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Q&A With Arnold & Porter's Robert Weiner

Law360, New York (October 14, 2009) -- Robert N. Weiner has headed Arnold & Porter LLP's litigation and business litigation practice groups. Weiner has substantial experience as a trial lawyer and appellate advocate in criminal and civil cases.

His experience includes serving as national coordinating and trial counsel in product liability and toxic tort cases involving, among other things, diet drugs, heart valves, pharmaceutical products, and lead paint. Weiner has represented clients in media-intensive congressional investigations and regulatory inquiries, as well as in confidential, criminal and disciplinary investigations.

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

A: It is difficult to identify the most challenging case, as most cases have their own unique challenges and all require the same undiluted commitment to getting it right. Matar v. Dichter, for example, posed a number of concerns.

I represented Avi Dichter, the former head of the Israeli Security Agency (Shin Bet). The appellants were Palestinians who had suffered injuries and lost family members in 2002 when Israel bombed a Gaza apartment complex in an attack on the military leader of Hamas. Their situation was tragic. They claimed that Mr. Dichter had participated in the decision to launch the attack. They charged him with crimes against humanity and war crimes, and sought damages under the Alien Tort Statute and the Torture Victim Protection Act.

It was important to win this case at the threshold, because discovery — including discovery regarding jurisdiction — could have created significant international problems if, as we expected, the plaintiffs inquired into the intelligence assets, targeting decisions, military capabilities, and internal policy discussions of the Israeli government.

Many potential defenses, such as Mr. Dichter’s lack of involvement and the opportunity for the appellants to proceed in Israeli courts, might potentially have opened the door to

discovery. Two defenses did not open the door — sovereign immunity and the political question doctrine.

I therefore moved to dismiss in the District Court on the grounds that sovereign immunity protected Mr. Dichter against liability for any actions he took on behalf of the State of Israel and that the case presented political questions unsuitable for resolution by a court. The district court agreed on both grounds and dismissed the case.

On appeal, the appellants argued that the Foreign Sovereign Immunities Act (FSIA) did not extend to former officials. Mr. Dichter was no longer an official of the Israeli government when the Appellants first sued, although he subsequently rejoined the government as a Cabinet Minister.

The Court of Appeals for the D.C. Circuit had rejected that argument in another case I handled, but, while this appeal was pending, the Fourth Circuit ruled to the contrary. The State Department took the position that the FSIA did not apply, but that Mr. Dichter was immune from liability under common law. The Second Circuit had not addressed the issue previously.

As the appellee, we defended the district court's rationale and distinguished the Fourth Circuit decision. But we also argued that the State Department's theory provided an alternative basis for affirmance and that the court should defer at the very least to the department's ultimate judgment that this case could not properly go forward in U.S. courts.

Confronted with this tangle, the Court of Appeals held that it did not need to decide whether the FSIA applied because, "even if Dichter, as a former official, is not categorically eligible for immunity under the FSIA, ... he is nevertheless immune from suit under common-law principles that predate, and survive, the enactment of that statute."

The court observed that the State Department, which filed an amicus brief in the case, "had urged the courts to decline jurisdiction over appellants' suit, and under our traditional rule of deference to such executive determinations, we do so."

Q: What do you do to prepare for oral argument?

A: I reread all the briefs and the substantive materials cited. If the panel has been announced, I read any potentially relevant cases decided by the panel members. I then seek to identify (a) the points on which I want the court to focus, (b) the simplest way to state them, and (c) a perspective on those points that illuminates them in a way the brief does not. I then write out the oral argument I would like to give, the key questions the court might ask, and the best, most direct answers. That goes in a notebook, with tabbed dividers for each argument and each question.

After reviewing and refining these materials further, I participate in a moot court before a panel of at least three lawyers, no more than one of whom has worked extensively on the case. Based on that experience, I revise the argument, as well as the questions and answers. Usually, I do a second moot court and make further revisions. I continue revising, supplementing, and reading potentially relevant sources right up to the time of the argument. I make sure that the arguments are in distinct modules, and I practice rearranging the order of presentation, and modifying the level of detail.

At the argument, I have the notebook with me, but generally do not consult it while presenting. By this point, I have internalized the arguments and isolated the key arguments and phrases. While preparing the rebuttal during the opponents' argument, I sometimes remove from the notebook and organize the relevant modules. But, again, I either do not refer to the materials while presenting, or just glance at them to ensure that I have covered all the points.

Q: What are some of the biggest problems with the U.S. appeals process?

A: The most significant problem is delay. It is often more important for the parties to obtain a decision — any decision — from the court than to wait months or more for a great piece of judicial craftsmanship. Sometimes, the court may wish to announce the result quickly and provide a full opinion later.

Q: Aside from your own cases, which cases currently on appeal are you following closely, and why?

A: I have written briefs in or otherwise worked on all the major pharmaceutical and medical device preemption cases in the Supreme Court and many of the key cases in the Courts of Appeals. I continue to follow preemption cases that are on appeal, including the cert petitions pending in Sandoz Pharmaceuticals Corp. v. Gunderson (prescription drugs), Breusewitz v. Wyeth (vaccines), and Adams v. Beretta U.S.A. Corp. (guns), as well as Howard v. Centerpulse Ltd, a medical device case in the Sixth Circuit, Bryant v. Medtronic, a medical device case in the Eighth Circuit, and Dobbs v. Wyeth Pharmaceuticals, a prescription drug case in the Tenth Circuit.

I am also following the South African apartheid cases pending in the Second Circuit on appeal from the district court's ruling on the political question doctrine and international comity in a lawsuit under the Alien Tort Statute. My cases for Israel in the district courts and Courts of Appeals have dealt with those defenses and that statute.

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

A: The lawyer who most impressed me was Chuck Ruff. I had the privilege of working with him in private practice and in government when he was White House counsel. Chuck was the complete lawyer. He could try cases, argue appeals, and advise clients, always with the greatest integrity. He knew how to engender ironclad credibility with any court or other forum he addressed. He could answer questions directly without deviating

from the themes on which he wanted to focus. And he could simplify the most complicated points. He was one of the great lawyers of our time.

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

A: I would suggest that he or she get experience at the trial court level. Reviewing appellate opinions, or even appellate briefs, can gloss over a key lesson — that those cases did not start out so neatly organized, with the arguments clearly delineated and the evidence lined up to support them.

Cases begin as an undifferentiated mass of facts, if that. Often, there are only potential sources of facts to be investigated. Learning how to assemble and present those facts, identify the key legal issues, frame them at trial, and preserve them for appeal can make a young attorney into a better appellate advocate.