Law360

May 13, 2013

## Q&A With Hunton & Williams' Stuart Raphael

Stuart A. Raphael is a partner in Hunton & Williams LLP's McLean, Va., and Washington, D.C., offices, where he focuses on appellate practice, commercial and environmental litigation, and water law. He represents Fortune 500 companies and state and local governments in litigation in federal and state court at both the trial and appellate levels. He recently authored a law review article discussing original-action litigation in the United States Supreme Court, Practical Considerations in Original Action Litigation, 12 Wyo. L. Rev. 15 (2012).

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

That's easy — representing Virginia in Virginia v. Maryland, 540 U.S. 56 (2003). The issue was whether Maryland had the authority to regulate and control Virginia's withdrawal of water from the Potomac River, given that the boundary line runs along the low-water mark on the Virginia side of the river. Maryland used its putative control to block Virginia's Fairfax County Water Authority from building a 300 million-gallon-a-day water intake structure extending 725 feet into the channel of the river. The new intake was critical to the water system serving most of Northern Virginia. From Virginia's perspective, the case was about whether Maryland could control growth and development in Virginia by restricting its water supply.

We argued that the Maryland–Virginia Compact of 1785 denied Maryland any such authority. The compact was negotiated by several of the founding fathers and gave the citizens of each state the right to use the river and to construct improvements appurtenant to the shoreline. We maintained that the compact established equal rights of access, rights that were not altered when Virginia later lost the boundary dispute in 1877, resulting in the boundary line being drawn on the Virginia side of the river.

The problem with our case was that, for decades, Virginia citizens had been applying to Maryland for water-withdrawal and waterway-construction permits, hardly ever questioning Maryland's authority over the Potomac River. We had a huge number of bad documents to explain away.

Once the Supreme Court assigned our case to a special master, the best strategic decision we made was to sequence the legal issues to postpone dealing with that unhelpful recent history. It enabled us to focus on our strongest claims first. The historical record was fascinating. It consisted of letters from James Madison, Thomas Jefferson, George Washington and George Mason. That history exercised gravitational pull to help keep everyone's attention focused on the strongest part of our case.

We succeeded in establishing the validity and scope of the 1785 compact before turning to Maryland's argument that Virginia lost its compact rights through decades of acquiescence in Maryland's control over the river. The special master went on to rule in our favor on that issue too, and by the time I argued the case before the court, the acquiescence issue lost its force; it didn't even came up at oral argument. We won the case 7-2.

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

Poor legal writing continues to be a big problem. Good thinking must precede good writing, but lawyers coming out of law school often do not think through their points, outline their arguments before writing them, or address obvious weaknesses forthrightly. Writing short, declarative sentences seems like a dying art. But there is reason for cautious optimism. Bryan Garner should be credited for his good work in this area, including books like The Winning Brief. And in 2010, the Scribes Journal of Legal Writing published his interviews of U.S. Supreme Court Justices, a must-read for practitioners interested in writing more persuasively. I think many law schools have been slow to recognize the problem. They need to do more to produce lawyers who can hit the ground running when it comes to writing persuasively and clearly.

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

The Supreme Court's 5-4 decision in South Carolina v. North Carolina, 130 S. Ct. 854 (2010), significantly altered the legal culture in state v. state cases by permitting nonsovereign entities to intervene if they can show an individualized and compelling interest not represented by one of the litigating states. Chief Justice Roberts warned in dissent that nonsovereigns had never before been permitted to intervene in such cases, and that allowing them in would fundamentally alter the nature of the court's original jurisdiction. I think he's right. When I handled Virginia v. Maryland, the case went very quickly, at least in part because the special master refused even amicus status to groups that sought to participate. Future original action cases in which nonsovereigns intervene will be more complex, expensive and time-consuming for the states who are parties, and much more challenging for special masters to administer.

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

Paul D. Clement of Bancroft PLLC (and former solicitor general of the United States). He really has the full package of appellate talent. His appellate briefs are outstanding, with a conversational tone and pithy, attention-grabbing statements of the question presented. And he presents oral argument multiple times a term in the Supreme Court, without using any notes. There's no question he's a superstar in the field.

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

In my first week as a practicing attorney, another lawyer asked me to prepare a transactional document and gave me one of his legal forms to use as a guide. The form contained horrendous legalese (nonsense such as "Know All Men By These Presents That"), which I dutifully included in my draft. Thankfully, a more senior lawyer chastised me for doing that, and I've felt liberated ever since to reject such legal gobbledygook; it has plagued our profession.