certifying a class, without requiring the functional equivalent of a §1292(b) trial court certification. In federal securities and antitrust litigation, an order denying a motion to dismiss for failure to state a claim can have just as potentially ruinous an impact upon a defendant as an order certifying a class. There should be discretionary power in the courts of appeals to review such interlocutory orders.

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

A: (Partner) Alan Salpeter, of Dewey & LeBoeuf (LLP), is a superb trial and appellate lawyer. He has taught a course on "The Strategy of Litigation" at Northwestern Law School for the past three years, and practices the highly effective skills and techniques that he preaches. He is thoughtful, insightful, an effective advocate and a great team player.

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

A: There are a number of things that a young attorney can do to develop and strengthen appellate skills. First, the attorney should work to hone his or her legal analytical and writing skills. This is a lifelong process, but can be accelerated by volunteering to work on appellate matters (pro bono or otherwise) with experienced appellate counsel.

Second, the attorney should study and gain a real understanding of how the appellate process works. On this point, it is critical to understand that appeals are based on a fixed record; therefore, an effective appellate advocate must master that record — and also understand what facts might exist but not be part of the record.

Third, the attorney should develop his or her ability to identify and evaluate controlling legal issues that can determine the outcome of an appeal. Here, a successful appellate attorney must keep in mind the appellate audience: An appellate court is going to bring a more detached and broader perspective to its consideration of the issues than a trial judge who has been overseeing the matter for months, so appellate counsel should try to focus on the policy or systemic issues that may resonate with an appellate court more than with a trial judge.

Finally, an attorney should gain perspective by meeting with retired appellate judges. If the attorney does not know any such judges, he or she should take advantage of the numerous federal, state and local bar associations, as well as the various Inns of Court, that regularly host events offering this opportunity.