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Q&A With Duane Morris' Ed Biester

Law360, New York (June 30, 2009) -- Edward G. Biester III is a partner in the Philadelphia office of Duane Morris LLP and is co-chair of the firm's antitrust & competition practice group. He has a general business and antitrust litigation practice, counsels clients on antitrust compliance, and represents clients in transactions and FTC and DOJ investigations.

Biester has represented clients in antitrust matters in the banking, insurance, health care, energy, chemical, aluminum, tobacco, electronics, software, semiconductor and consumer products industries.

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

A: In *American Express v. Visa*, we represented a major credit card issuer that demanded and received a very efficient and focused defense, even though American Express was seeking billions of dollars in damages, and was litigating in the wake of an action in which the Department of Justice had already obtained injunctive relief against Visa and MasterCard based on a finding of violation of the Sherman Act.

American Express asserted collateral estoppel, even as against credit card issuers who were not parties to the DOJ action.

Limiting our clients' risk and litigation expenses and seeing the matter through to an acceptable resolution demanded efficiency and cooperation in joint defense, attention to the dynamics and relationships in the industry, and exercise of judgment, patience and focus.

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

A: About 10 years ago, I had the opportunity to participate in the efforts of the bench and bar to establish a local business court program, and I continue to work to support the program.

With the support of judges and lawyers, this program has resulted in significant improvements in the management and adjudication of business disputes in Philadelphia.

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

A: First, on a practical level, there must be a better way to rein in the expenses of electronic discovery.

As to the antitrust laws, current law provides plenty of room for adjustments in enforcement policy and, where appropriate, in legal rules adopted by the courts.

Continued incremental case-by-case evolution spurred by the more aggressive enforcement we are seeing would lead to better results than attempts by Congress to rewrite antitrust laws.

However, two points raised by the Antitrust Modernization Commission two years ago are worth consideration: (1) a federal rule to govern direct and indirect purchaser standing and rights and pass-on limitation on damages to avoid the inefficient and arbitrary patchwork of state law rules; and (2) rules for contribution and indemnity in antitrust actions to avoid arbitrary and unfair imposition of disproportionate liability.

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

A: Increased federal enforcement and the pressures of recession in the global economy.

The Department of Justice wants to reinvigorate Section 2 enforcement.

The Federal Trade Commission has declared war on reverse patent settlements, and wants to invigorate enforcement against “unfair competition” under the FTC Act. Mergers are getting more scrutiny than a year ago.

Where is the next wave of cases coming from? “It’s the economy, stupid.”

Carl Shapiro sounded the warning in his speech in May on Competition Policy in Distressed Industries: warning that it is in tough economic times, with global recession, receding demand, excess supply and lower than average return on investment, when suppliers may be most tempted to collude.

A few years from now, we will find out whether he was right.

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

A: Rich Parker at O'Melveny is one of many great and versatile antitrust lawyers I have observed handling both litigation and transactions.

He creates an immediate impression of solid competence and confidence, gets to the point, holds firm, and genuinely enjoys both what he does and the people involved.

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

A: Three things: First, go work at the Department of Justice or the Federal Trade Commission if you have the opportunity.

Second, think globally and from the perspective of the businesses you represent, and look for a good industry-specific and preferably international niche in which to build your practice.

Third, volunteer to do a particular project for an ABA antitrust section committee. Find someone you know to put you in touch with a committee chair or vice chair.

It is time-consuming, but rewarding, and the section is filled with great people who also happen to know quite a bit about antitrust.