

Leading Questions: Selendy & Gay's David Elsberg

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Lawyers are great at asking questions, but how are they at answering them? Bloomberg Law is talking with lawyers and other legal industry players at the top of their fields to find out what makes them tick, what challenges they face, and how they do what they do.

David Elsberg is co-founder and co-managing partner of the two and a half-year old litigation powerhouse Selendy & Gay. Elsberg is a seasoned trial lawyer, and has litigated a broad range of complex commercial cases, including trials and arbitration hearings involving issues like financial fraud and malfeasance, investment funds, corporate governance and control contests, energy, bankruptcy, employment, and structured financial products.

Bloomberg Law spoke to Elsberg about conducting trials remotely, his firm's unique approach to recruiting, and how young lawyers who want to be litigators can get their foot in the door.

Bloomberg Law: What sets your firm apart from other Big Law firms?

David Elsberg: We have a roughly 50/50 split of plaintiff and defense work, which makes us more formidable advocates for our clients on both sides of the "v". One reason we're able to do this is that we're trial lawyers, so we have fewer conflicts than Big Law firms that have transactional and other practice groups aside from litigation. This means that, for example, we can sue big banks whereas most Big Law firms can't, because it would interfere with their transactional work.

Also, we've positively disrupted some of the long-standing methods that have underpinned Big Law firms. For example, as part of our recruiting process, we provide a hypothetical factual situation and require each applicant to do a written analysis using case law that we provide. The writing sample is then anonymized, so that when we assess a writing sample, we do not know the name or other characteristics of the applicant. This element of our recruiting process draws a self-selecting group of motivated lawyers who are willing to take this extra step to join our firm. It also helps us hire based not on bias, but merit. This and other extra steps we take in recruiting have led to a diverse group of associates who are

wonderful human beings, who work extremely well with clients and co-counsel, and produce extraordinary work.

BL: What is the biggest challenge currently facing your practice area?

DE: Adapting to practicing remotely because of Covid-19. We've done a number of trials and arbitration hearings remotely, and it's worked very well—because we've changed our approach to certain aspects of our practice. For example, all trial lawyers have been confronted with the challenge to develop methods to keep the attention of the judge or jury through a screen, and the challenge to drive home cross examinations with the same impact as when everybody is together live in the courtroom.

BL: How did you become involved in pro bono work for the parents of the Sandy Hook Elementary School mass shooting victims as the families sued gunmaker Remington Arms?

DE: We actively look for opportunities to litigate pro bono matters that have a significant, national impact. Our commitment to do this is exemplified by the Sandy Hook case. We got involved to provide support to the firm handling the wrongful death lawsuit for the families against Remington in Connecticut State Court. Specifically, we have worked on issues that arose in connection with Remington's filing for bankruptcy. The goal in the bankruptcy proceedings is to make sure there are funds available to support the ongoing wrongful death litigation brought by the families in Connecticut. One of the aims in that suit is to get discovery to learn the motives for Remington's assault rifle marketing decisions, and the public safety implications associated with its marketing strategy.

BL: How has the pandemic impacted and/or transformed your litigation practice?

DE: We founded our firm only about three years ago, and made a decision at that time to build a cutting edge IT infrastructure, instead of adopting legacy technology that many Big Law firms have used for decades. One reason we did that was so that we would be positioned to provide the best service for clients across the country from our office in New York. Don't get me wrong, though. I'm very eager to get back to doing things in person. Integrating new associates, building and maintaining culture, spontaneous conversations that generate valuable ideas—all are better done in person, with everybody under one roof. In fact, from the start we decided that we will have a single office in New York, rather than opening multiple offices in different places, precisely so we would get the significant benefits of working together as a cohesive, nimble team.

BL: What is your favorite war story from your career/practice?

DE: A plaintiff argued at trial that our client used a flawed approach to determine that it was solvent; that in fact, our client was insolvent; and that the court should adopt an alternative method to determine solvency. During a short break in the middle of my cross examination of the plaintiff's key witness, a superb associate looked at the financials for a subsidiary wholly owned by the plaintiff. The associate did some quick math and figured out that if the method that the plaintiff was urging in court were applied to the plaintiff's own subsidiary, that subsidiary would be insolvent.

After the break, when I put the associate's math up on the screen, the witness admitted that the plaintiff's subsidiary would be insolvent using plaintiff's approach. This was a big problem for the plaintiff and its subsidiary, because the subsidiary had paid a dividend to the plaintiff, which would violate a statute that prohibits an insolvent company from making such a dividend. In the post-trial decision, the court ruled our client's way, and noted that the plaintiff's insolvency theories couldn't be reconciled with its approach outside of litigation.

BL: What advice would you give an associate just starting out his/her Big Law career?

DE: Aggressively seek out opportunities to develop your skills through experience, right out of the gate. If you want to be a trial lawyer, from day one stay informed about which cases in your firm are likely to go to trial—and ask the more senior lawyers to put you on the team and to give you witness examinations and arguments (or at least parts of arguments). Jump on opportunities to work on TROs and preliminary

injunctions where you can get stand up experience. Ask to do depositions (or at least parts of depositions). Ask early and ask often.

It's unfortunate, but the reality is that in Big Law, many litigation associates never get meaningful courtroom experience, which makes it harder to put yourself forward as a trial lawyer as a young partner, which makes it harder to do so as a senior lawyer. So there are a lot of Big Law litigation partners, even senior partners, that have very limited trial experience. But if you seek out the experience, it can become a virtuous cycle: you do part of a deposition, the partner and client sees you're good at it, and then they trust you to do an entire deposition, and they see you're good at it and so they give you a chance to do a minor witness at trial, and so on. Don't wait for opportunities to land in your lap, energetically seek them.

Attorney

- David Elsberg