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Q&A With Patton Boggs' Giovanna Cinelli

Law360, New York (October 28, 2009) -- As chair of Patton Boggs LLP's export control practice group, Giovanna Cinelli advises a number of defense companies and high technology industries on complex export/import control and compliance matters involving export transactional due diligence, investigations, audits, technology transfer, licensing, national security and industrial espionage issues. Her clients include members of the satellite, fighter craft, military platforms, encryption, computer and software industries.

Cinelli has worked extensively with the U.S. Departments of State, Commerce, Defense, Treasury, and Energy and the office of the U.S. trade representative on these matters.

Q: What attracted you to your practice area?

A: The unique balance between law and national security made resolutions of any issues both interesting and complicated. The need to consider not only the requirements of law, but how an executive agency, rather than the courts, would interpret the objectives behind the statute differentiated this practice from a traditional litigation or a corporate practice.

Second, the "contextless," or far-reaching nature of the export laws, is daunting in the sense that so many other areas of the law are equally implicated by U.S. export controls and requirements, yet the other areas do not involve the traditional view of trade — which is the movement of goods outside the United States.

Within the last 10 years, a broader understanding of how exports may occur has resulted in a realization that corporate transactions, litigations, arbitrations, bankruptcy proceedings and intellectual property protections all benefit from export analyses. This breadth is a testament to the congressional drafters' prescience in enacting the Arms Export Control Act and other export laws such that they apply to areas where inadvertent transfers of controlled technology, services or products may arise.

Q: What is the most challenging case you've worked on, and why?

A: Our export practice focuses on the highly complex, document intensive and legally challenging issues that run the gamut from preventive to defensive counseling.

If I had to pick the most interesting and challenging area, it would be the investigation and resolution of potential export violations that are simultaneously pursued criminally in the courts and administratively before various U.S. government agencies.

Given the U.S. government's broad jurisdictional mandate in the civil enforcement of breaches of the export laws and the heightened interest by the Justice Department since 2007 in prosecuting export violators, I find that

challenges arise whenever companies are balancing the submission of voluntary disclosures on the administrative side that are also of interest to the U.S. attorneys' offices or the Justice Department.

A company's decision-making process is impacted by serious questions of waivers of privilege; proper investigative analyses; and interpretations of the same export law, particularly since they are made under two different standards (criminal and civil).

Q: What are the most challenging legal problems currently facing clients in your practice area?

A: Among the most difficult issues facing companies is how to comply with export laws and regulations that government agencies inconsistently interpret. Delicate legal and business judgment calls must be made when a company seeks to properly classify its products or technology under the International Traffic in Arms Regulations or the Export Administration Regulations.

This is also true when companies evaluate whether a particular license exemption or exception applies to transfers of data and services provided to non-U.S. persons or when and how to investigate and submit a voluntary disclosure.

And because national security and foreign policy objectives sometimes prevent the governing agencies from directly and candidly explaining why a particular decision is made, companies are left with a broad range of unknowns for which they may nonetheless be held liable.

These acts sometimes raise constitutional concerns that are difficult to address when the same federal agency holds licensing and compliance authority over a company.

Q: How do you see your practice area evolving in the next five years?

A: Regardless of the recent announcements concerning a wholesale revamping of U.S. export laws, export restrictions have been in place since the Revolutionary War and are unlikely to fundamentally change.

Administrations may decontrol items by removing licensing requirements from products and technology, but that does not alter the national security impact that results from sensitive items falling into the hands of those countries or individuals who disagree with U.S. policy or view the United States as an enemy.

If licensing requirements are removed, the due diligence burden on companies rises as the responsibility for tracking shipments or transfers devolves to private industry. The costs to industry and the concomitant legal obligations simply shift from licensing to oversight.

I expect, therefore, that some controls will remain, the scope of the export laws will change to encompass licensing requirements for items that are considered sensitive today, and the myriad of "technical transfer sieves" we have in the United States will increase.

I also expect that more parties — such as universities — will determine that their need for compliance has grown as their activities shift. The expansion of parties interested in establishing compliance frameworks would, I anticipate, increase the need for highly competent counsel that can investigate, audit, prepare disclosures, and assist in criminal and civil enforcement cases.

I also foresee that the government will be held to a higher standard than in the past not only on the basis of recent cases such as *United States v. Pulungan* and *United States v. Melendez-Diaz*, but on the trend to limit the government's discretionary authority in compliance and enforcement actions.

Q: Outside your own firm, name one lawyer who's impressed you and tell us why.

A: The practice of law, especially in this area, is comprised of so many competing and sometimes conflicting goals that it is important to maintain a clear, keen and objective approach to the advice provided. That requires a strong ethical base and a comfort level with the analytical knowledge you possess and the advice you provide — not only because it is reasonable and supportable, but because it is ethical.

Judge Henry Hudson [of the U.S. District Court for the Eastern District of Virginia], who was in private practice at the time I met him, epitomizes this approach. I admire his balanced view and his ability to "call it as he sees it" — a skill which serves clients well and allows clients to make decisions on the basis of relevant information, not just unsupported opinion.

Having had the pleasure of working with him in private practice, I was inspired by his consistently detailed analysis and balanced approach towards assisting clients.

Q: What advice would you give to a young lawyer interested in getting into your practice area?

A: Apart from the fairly standard advice of "be the best you can be" and "know the area of law like the back of your hand," I would strongly advise young attorneys to learn early the difference between advising your clients and giving a client the answer he/she/it wants to hear.

Clients are seeking advice from qualified and competent counsel because they need to make decisions which impact not only their legal obligations, but their short- and long-term business goals as well.

That requires straight answers, sometimes unpleasant, when it comes to helping a client navigate an area of law that is not premised solely on business considerations.