

## Q&A With Akin Gump's Paul Gutermann

*Law360, New York (March 08, 2013, 12:05 PM ET)* -- Paul Gutermann is head of Akin Gump's environmental practice. He has a national practice resolving issues arising under environmental statutes and handling environmental issues in mergers, divestitures and restructurings. Gutermann has been lead trial counsel in enforcement actions brought against electric generating stations for alleged violations of the Clean Air Act. He is an authority on climate change issues, including carbon trading, the creation and sale of GHG offsets and disclosure of climate change risks and liabilities.

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

A: My most challenging and — not coincidentally — fascinating [case] involved defending Illinois Power Company in one of the first Utility Enforcement Initiative cases brought by U.S. Environmental Protection Agency. The challenges from this case arose from the fact that we had no precedent for many of the issues.

To challenge the government's novel legal theories developed for this litigation, we had to locate and persuade former EPA employees to agree to testify and to develop trial testimony regarding prior EPA regulatory interpretation that could be admissible. We also had to create innovative means of proving that maintenance projects at the power plant did not cause emissions increases. We developed detailed attacks on the EPA's health and environmental effects evidence, air emissions transport computer models and historical availability of control technologies. We ultimately developed three-dimensional, digital models to demonstrate these conclusions to the court.

During discovery, we probed deeply into the scientific bases for the EPA's claims of health and environmental effects. For example, in deposition, I was able to discredit the EPA's primary health effects expert, a former chairman of the EPA's Clean Air Act Scientific Advisory Committee, to the extent that he disavowed critical portions of his own expert report. I also established through deposition testimony that the EPA's air quality modeler made errors in changing the model's computer code and in analyzing data so as to make his conclusions unreliable and uncovered mathematical errors in the EPA's experts reports that, when corrected, supported our contentions that the alleged effects were not discernible.

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

A: The regulated community in the United States incurs massive costs and related inefficiencies because federal and state regulatory agencies do not promulgate clear and direct regulations and attempt to regulate through "informal" measures such as guidance documents and "nonbinding" interpretive memoranda. Agencies do this largely for self-preservation; i.e., avoiding having to make tough decisions, retaining flexibility to change interpretation without changing the regulatory language and to minimize opportunities for being second-guessed.

While understandable as a human reaction, agency officials fail to appreciate not only the unnecessary direct economic cost but also the opportunity cost of those funds not being available for investment of new technologies with the potential for greater environmental benefit.

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

A: This may seem somewhat obscure, but the fiscal situation in the federal government, as well as in many states, can lead to severe underfunding of qualified technical personnel to evaluate and shepherd permit applications through the regulatory process. Every day a permit application remains pending before an agency represents a day lost to construction and operation of the facility. The costs of these delays can be so great that otherwise sound projects are abandoned.

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

A: David Buente of Sidley Austin. David is an experienced, creative and practical lawyer. In addition to his deep knowledge and experience, he excels at working collaboratively and without the need for ego gratification.

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

A: I am tempted to go with the time I answered a phone call from a partner late on a Friday afternoon and ended up working nonstop all weekend on a temporary restraining order motion and ended up second-chairing a six-month trial. But, I learned the most from what, fortunately for me, turned out to be a “harmless error.”

I was working with a colleague in another office and waiting to receive from him final client approval to file a petition for review in the D.C. Circuit. This was the final day on which the petition, which was jurisdictional, could be filed. I received the client approval and delivered the package for filing. At that time, the deadline for the D.C. Circuit was 4:00 p.m., but the delivery staff confused that deadline with the 4:30 p.m. deadline for district court filings.

When the delivery staff informed me of the mix-up and that the petition had not been filed, the passing of my career passed before my eyes. I immediately ran to the courthouse, hoping to find someone in the clerk’s office and hoping for mercy. I could hear voices and movement inside, but no one answered my knocks. As a last resort, before leaving, I slid the envelope under the door and returned to the office to face the music.

The next morning, I went down to the clerk’s office to see if there was any way to cure and discovered that someone had taken mercy on me and had docketed the petition the previous day. I learned never to let a deadline get so close and when I became the decision-maker, to not allow anyone working on my matters to do so.

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