

Q&A With Morgan Lewis' Brad Fagg

Law360, New York (February 25, 2013, 1:56 PM ET) -- Brad Fagg is a partner in the litigation practice at Morgan Lewis & Bockius LLP, resident in Washington, D.C. He co-chairs the firm's government contracts practice and the firm's energy litigation practice. He represents commercial clients in a wide variety of high-stakes contractual and regulatory disputes, federal and other procurement matters, construction disputes, government and internal investigations, False Claims Act cases, and predispute counseling matters. Prior to joining Morgan Lewis, Fagg was a trial attorney in the Civil Division of the U.S. Department of Justice, where he handled civil fraud cases, procurement disputes, takings claims and employment appeals.

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

A: There has actually been a class of cases — the “spent nuclear fuel” damages matters that I have been lucky enough handle for the past several years — that have presented some of the biggest challenges. Morgan Lewis represents most of the domestic nuclear utility industry in contractual damages lawsuits against the federal government, arising out of the U.S. Department of Energy's failure to commence accepting spent nuclear fuel for disposal at Yucca Mountain in 1998, as required by law. The cases have involved almost everything that can make a large civil damages lawsuit challenging: unsettled legal issues, problematic discovery, unprecedented harm, highly technical facts, a motivated and well-financed adversary, and massive dollars at stake.

Even beyond all of that, though, the spent nuclear fuel damages cases arose from fundamental, and troubling, failures of our political system. It is the rare damages case that serves as a proxy for resolution of such existential issues about how our political, societal and civic institutions should work. The cases have presented a sobering lesson (to me at least) in how wide the gulf can be between aspirational governmental policy on the one hand, and what actually gets done in the real world on the other.

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

A: Much has been written and discussed about the need for federal procurement reform, and much of that commentary is well founded. A cross-cutting issue that I think may present one of the most vexing challenges, however, relates to government contract administration and oversight. Many disputes and much frustration can often be traced to inadequate contractual implementation by the government. The cure, though, involves the commitment of more — not fewer — resources, to maintain and improve the capability, competence and professionalism of the government contracting workforce. In times of tight budgets, and reflexive calls for the slashing of government expenditures, I fear that the dichotomy between the problem and the solution in this area will result in continued struggles.

On a more specific note, there is an anachronistic statute (28 U.S.C. § 1500) that traces its origins to Civil War-era forum shopping. Although the statute is still rigidly — if grudgingly — applied by courts, in its modern incarnation it is uniformly cited as the prototypical “trap for the unwary.” Section 1500 automatically divests the Court of Federal Claims of jurisdiction if there is a pending district court suit involving (arguably) the same matter or similar facts. It is an unjustified procedural obstacle that serves no policy that could not be achieved by more efficient and effective means. Litigation over Section 1500 also results in unnecessary waste of judicial and party resources and, potentially, the forfeiture of meritorious legal claims. I would add my voice to the many calling for congressional repeal of the statute.

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

A: As I mentioned with respect to the reform challenges, significant and draconian governmental budget volatility is likely to be a fixture for government procurement for the foreseeable future. Dealing with the threat or reality of sequestration, and the constant related battles over budgets and debt limits, are issues that will infect the government’s relationship with every contractor with whom it does business. These are matters that will touch everyone in this practice area in one way or another for years to come.

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

A: J. Bradley Fewell, vice president and deputy general counsel of Exelon Corporation, has been impressive in his ability to manage diverse areas of the law, and to reach outside of his comfort zone. I have had the pleasure of knowing and working with Brad for nearly a decade now. During that time he has progressed from a nuclear regulatory specialist to a senior adviser at one of the country’s largest utilities, with a portfolio of diverse responsibilities that cover the spectrum of thorny legal issues that a major company like Exelon faces. While maintaining his nuclear “roots,” Brad has taken on the legal aspects of varied and complicated interactions between his company and all manner of federal commercial, investigatory and oversight authorities. Brad’s success has, I think, been the result of his ability to apply his skills and sound judgment to new areas, and his willingness to do so. It has been rewarding to watch Brad’s career arc, and to witness his mastery of each new challenge.

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

A: Early in my career as a “pup” lawyer at DOJ, I got roughed up in some moot court sessions for “losing the forest for the trees.” The challenge arises from the need to deeply immerse oneself into the facts and details of a case, which is absolutely critical. But, as I learned early and continue to appreciate today, you have to be able to convey the most complicated concepts concisely and plainly. I don’t think you can overemphasize the value of being able to relay the essence of a complicated case or problem to an uninitiated listener in an “elevator” or “cocktail party” conversation. If you can successfully do that, I think you are already well on your way to enjoying success as a lawyer.

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