

# Law360

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## **Q&A With Hunton & Williams' Michael Mueller**

Michael J. Mueller is a partner in the Washington, D.C., office of Hunton & Williams LLP and co-chairs the firm's commercial litigation practice. He has focused on class actions and other complex civil litigation. He has been lead counsel in class actions in various industries, including consumer electronics, food processing, health care, restaurants, retail sales and software.

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

A: It is hard to pick just one case, since every class action has its own unique challenges. One of my most challenging cases was my first case, in 1987, before Judge Nicholas Politan in Newark, N.J.

The case involved two different plaintiff classes suing a company (my client at the time) and a defendant class of employees at that company. The issues surrounding the appropriateness of the defendant class were on the cutting edge of the law.

We went to a hearing to argue against a summary judgment motion that had been filed by the plaintiffs; we prevailed, but were ordered to commence trial the next day even though neither side had prepared for trial.

The bench trial resulted in an order to arbitrate the issue, and the ensuing arbitration lasted seven months, which, at the time, was the longest arbitration in the history of the airline industry.

In addition to that case, since 1998, I have been lead counsel in a series of wage-hour collective actions and class actions that have been challenging by virtue of the sheer length of time they have lasted, and by the need to coordinate factual and legal positions across many cases.

Even when one case gets resolved, we have seen plaintiffs' counsel file follow-on actions involving the same class definition or new employee groups at the same work sites; that creates its own unique challenges of accommodating the defense position to the rulings in the prior litigation and advancing new arguments that were not previously at issue.

### **Q: What accomplishment as an attorney are you most proud of?**

A: In the 25 years since I graduated from law school, there have been many things, both professionally and personally, that have been gratifying. I am pleased every time that I help clients achieve their business objectives, whether it be winning a case, reaching a settlement or meeting any other goal they were pursuing.

One of my favorite cases was a hybrid Fair Labor Standards Act collective action and Rule 23 class action. After arguing an interlocutory appeal on an issue of first impression in the federal appellate courts, the Third Circuit reversed certification of the Rule 23 class, in part based on the different procedures imposed by Congress for FLSA claims versus state-law wage-hour claims.

On a personal level, it has been very rewarding to mentor so many younger lawyers who have gone on to become partners or start their own successful practices.

It also is personally rewarding to have represented individuals as plaintiffs. I once represented two gentlemen from Cameroon who brought a bailment action when an auto dealership could not return a vehicle they had brought in for repair. Their gratitude for a successful outcome was perhaps greater than that shown by any other client I have had.

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

A: In my view, it is too easy to get a class certified. Although Congress made an indirect attempt to address this issue by enacting the Class Action Fairness Act of 2005 (CAFA), that reform was focused on shifting state class actions into a federal forum.

I generally represent defendants, and those clients have welcomed judicial “reform,” such as the Third Circuit’s ruling in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (2008), instructing the lower courts to rigorously examine the record to determine whether the plaintiffs have established each element of Rule 23 by a preponderance of the evidence, even if doing so involves a preliminary inquiry into the merits.

In many cases, an order certifying a class imposes undue leverage on a defendant to settle separate and apart from the merits (or lack thereof). The Advisory Committee on Civil Rules and Congress should further tighten the standards for certification by rule or statute.

Another area that needs reform is the nature of evidence that can be presented in FLSA collective actions. Plaintiffs in these cases typically seek “first stage” conditional certification based either on mere allegations or evidence from a limited number of employees.

This raises due process concerns for defendants, because cross-examination of the plaintiffs or additional class members often reveals inconsistencies with the self-serving allegations or testimony from the employees who were hand-picked by plaintiffs’ counsel.

**Q: Where do you see the next wave of cases in your practice area coming from?**

A: First let me say that I don’t see the current wave subsiding. I am continuing to defend many wage-hour hybrid cases (an FLSA collective action combined with, or parallel to, a state-law-claim class action), and I expect to see many more of those cases filed in the near future.

I think we will see an expansion of consumer-products class actions, particularly as the Internet exposes consumers (and plaintiffs’ counsel) to complaints by other consumers on product forum websites, complete with detailed descriptions of why a company allegedly did something wrong.

In the longer term, I think we can expect to see trends in our society driving the types of litigation that will follow. For example, as our health care delivery system changes and our population ages, we should expect more class actions involving health care issues and retirement plans.

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

A: Carter G. Phillips of Sidley Austin LLP. Carter and I were co-counsel in the Supreme Court in *IBP Inc. v. Alvarez*, which was Chief Justice John Roberts' first oral argument on that side of the bench.

Carter is tremendously smart and he imparts a lot of practical guidance as you work with him. He is also a genuinely nice guy and a gentleman. In an era in which some aspects of legal practice have become just a "business," Carter is a reminder of what it means to be a true professional.

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

A: The first thing I would ask is whether they are really interested in class actions, and why. They need to have an interest and affinity for helping clients work through complex legal situations where it often takes years to achieve the client's business goals for the litigation and is not always an outright "win."

I would also give young lawyers the same advice that was given to me by the judge for whom I clerked, the Hon. Avern Cohn in Detroit, Mich.: Regularly read the advance sheets of the Supreme Court and at least one other court, preferably the appellate court where you practice.

For those interested in practicing in the area of class actions, I would recommend obtaining a copy of some of the leading treatises, such as Newberg on Class Actions, and frequently perusing different sections to become familiar with the many issues that arise and possible solutions. I also would recommend subscribing to periodicals dedicated to this area of law.