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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Q&A With Latham & Watkins' Matthew Brill

Law360, New York (August 25, 2011) -- Matthew A. Brill is a partner in the Washington, D.C., office of Latham & Watkins LLP. He represents cable operators, wireless carriers and others in regulatory, litigation, and transactional matters involving a broad range of communications issues. Brill represents clients before the U.S. Federal Communications Commission and in trial and appellate court proceedings, and he also advises leading financial institutions.

He has served in leadership positions for the D.C. Bar Computer and Telecommunications Law Section and the Federal Communications Bar Association. Before joining Latham, he served as senior legal advisor to FCC Commissioner Kathleen Abernathy.

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

A: FCC-related litigation frequently presents challenges of one sort or another, but one case in particular stands out. I represented a group of cable companies in a formal complaint proceeding before the FCC, alleging that a major carrier's retention marketing practices made improper use of proprietary information that the carrier obtained in the course of porting telephone numbers when customers switched providers.

What made the case especially tough was not simply the complexity of the legal issues and skilled opposing counsel, but the then-FCC chairman's clear skepticism regarding the complaint. That former chairman had been engaged in a series of heated and high-profile disputes with the cable industry, so we knew going in that obtaining his support would be challenging.

To no one's surprise, the FCC's Enforcement Bureau, directed by the chairman, initially ruled against us. Usually, that's the end of the road, as it is very rare for the FCC commissioners to overturn a staff ruling and to force the Chairman to dissent. But the other commissioners pored over the pleadings and heard oral argument, and ultimately determined that the cable companies had the law and the facts on their side.

The D.C. Circuit unanimously upheld their decision, and that in turn led to a successful damages settlement. Although the hostile forum initially proved daunting and frustrating, the willingness of the commissioners to take a fresh look at the issues and to exercise independent judgment was a refreshing and affirming experience.

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

A: The communications industry is changing at lightning speed, as new products and services continue to emerge and challenge old regulatory constructs. If you go back just a decade, broadband was in its nascency, and there were no tablets, no iPhone, no Netflix, etc. Although the pace of change makes it difficult for regulators to keep up — and as a former senior staff member, I'm sympathetic to their plight — the agency must adapt its rules to new realities.

My own view is that the emergence of robust competition has rendered many of the old rules obsolete and also counsels against adopting new regulatory mandates, such as the "net neutrality" requirements adopted by a divided commission at the end of 2010. But regardless of where one stands on the appropriate substantive outcomes, there are too many key issues that have been allowed to languish, perhaps for fear of the political implications of any decision.

For example, more than a decade after recognizing the importance of Voice over Internet Protocol (VoIP), the FCC has yet to decide its classification or the extent to which traditional intercarrier compensation rules apply. The ensuing uncertainty has led to dozens of high-stakes lawsuits that require significant resources and could chill investment. The courts and state regulators have urged the FCC to act, but it has been unable or unwilling to do so.

Although I have great respect for the FCC as an institution, and for the talented people who work there, the agency needs to do a better job of resolving uncertainty. Even if the answers it supplies aren't always the ones I would choose, allowing critical issues and disputes to remain unresolved for years is seldom the right way to proceed.

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

A: The FCC's classification of IP-based services, such as VoIP and IP video, is pivotal, because the labels chosen by the FCC will determine many of the rights and obligations that apply to those services. If VoIP is a telecommunications service, it will be subject to far more regulation (at the federal and state levels) than if it is an information service. By the same token, the extent to which IP video services are cable services will have profound implications for program access rights, carriage obligations and municipalities' ability to collect franchise fees.

Thus, while the classification debates often seem dry and academic, they are often the most important issues addressed by communications lawyers, and they are issues that have been at the core of my practice in recent years.

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

A: I have found that the communications bar attracts enormous talent, likely because of the combination of cutting-edge issues and diverse opportunities to argue before courts and regulatory agencies alike. And I have been fortunate to work with many of the best and brightest, both in private practice and at the FCC.

One of the most impressive lawyers I have worked with (or against) is Lynn Charytan, a colleague from my previous firm who now works in-house for Comcast. Lynn has it all — a brilliant and super-quick legal mind, deep subject matter expertise, wise judgment, and the ability to present complex issues clearly and understandably, no matter the audience. She also loves her work and maintains a sense of humor, which makes collaboration a joy. In my experience, Lynn has been equally impressive as an advocate and as a counselor, and I know her former clients miss her as much as her current employer cherishes her.

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

A: When I was just out of law school, clerking for a federal district court judge, I remember getting dug in on various issues and extremely frustrated in those few instances when the judge and I didn't agree.

One time, after I passionately presented my recommendation for resolving an issue a certain way, the judge, having heard quite enough from a young whippersnapper, took me over to the corner within his chambers where he had various framed photos and certificates. "You see that there?" he said, pointing to a document memorializing his appointment to the bench by President Ronald Reagan. "Do you have one of those?"

I slowly shook my head, "No, I don't, Your Honor." "Well," he added, "I guess that ends the discussion." It sure did.

This playful rebuke has stayed with me over the years. When I was an associate in a law firm, I often reminded myself that, however strongly I felt about a particular tactical issue, there comes a time to shut up and get on board when the partner or client decides on a different approach, and I had no trouble supporting the decision that was made. That outlook was important in working for an FCC commissioner; it was her name on the president's certificate, not mine.

The same remains true in my practice today: While I like to think that my clients usually take my advice, I am ready to defend their positions just as zealously even when I would have made a different legal (or especially business) judgment. I believe most lawyers learn that lesson at some point, but I appreciate that my judge made clear early on who got to wear the robe and bang the gavel.