

Q&A With Kelley Drye's Dana Rosenfeld

Law360, New York (August 26, 2011) -- Dana B. Rosenfeld is a partner with Kelley Drye & Warren LLP in the firm's Washington, D.C., office and chairwoman of the firm's privacy and information security practice, as well as a member of the advertising and marketing practice. A former assistant director of the Federal Trade Commission, she focuses her practice on privacy and data security, advertising and consumer protection matters.

Rosenfeld represents clients before the FTC and state attorneys general — including recent matters for major retailers, food and dietary supplement manufacturers, and financial services institutions — and provides ongoing compliance advice related to existing law, best practices and self-regulatory programs. She is ranked as a leading practitioner in the privacy and data security area by Chambers USA, 2010 and 2011.

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

A: Together with my colleague Jodie Bernstein, I represented the Council of Better Business Bureaus (CBBB) and the Children's Advertising Review Unit of the National Advertising Review Council in developing the Children's Food and Beverage Advertising Initiative (CFBAI), a self-regulatory program designed to encourage the advertising of healthy foods and active lifestyles to children. This project also included the revision of the industry's Self-Regulatory Guidelines for Children's Advertising.

It was a tremendous challenge to develop a process that was inclusive of all participants and resulted in a highly effective self-regulatory program that ultimately was supported by a substantial number of global food companies and media providers, as well as the Federal Trade Commission. Gaining the support of this wide array of industry sectors, including quick-service restaurants, global manufacturers of myriad food products, beverage manufacturers and candy companies, was frequently referred to by one participant as "herding cats." As one of the lead "herders," I am proud that the CFBAI, which came into existence in 2006, continues to operate under the auspices of the CBBB, and is widely regarded as an excellent example of effective self-regulation. See, e.g., www.adweek.com/news/advertising-branding/will-food-industrys-new-marketing-guidelines-satisfy-feds-133437

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

A: Companies subject to deceptive advertising or privacy investigations may find themselves defending multiple actions by the FTC and one or more state attorneys general for essentially the same practices. These are often either preceded or followed by private class action litigation. The result is huge defense costs and conflicting settlement demands, which can sometimes force a company to scale back operations or declare bankruptcy. Reforms that could reduce such burdens and provide greater clarity to companies seeking to comply with the law are needed to avoid these consequences.

One option for managing this problem is for industry sectors to focus on self-regulatory initiatives that would include “best practices” which, if followed, would give companies some degree of protection from law enforcement action. For such programs to be successful, however, the programs must include both a public reporting and enforcement mechanism, similar to the CFBAI program addressed above, as well programs developed by the Distilled Spirits Industry Council and the National Advertising Division of the BBB. It also is essential for industry members to engage in outreach to relevant governmental agencies as they develop best practices with a goal of ultimately gaining agency support for the program.

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

A: A series of consent orders obtained by the FTC in the late 1990s and early 2000s set the stage for privacy and data security law enforcement for years to come. These early privacy cases held companies accountable for their privacy statements and practices.[1] As an assistant director in the Bureau of Consumer Protection at the FTC, I was involved in developing the theories that led to these settlements. And now as a lawyer in private practice, I appreciate that these early cases were important for several significant reasons.

First, they established the FTC as the leading federal agency in the newly emerging area of privacy, a role which it has continued to play to the present day. In addition, the work by the FTC resulted in comprehensive and lasting changes in the way businesses collect, use and disclose customer information. While this process has evolved over time, and led to the passage of privacy and data security laws on the state and federal level, it was the early work by the FTC that brought attention to the practices in the first instance.

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

A: One of my mentors at the FTC was Teresa Schwartz, who at the time was the deputy director of the Bureau of Consumer Protection. Before joining the FTC, Teresa was a law professor at George Washington University, and earlier in her career had worked as an attorney advisor to an FTC commissioner. As deputy director, Teresa played many roles, including managing the day to day work of the bureau and developing program initiatives and strategic planning efforts.

Teresa was a wonderful manager and a thoughtful leader. She was equally well regarded by the staff she managed as by those above her in the chain of command at the FTC. She accomplished this by her inclusive approach to management, which gave value to the opinions and views of the staff in reaching decisions affecting them. As a result, staff felt that they were part of the process and took ownership of the results. She also was an extremely creative thinker and hard worker, and led efforts such as the agency’s first hearings on electronic commerce issues, which resulted in a report, “The Federal Trade Commission: Anticipating the 21st Century.” This report set the stage for the FTC’s enforcement agenda, much of which is still being carried out today.

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

A: In one of my first matters as an attorney in private practice after leaving the FTC, I was representing a client under investigation by the FTC and multiple state attorneys general. In the course of that representation, I was in negotiations with the FTC over a settlement, and after a particularly lengthy and difficult settlement meeting, I neglected to immediately call the client to report on what had occurred. Not surprisingly, the client was furious, and I was extremely embarrassed.

While the client had been very pleased with the work we had done thus far, much of the trust that we had developed over the course of the representation was gone. As a government lawyer not accustomed to representation of private clients, I clearly did not appreciate the seriousness of the situation for the client and the need for regular and open communications regarding the work that I was doing. Since this incident, I have made it a priority to be extremely responsive to client requests and communicate frequently about developments, whether or not I view them as significant to the outcome of the matter.

[1] See, e.g., GeoCities Inc., FTC Docket No. C-3850 (Feb. 5, 1999) (consent order) (alleging that company misrepresented the purposes for which it was collecting personal information from both children and adults); Liberty Fin. Cos., FTC Docket No. C-3891 (Aug. 12, 1999) (consent order) (alleging that site falsely represented that personal information collected from children, including information about family finances, would be maintained anonymously); FTC v. ReverseAuction.com, Inc., No. 00-0032 (D.D.C. Jan. 10, 2000) (consent order) (alleging that online auction site obtained consumer data from competitor site and then sent deceptive, unsolicited e-mail messages to those consumers seeking their business); FTC v. Toysmart.com LLC, 00-CV-11341-RGS (D. Mass. filed July 10, 2000) (alleging site attempted to sell personal customer information, despite the representation in its privacy policy that such information would never be disclosed to a third party); FTC v. Rennert, No. CV-S-00-0861-JBR (D. Nev. July 24, 2000) (consent order) (alleging that defendants misrepresented their security practices and how they would use consumer information).

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