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APPELLATE LITIGATION STRATEGY:
AN IN-HOUSE TRIBAL ATTORNEY’S PERSPECTIVE

A. INTRODUCTION

1. Practicing Indian law since 1980 where I worked for the U.S. Department of Justice in the Indian Resource Section

2. Since leaving DOJ, career has been almost evenly divided between private practice and in-house counsel work

a. 1983—1999 Private practice in Boulder Colorado

b. 2000—Present General Counsel Mohegan Tribe, Saint Regis Mohawk Tribe

3. In private practice I argued eight (8) appeals for tribes and tribal member clients.

- State of Montana v. Clark, 749 F.2d 740 (D.C. Cir. 1984) (Surface Mining Reclamation Act—Crow Tribe)
- Wildman v. United States, 827 F.2d 1306 (9th Cir. 1987) (Quiet Title action—Fort Mojave Tribe)
- U.S. v. 29 Acres of Land, 809 F.2d 544 (8th Cir. 1987) (Condemnation of individual allottee lands—Indian allottee)
- Bear v. United States, 810 F.2d 153 (8th Cir.1987) (Settlement over Missouri River land flooding—Winnebago Tribe of Nebraska)
- Northern Arapahoe Tribe v. Hodel, 808 F.2d 741 (10th Cir. 1987) (BIA hunting regulations—Northern Arapahoe Tribe)
- Metropolitan Water District v. United States, 830 F.2d 139 (9th Cir. 1987) (Colorado River water rights—Fort Mojave Tribe)
- Brown v. Washoe Housing Authority, 835 F.2d 1327 (10th Cir. 1988) (Immunity of tribal housing authority—Washoe Tribal Housing Authority)
- Crow Tribe v. Reppis, 73 F.3d 982 (10th Cir. 1995) (Treaty hunting rights on off-reservation lands—Crow Tribe)

4. The Metropolitan Water District case went to the U.S. Supreme Court where I also argued there. See, California v. U.S., 490 U.S. 920 (1989) (affirmed by an equally divided Court)
 - a. In 2012, I organized a Symposium at the University of New Mexico Law School, “The First Thirteen”
 - b. This was a symposium of the first thirteen Natives to argument before the U.S. Supreme Court from 1980 to 2001
 - c. Links to event:
<https://www.ailec-inc.org/PDF%20files/The%20First%20Thirteen%20Agenda%20-%202013-7-12.pdf>
<https://www.ailec-inc.org/PhotoGallery-The%20First%20Thirteen%20Symposium-2012.html>
 - d. Event featured observations of Native attorneys who argued cases before the Court
5. After moving to in-house practice in 2000 I argued one appellate case, before the Connecticut Supreme Court, on behalf of the Mohegan Tribe in Kizis v. Morse Diesel International, Inc., 260 Conn. 46 (2002) (Immunity of casino employee in slip and fall case)
6. As General Counsel for the Saint Regis Mohawk Tribe since 2006 I have been involved in a several appeals including:
 - a. State cigarette tax regulations (Seneca Nation v. Patterson (2d Cir.)
 - b. Reservation boundary case (Saint Regis Mohawk Tribe v. Cuomo (2d Cir.)
 - c. Pending patent litigation (patents assigned from Allergan), Saint Regis Mohawk Tribe and Allergan, Inc. v. Mylan Pharmaceutical, Inc. et. al. (Fed. Cir.)
7. In this paper, I provide some observations based upon my experience in Indian law case appeals in general and from an in-house tribal attorney perspective

B. GENERAL OBSERVATIONS—INDIAN APPELLATE PRACTICE

1. There have been dramatic changes in tribal legal representation since I first started practicing law

a. When I was in private practice (1980s and 1990s) there were very few law firms practicing Indian law

b. Since the mid-1990s Indian law practice in general has grown dramatically

(1) Articles on the subject:

<https://tribalcollegejournal.org/the-growing-market-for-indian-lawyering/>

c. Also a growth in larger law firms representing tribes

(1) Indian law firm practice areas

(2) Appellate and Supreme Court law firm practice areas

(3) Also emergence of the Native American Rights Fund Supreme Court Project

2. Courts have increasingly become less sympathetic to tribal rights

a. Message is often for tribes to “stay out of court”

b. See Indian Country Today article in 2013:

