

Q&A With Mayer Brown's Keith Willner

Law360, New York (December 02, 2011, 4:05 PM ET) -- Keith Willner is a partner and firmwide practice leader of Mayer Brown LLP's real estate practice.

Based in Washington, D.C., Willner regularly counsels major real estate investment trusts, institutional developers, banks, private equity and opportunity funds, insurance companies, pension funds and pension fund advisors, asset managers, and other capital providers in connection with the acquisition, venturing, financing, leasing and disposition of real estate.

His transactions often focus on complex structuring issues, and tax, Employee Retirement Income Security Act, bankruptcy and corporate considerations involving foreign and domestic investors.

Willner received his law degree and his undergraduate degree from the University of Virginia.

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

A: I've handled billions of dollars of deals all over the world, involving all kinds of property and a multitude of people and institutions, but the most challenging and unusual transaction I've had was the representation, years ago, of a lender in taking back a small medical research facility which had defaulted on its mortgage.

The borrower used animals for biomedical research and had imported a shipment of monkeys from Africa. Apparently, the animals had not been thoroughly screened because, after arrival, the monkeys started dying of the ebola virus.

Ebola is a very scary disease because it has nearly a 100 percent casualty rate. Several people had come into contact with the diseased animals, but luckily no human being became symptomatic, although some tested positive for associated antibodies.

Instantly, the case became national news and the laboratory folded. We were eventually successful in recovering the building, and the lender hired expensive consultants and experts to scour it with disinfectants.

Shockingly, no one wanted a flex office building that formerly housed diseased monkeys, and the lender was forced to remarket it as a record-storage facility.

Ultimately, they found no purchasers at any price, and had to knock the building down and sell it for land value.

Despite all the difficult transactions and tricky negotiations I've found myself in since then, I've never had to deal with a building infected with a fatal disease.

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

A: One of the aspects of real estate practice today that most needs reform is the U.S. Bankruptcy Code. Many smart people have met with dubious success trying to establish a framework which reconciles the competing policy goals of affording borrowers a fresh start and providing predictability to the commercial lending community.

On one hand, bankruptcy affords borrowers the opportunity to escape debts that they have no prospect of repaying. It also benefits society as a whole by freeing up projects that would otherwise be blighted or moribund for new investment so that they may become productive contributors to the economy rather than drags on communities and development.

On the other hand, commercial mortgage lending is founded on the principle that if one lends money, one either receives the money back with the contracted-for return, or one realizes upon the collateral in mitigation of the loss.

Commercial mortgage lending is priced based upon those fundamental assumptions. To the extent that bankruptcy disturbs those assumptions, it increases risk and therefore increases pricing and decreases the desirability of real estate mortgage lending relative to other fixed-income investment opportunities.

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

A: An important issue to the real estate practice today is the relative illiquidity of capital markets, and how to bring capital to bear at all levels of the capital stack.

Everyone knows about the excesses of 2006-07. The capital markets were wide open and investment at every level of the capital stack — mortgage debt, mezzanine debt, preferred equity and common equity — were seemingly at all-time highs.

Unfortunately, the mania that produced the modern-day gold rush produced numerous unwise investments. The collapse that ensued revealed numerous gaps in the “perfect information” that was assumed to govern and rationalize the markets, especially in the public stock sector.

It is obvious now that people placed too much faith in the rating agencies and their ability to accurately assess risk. It is also clear that imaginative investment bankers created financial products which they ballyhooed as exploiting efficiencies in the market but which were not fully understood by investors and which ultimately caused tremendous exposures and nearly caused the financial markets to implode.

In light of the magnitude of the losses that were sustained, it is not surprising that the markets have tightened to the point that the relative unavailability of capital has constrained real estate markets and limited capital and value growth.

This newfound conservatism has imposed a much-needed discipline on the real estate market, but has also become a governor on the economy. A major issue in real estate over the next couple years is how to restore faith in the market to a point where institutional investors and the general public again devote resources to real estate investment.

This challenge is particularly important in light of the number of mortgage loans coming due in the next two years. Without new capital to both fund the exits from the existing loans and to support value growth, I see on the horizon significant obstacles and difficulties for real estate.

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

A: George Ruhlen. George is an attorney and a managing director for U.S. real estate at the Carlyle Group in Washington, DC. There are at least three reasons why George has always impressed me.

First, George is able to separate the wheat from the chaff. He understands what issues are important and zealously protects and defends those issues but does not bog down the transaction by obsessing on points that are not integral to the deal.

Second, George is able to distill very complicated issues into easily understandable pieces. He is an excellent communicator. I have seen George win fundamental issues in a negotiation because he was able to explain his position in a way the party sitting across the table could understand and appreciate, while his opponent couldn't rebut George's positions or even respond in a way his own client could understand.

Finally, George maintains a sense of calm, humor and self-assurance, whatever the circumstances. I have seen him, through his demeanor, palpably reduce the level of tension even in highly contentious negotiations. In other words, he keeps his head while those around him are losing theirs.

Each one of those practices is one of the cardinal qualities of good legal representation, and I strive every day to reach his level.

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

A: One of the many great mistakes I made early in my career was not learning how to type. Through the kindness of girlfriends and strangers, I managed to survive college and law school without any typographical skills.

I made it through the early years of practice through the use of hand-held recorders and tiny microcassettes. I still shiver as I think of my driving down the road while dictating briefs and memoranda using that ridiculous hand-held recorder. I also apologize to a succession of secretaries who had to interpret my muddled dictation through old-fashioned earphones from tape playback machines operated by foot pedals.

With the advent of modern technology, I was faced with the dilemma of the dinosaurs: adapt or perish. After flirting with the latter, I reluctantly bought a book on typing and spent a summer teaching myself how to type.

Today, I would never consider myself an expert, and couldn't possibly qualify for the position held by my administrative assistant. However, I can truthfully report that I typed this response — and every other contract, memorandum and email I do today — all by myself.

Now, I understand that they have this new thing called Facebook ...