Law360
Q&A With Sidley Austin's Joe Guerra
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Joseph R. Guerra is a partner in Sidley Austin LLP's Washington, D.C., office and co-chairman of the firm's appellate practice.

Formerly a principal deputy associate attorney general for the U.S. Department of Justice, he focuses his practice on traditional appellate representation and on law-intensive, trial-level litigation, raising novel and often complex questions of federal or state law.

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

A: Mobil Pipe Line Co. v. Federal Energy Regulatory Commission, in which I represented Mobil Pipe Line in its efforts to overturn a FERC decision denying the company the ability to charge market-based rates on one of its oil pipelines. Often, in cases involving review of agency action, one of our principal tasks as appellate lawyers is to translate the complexities of the regulatory scheme and the factual issues in the case for the judges who are deciding it. This case was especially daunting in this regard.

It required an understanding of the history of oil pipeline-rate regulation, how the transportation of crude oil from one region to another creates opportunities to arbitrage regional price differences and why a pipeline's ability to capture such differentials through market-based rates should not properly be considered evidence of market power.

So in addition to explaining multifaceted legal, factual and regulatory issues, we had to explain and then debunk the agency's economic theory as well. And we had to do all of this in a setting where the agency gets considerable deference and had never before granted market-based rate authority to a crude oil pipeline.

In fact, in light of these considerations, there was considerable debate about whether it made sense to seek judicial review at all. Fortunately, the client chose to do so and ultimately created an important precedent.

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

A: To be honest, I don't really see any areas of appellate practice that are in need of reform. The appellate process works remarkably well. The rules are straightforward and well-understood, the process affords sufficient opportunity to develop the issues and arguments, and relationships within the bar are usually collegial and professional.

There are some circuits where the caseloads are very heavy, and there are a number of vacancies, which can lead to unfortunate delays between the time an appeal is docketed and a decision is rendered. Luckily for me, this is not true in the appellate courts where I practice most frequently.

There are also some wide variations among the circuits in how "user-friendly" their clerk's offices are. In my experience, the [U.S.] Supreme Court has the most approachable and

helpful clerk's office. When you argue there, the clerk, William Suter, ends his explanation of courtroom protocols with a request for feedback on how his office can be improved, and it's clear from the responsiveness of that office that he really means it.

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

A: Because so much of my practice involves either challenges to agency action or litigation over the meaning of statutes that agencies interpret, I'd have to pick Chevron USA Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837 (1984). When Justice Stevens retired, there were articles and symposia identifying Chevron as his most cited and most significant decision. I graduated from law school the year after the decision came down, so throughout my career, its two-step analysis has been the governing framework for determining the deference owed to an agency interpretation of a statute it administers.

As a former deputy in the Office of Legal Counsel at the Department of Justice, I appreciate the decision's separation-of-powers foundations. And as a practicing appellate lawyer, Chevron is the gift that keeps giving. The court has periodically refined the Chevron framework, as it did, for example, in United States v. Mead, 533 U.S. 218 (2001), which conditioned Chevron-style deference on showings that Congress delegated lawmaking authority to the agency and that the agency actually exercised that authority.

Just last month, in City of Arlington v. FCC, the court heard argument on whether federal agencies get deference when they interpret the scope of their own jurisdiction, a question that's been debated for two decades. And one of these days, the court is going to revisit the question of how much deference to accord an agency's interpretation of its own regulations and in particular, whether so-called Auer deference creates undue incentives for an agency to issue vague regulations through notice-and-comment rule-making and then demand deference to its aggressive or unanticipated interpretations of those regulations.

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

A: There are an awful lot of very talented lawyers in my field, but one of the most impressive performances I ever witnessed — and one that made a lasting impression on me — was an argument that now-Chief Justice Roberts gave when he was a deputy in the solicitor general's office.

The case involved Amtrak's statutory right to request an order from the old Interstate Commerce Commission condemning railroad property that Amtrak "required" for its services. The question was whether "required" meant indispensable or simply "convenient and useful," as the ICC had concluded. The agency's interpretation was aggressive and raised the kinds of property rights concerns that later made the Kelo [v. New London] decision so controversial.

My recollection is that at oral argument, Roberts faced intense and persistently hostile questioning, especially from Justice Scalia. I had written an amicus brief in support of the ICC decision and knew that Roberts could escape the barrage by embracing a fallback argument. But he never wavered from his contention that the agency's decision should be upheld under Chevron, and the government ended up winning the case 6-3, with Justice

Scalia, to my amazement, joining the majority.

Sometimes, it's necessary to retreat from an argument and try to win on the narrowest ground available. But in retrospect, I saw that Roberts had correctly determined that Chevron was the government's best argument and that he shouldn't back away from it, despite the hostility it was going to engender in some quarters.

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

A: I once handled an appeal where my client had obtained a license to place fiber optic cables in public rights-of-way in a small municipality, and after the company complied with all permitting requirements and the cable was in the ground, the municipality adopted an ordinance imposing franchise fees on such cables. My client felt this was extremely unfair because the cable could only be removed at considerable expense and disruption, and I shared that view.

But at oral argument, several of the judges saw the case as a classic contest between David and Goliath, where the municipality was David, and my client was seen as the big, out-of-state Goliath trying to take unfair advantage of a small town. Although it didn't affect the outcome, I was quite taken aback by this reaction.

We're trained as lawyers to be able to see and understand the strengths and weaknesses of the other side's legal argument. But this experience taught me that it is also essential to recognize that even typically dispassionate appellate judges can bring certain perceptions and feelings to an issue, and it's a mistake to ignore that when briefing and preparing to argue a case.