<https://newsmaven.io/indiancountrytoday/archive/indian-law-attorneys-advice-to-tribes-stay-out-of-the-courts-xEiRSV0KJEChBvYmaaMY3w/>

c. Tribes urged not to take cases to the Supreme Court in certain cases

C. OBSERVATIONS—AS IN-HOUSE COUNSEL TO TRIBE

1. Since the mid-1990s there has also been a huge growth in the area of in-house tribal attorneys (attributable in part to Indian gaming and greater participation of tribes in the national economy)

a. See the great article on the subject of tribal in-house attorneys: “Lawyering for Groups: The Case of American Indian Tribal Attorneys” (Fordham Law School, Kristen Carpenter and Eli Wald, 2012)

The article is here: http://fordhamlawreview.org/wp-content/uploads/assets/pdfs/Vol_81/Carpenter_May.pdf

b. There also a national association of Tribal In-house attorneys

See website: <https://tica.wildapricot.org/>

2. One of the main jobs of the in-house counsel is to manage outside counsel

a. I wrote a paper for the Tribal In-House Counsel Association titled “Herding Cats—How to Manage Tribal Outside Counsel”

b. I listed five main areas of interaction with outside counsel that require management

1) Selection and hiring of the attorney or firm

2) Controlling costs of outside counsel; reviewing billing

3) Interacting with outside counsel on a particular matter or case—making sure that you are involved in the matter or case

4) Reporting regularly to the Tribe (Council, Chair, Chief of Staff)—you are the liaison to them

5) Facilitating decision making by the Tribe (Council, Chair, Chief of Staff)—strategy, settlement, appeal decision; explaining legal memoranda to Council

3. These jobs apply to outside counsel handling appeals

a. For litigation in general and for appeals, decisions must be made by an informed tribal leadership--includes whether or not to appeal a case from the trial court, what arguments are presented, issues to appeal or not, what lawyers will handle an appeal

b. One of the key attributes or functions of the in-house attorney is to inform tribal leadership

- c. It is critical for outside counsel to utilize the in-house attorney for briefings of the Council on appeal issues
4. Consideration should be given to hiring specialized appellate practitioner
- a. If the tribe's attorneys at the trial level are not experienced in appellate practice
 - b. If issues involve specialized Indian law issues (like ICWA, contract health, housing, etc.) the tribe should consider bringing in the expertise of attorneys who specialize on those areas
 - c. It helps to reach out to national Indian organizations (NCAI, USET), other in-house counsel (the Tribal In-house Counsel Association is good resource), Native American Rights Fund, Indian Law Resource Center, Indian law professors
5. If your case involves non-Indian law issues you should consider hiring a specialist
- a. Examples would bankruptcy, intellectual property, international law, etc.
 - b. If the tribe's outside counsel is a large firm it may have attorneys who special in these areas
 - c. Our Allergan case is a good example
6. Related to Allergan is the issue of a tribe's appeal impacting other tribes (and Indian Country and federal Indian law as a whole)
- a. In Allergan we asserted sovereign immunity in the U.S. Patent Trial and Appeals Board
 - (1) The circumstances of our case raised eye brows in the patent legal community because Allergan assigned its valuable Restasis (dry eye) patents to us in the middle of the patent proceeds and we immediately moved to dismiss the parties who brought the proceeding to challenge the patents
 - (2) Opposing parties (Mylan and Teva) were huge pharmaceutical companies in their own right who sought to introduce generic versions of Restasis

(3) Indian Country took notice and we were soon contacted by NARF and NCAI who raised concerns about the case and its potential to damage the doctrine of tribal sovereign immunity

7. The issue of impact on other tribes is not uncommon

a. It occurs most commonly when immunity is raised

b. This occurred in the last four cases: *Lewis v. Clarke*, 197 L. Ed. 2d 631, 137 S. Ct. 1285 (2017); *Michigan v. Bay Mills Indian Community*, 188 L. Ed. 2d 1071 (2014); *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001); and *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998)

c. I recall being on calls with other tribal attorneys where concerns were raised

d. The same considerations also apply in other jurisdictional cases (Montana exception or taxation) over non-members

(1) Tribal law practitioners have been concerned about doctrinal damage where there are so-called “bad facts”

(2) Some cases that come to mind are: Dollar General, Atchison Trading Company and Strate v. A-1 Contracting

e. These cases raise unique issues for tribes and their attorneys