CARLTON FIELDS

Q&A With Carlton Fields' Brian Rosner

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Law360, New York (April 29, 2013, 2:34 PM ET) - Brian Rosner is a shareholder in Carlton Fields' New York office. He has experience representing clients at trial and on appeal, having tried numerous complex civil and criminal matters in state and federal court, and briefed and argued hundreds of appeals, including appeals to the United States Supreme Court and the New York State Court of Appeals.

He represents senior executives in complex business and employment disputes, SEC securities fraud investigations and enforcement actions, and securities fraud lawsuits brought by class action plaintiffs. In addition, several federal courts have appointed him to act as a receiver in receiverships created under the Commodity Exchange Act.

Rosner began his career with the New York County District Attorney's Office. Between 1975 and 1988, he served as a senior trial attorney in the Frauds Bureau, where he investigated and tried numerous cases, including complicated fraud and murder cases. Between 1978 and 1980, Rosner also served as a supervising attorney in the Appeals Bureau, where he drafted and argued more than 100 criminal appeals, many concerning novel legal issues.

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

A: The highest burden of proof is proof beyond a reasonable doubt, and the burden is most difficult to bear in a circumstantial evidence homicide case. The best witness (the victim) is dead, and there are no other witnesses, only an arguably logical chain of events and circumstances.

The most difficult trial I participated in involved a senior citizen who appeared to have drained her modest bank account and absconded to a Caribbean island, until her rock-weighted corpse floated up in the Hudson River. Painstaking factual reconstruction identified a killer (her social worker). After his conviction, his counsel rendered the compliment of saying, off the record, that we had

reconstructed the facts wrong, though the conclusion was right.

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

A: Hourly billing: It often does not work. Not every hour of work is equal in importance or skill level required. Further, the concept of billing by the hour contains a conflict: I agree with Michael Roster, who opined that a "billable hour" is a unit of production, to be reduced in the name of efficiency; for the law practice, the billable hour is a measure of profitability, to be increased in number and cost (per hour). When Abraham Lincoln practiced — and for a hundred years before and after Lincoln — American lawyers billed based upon value of services provided. Even in complex litigation, the better practice is block billing with an agreed upon level of adjustment due to changed or unforeseen circumstances.

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

A: The premise of the multimillion-dollar industry of securities fraud litigation is the 1988 Supreme Court case Basic vs. Levinson, in which, based upon the court's adoption of an economic theory (the efficient capital market hypothesis, "ECMH"), the court concluded that individual reliance need not be proved in securities fraud cases. Rather, due to ECMH, all misrepresentations are reflected in a stock's price and can be calculated since a stock price moves in rational lock-step response to a misrepresentation.

The problem with this Basic analysis is that few economists believe this theory now. For a generation, the Nobel Laureates in Economics have been behaviorists: stock prices move in response to emotions, herd behavior and, occasionally, fundamentals, although it is generally not possible to parse what movement is attributable to what cause. In Basic, the Supreme Court adopted an economic theory just as it was being abandoned in the real world of economics.

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

A: The difficulty of trial practice in "complex business litigation" is getting a jury to understand what those hundreds or thousands of pages of documents mean. A master in this regard is the recently deceased attorney Peter Fleming. He had the knack of pulling one page from the evidence cart and, with clear, incisive questioning, telling the jury his narrative of the case with that one previously obscure page.

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

A: As a young assistant district attorney, my first experience with the New York State Court of Appeals was to argue a leave application — seeking permission to take an appeal — before Chief

Judge Charles Breitel. It was a stop and frisk case involving a weapon at a time when crime was much more rampant in New York City than it is today, and, in response to the times I think, I was florid in describing the horrid consequences to society were the lower court's decision permitted to stand.

Chief Judge Breitel — who himself had once been an assistant district attorney arguing appeals — leaned across his desk and, avuncularly, advised that I not exaggerate but let a plain, straight statement of the facts speak for themselves. I have since tried to do that, removing adjectives and adverbs, and other exaggerators, from oral and written argumentation, much to the betterment of the presentation and the understanding of judges and juries.