



November 8, 2014  
10:45 AM – 12:00 PM

### **Session 603: Appellate Advocacy**

2013 was a banner year for APA appointments to both federal and state appellate courts, in part due to the growing recognition of the exceptional APA lawyers who specialize in appellate practice. How did those lawyers succeed, and what makes appellate advocacy different from trial court litigation? Attend this program to gain insights from the bench and the bar on how to successfully navigate the ins and outs of appellate practice, whether it's crafting a winning brief, effectively preparing for oral argument, or developing strategy for amicus briefs. You'll be arguing before the Supreme Court in no time!

Program Co-Chair & Moderator:

Greg Wu, *Partner*, Shook Hardy & Bacon L.L.P.

Program Co-Chair & Speaker:

Peter Karnajia, *Partner*, Davis Wright Tremaine LLP

Speakers:

Hon. Carla Wong McMillian, *Judge*, Georgia Court of Appeals

Pratik Shah, *Partner*, Akin Gump Strauss Hauer & Feld LLP



# ORAL ADVOCACY

Kevin M. Fong, Pillsbury Winthrop Shaw Pittman LLP

# Challenges in Oral Advocacy

- How to begin your argument
- Using the facts in a legal argument
- Dealing with hypothetical questions
- Transitioning to a new topic
- Distinguishing cases
- Rebuttal
- How to close your argument

# A Ninth Circuit Oral Argument

- *Confederated Tribes of the Chehalis Reservation v. Thurston County*
- Argued in June 2013
- Are buildings on land held in trust for an Indian tribe exempt from state/local taxes?
- The Chehalis Tribe bought land in Thurston County, then asked the Dept. of Interior to buy it and hold it in trust for the Tribe.
- The Chehalis Tribe then leased the property to a joint venture in which the Tribe owned a 51% interest.
- Great Wolf Lodge was built on the property, with a hotel, convention center and indoor water park.

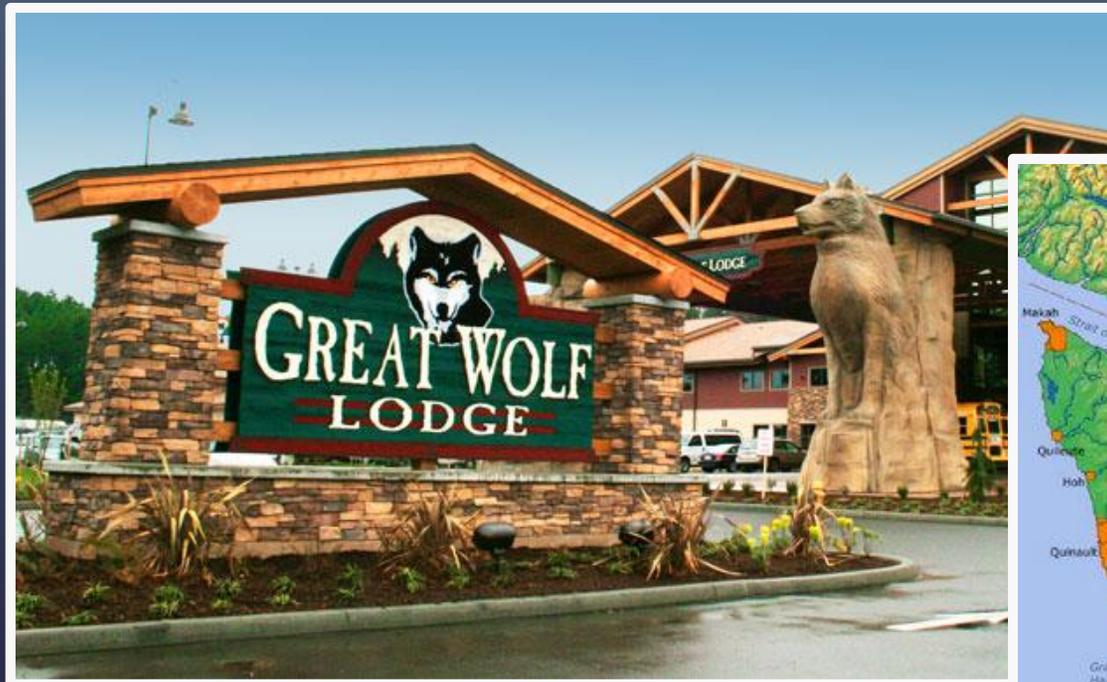
# Background on the Supreme Court's Prior Cases

- *U.S. v. Richert* (1903). County has no power to tax Indian-owned buildings on trust lands.
- Section 465 of Title 25 of the United States Code. United States may acquire land and hold it in trust for an Indian tribe.
- “such lands . . . shall be exempt from State and local taxation”
- *Mescalero Apache Tribe v. Jones* (1973). Ski lifts operated by a tribe on tax-exempt land would be immune from property tax.

# How to Begin Your Argument



# Using the Facts



# Making it Easy for the Court



# Hypothetical Questions



# Transitioning to a New Topic



*Chehalis River*



# Distinguishing Cases



# Rebuttal



# How to Close Your Oral Argument



## Chehalis Canoe Family 2013 Journey "Paddle to Quinault"

This is seventh year that the Chehalis Canoe Family participated in One Heart and One Mind on the Canoe Journey with tuulop tit wiṭ (Tu-lap ti weah), a twenty-seven foot ocean canoe. The Canoe Journey is a traditional and spiritual journey on the ancestral waters by the First Peoples of the Northwest Coast, and is a feat requiring mental, physical and spiritual readiness. The Canoe Journey creates opportunities for tribal members to re-learn, strengthen, and reinforce their canoe traditions. There are many cultural values that are learned from the canoeing, including pride, cultural knowledge, learning how to paddle, respect, and sense of achievement. This year was the Paddle to Quinault, who previously



The Chehalis Canoe Family arrive at Makah and wait to ask permission to come ashore.

