

## Q&A With Lane Powell's Tom Sondag

*Law360, New York (August 06, 2010)* -- Thomas W. Sondag chairs Lane Powell PC's appellate practice group. He has been lead counsel on more than 200 appeals in state and federal courts, spanning a wide variety of substantive areas including banking, antitrust, energy, securities regulation, real property and employment discrimination.

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

A: Every case presents challenges. A case I'm currently working on has presented several challenges because of its scope — it involves a claim for insurance coverage of environmental contamination arising out of nearly 40 years of business operations.

The case took years to try and resulted in hundreds of very complicated findings and conclusions by the trial court. Most cases generate few truly substantial issues for appeal, but this case presented several, and in areas in which Oregon law is not particularly well developed.

As in any case, the ultimate challenge is to present that complex case in a way that makes sense to a very busy appellate court.

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

A: The first thing I do is what the court does: read the briefs. In most courts in which I appear the time between briefing and argument affords sufficient distance from the case to permit me to view it without an advocate's bias.

Reading the briefs cold allows me to replicate, to a degree, the process the court goes through in reading the same briefs, and (I hope) to identify the questions that occur to the court as it does so.

Next, I reacquaint myself with the record. In the Ninth Circuit, the court has a remarkably good grasp of the record. In appearing before that court, you must know the record, too, or your cause will suffer.

In contrast, our state court of appeals does not have the same resources as the Ninth Circuit, and usually has not had the opportunity to study the record in much detail before argument. But the attorney still must know the record; indeed, the court depends on counsel to assist it with factual issues that arise during argument.

Finally, after again becoming very comfortable with both the law and the facts, I outline the argument points I want to make — although calling it an "outline" is not really accurate.

The courts in which I appear tend to be very active, making it impossible to pursue any sort of a structured argument. Drafting an outline is really just another step in preparing.

In the end, I attempt to identify the two or three most important things — no more than that — that I want the panel to take away from argument. In addition to answering any and all questions the court may have, you need to be able to explain in simple terms why your client should win.

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

A: In the Ninth Circuit, the biggest problem is the court's size. The circuit itself is vast, and covers roughly 20 percent of the U.S. population. And the court is also quite large. Counting senior judges — and the court could not survive without its senior judges, who are quite active — the court has nearly 50 judges. As an attorney, it is very difficult to develop any sort of familiarity with that many judges.

One of the things that is wonderful about our state appellate system is the genuine trust that the court has in the attorneys that appear before it. In the Ninth Circuit, I fear, a similar level of trust does not exist, and I'm not sure that it can.

The delay inherent in a Ninth Circuit appeal is also troubling. While the court is not particularly charitable when it comes to granting counsel extensions of time to brief a case, there is a significant delay between briefing and oral argument. That is a costly inefficiency for litigants.

One of our state court judges has explained that delay can be built into either the front end or the back end of the process, and our court opts for the front end — in the sense that it is relatively liberal in granting requests for extensions of time. The flip side of that is that cases are heard more quickly once briefing has concluded, which is more efficient for the parties.

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

A: *Dukes v. Wal-Mart*, of course — what the court has to say in that case will obviously be significant to all class action litigation in the circuit.

The Ninth Circuit recently certified to the Oregon Supreme Court a question concerning the state's ability to participate in a post-verdict settlement of claims involving punitive damages, in light of the state's statutory right to 60 percent of any punitive award.

When it comes to punitive damages, Oregon has a checkered history, to say the least, so it will be interesting to see where the court comes out on that one.

Finally, our state Supreme Court also has before it a case involving the finality and appealability of certain types of judgments — the sort of issue only an appellate wonk could love, I suppose.

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

A: When she was in private practice, Susan Graber was an excellent lawyer. And, since taking the bench, first in Oregon, and now in the Ninth Circuit, she's been an excellent jurist. No agenda; just clear and concise reasoning that the lawyer, and the client, can understand.

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

A: First, be patient. It is difficult in most firms to develop an appellate practice right out of the box, and an understanding of trial practice will greatly aid you as an appellate litigator.

Second, strive to be fiercely objective. One of the keys to being a good appellate attorney is to learn to separate the strong arguments from the weak, and to get rid of the weak.

Third, and somewhat contrary to the foregoing, learn not to give up on an issue too soon. Poke it; pull it; massage it — and if there's still nothing there, then give up on it.

Finally, always remember that your credibility is critical. It takes a lifetime to develop, but only a moment to lose.