## Great Wolf Lodge—Ninth Circuit Court of Appeals Finds That Thurston County May Not Assess Property Taxes

By David Burnett, Chairman  
On July 30, 2013, the Federal Ninth Circuit Court of Appeals filed its decision in *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization, et al.* That lawsuit was originally brought by the Tribe in 2008 against the Thurston County Board of Equalization and various Thurston County officials to dispute the County's property taxes on the Great Wolf Lodge. The Tribe has refused to pay these property taxes since the original tax assessment in 2007. In 2010,



**APPELLATE ADVOCACY**  
**NAPABA 2014 Convention Panel Discussion Outline**

**PETER KARANJIA**

Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue, NW  
Suite 800  
Washington, D.C. 20006  
(202) 973-4256

**GREGORY WU**

Shook Hardy & Bacon LLP  
2555 Grand Boulevard  
Kansas City, MO 64108  
(816) 559-2189

August 25, 2014

## **I. INTRODUCTION (3:30-3:40 pm)**

### **A. Introduction of panelists**

### **B. What explains the recent rise of APA appellate lawyers?**

## **II. 4 TIPS TO BETTER APPELLATE BRIEFS (3:40- 4:00pm)**

### **A. State how and why should your client prevail**

- If the law is on your side, then state why it is also “right” and “fair” that you win
  - i. Is proposed outcome good or bad as a matter of jurisprudence?
- Compelling, narrative statement of facts; avoid temptation to do a simple chronology
- Frame the issue at the outset of the brief, weaving facts as appropriate to make them concrete

### **B. What is the law at issue in appeal?**

- Statute v. common law – what does the court have the power to do?
  - i. Remember, courts can’t rewrite badly written statutes
- What is the best type of case to discuss?
- Avoid duplicative citations

### **C. There is a reason it’s called a brief**

- Be clear and concise without using adjectives like “clearly” :)
- Roadmap and organize arguments; topic sentences and transitions
- One thought to a sentence
- Eliminate passive voice
- Edit, edit and edit

### **D. The standard of review can make or break your appeal**

- Appellant-petitioners – consider how many issues of error to you really want to include
- Appellees – focus court’s attention so the result is upheld

### **III. THE VALUE AND IMPORTANCE OF ORAL ARGUMENT (4:00- 4:15pm)**

#### **A. Not a Talking Brief**

- Key points only
- Different perspective
- Theme

#### **B. Address Whatever is Troubling the Court**

“Far better to learn of the judge’s qualms while time remains to give the answer than to be shocked when the opinion appears.” (Judge Easterbrook)

“The brief offers you the opportunity to state your case without interruption; oral argument gives you the opportunity to defend it by responding to the Court’s concerns.” (Judge Wachtler)

#### **C. Does Oral Argument Make a Critical Difference?**

“Cases are not won at oral argument; they are only lost” (Judge Aldisert)

“Does oral argument change a well-prepared judge’s mind. Rarely. What often happens, though, is that the judge is undecided at the time of oral argument (the case is a close one), and oral argument makes the difference.” (Justice Scalia)

#### **D. SOME DIFFERENCES BETWEEN APPELLATE AND TRIAL COURT ORAL ARGUMENT**

- More Often a “Hot Bench”
- Less Time
- Different Dynamic of Multi-Judge Panel

### **III. PREPARING FOR THE ARGUMENT (4:15- 4:30pm)**

#### **A. Preparation is Key**

- Not enough to re-read the briefs and prepare a script.

#### **B. Thoroughly Review the Record**

- Be prepared to answer questions about where documents can be found in the record; what the record establishes on a particular issue; and the procedural history.

**C. Re-read Key Cases**

- Be prepared to answer questions about cases
- Did a member of your panel write (or join) an opinion in one of the key cases?
- Update research before argument

**D. Anticipate Questions**

- Practice answers to likely questions -- especially those probing weaknesses in your case

**E. Think of a Fallback Position**

**F. Prepare an Outline**

- Two or three key points
- Include points you “must” make
- Organize into “modules”
- Think of transitions

**G. Work on and Practice an Opening**

- Goes to the heart of the case
- Can give judges roadmap of your argument

**H. Moot Courts**

**I. If Unfamiliar With Court, Visit it in Advance**

**IV. THE ACTUAL ARGUMENT (4:30-4:45 pm)**

**A. Do's**

- Listen carefully to questions judges ask you
- Listen carefully to adversary's presentation and, in particular, judges'

questions to adversary

- Make concessions where necessary to maintain credibility, but do so with extreme care
- Deliver points in simple and hard-hitting style
- Be yourself
- Be flexible
- Be respectful and earnest in tone; convey that you genuinely believe in correctness and justness of your position
- If rebuttal is allowed, always reserve time
- Distill only two or three key points on rebuttal; less is more
- Be particularly careful about citing or quoting from precedents decided by judge on your panel
- Sit down when the court already has shown that it agrees with your position or there's nothing material you can add

**B. Don'ts**

- Don't read from a script or your brief
- Never defer an answer
- Never make personal attacks on opposing counsel or the court below
- Never show impatience or frustration with judge's questioning
- Don't dismiss a hypothetical question by saying "that's not this case"
- Don't waste time on lengthy quotations from statutes, cases, etc.
- Don't be afraid to say "I don't know the answer, Your Honor"
- Don't attempt humor (except in very rare cases where self-deprecating humor is appropriate and you are sure it will be well received)