



LITIGATION 101: HOW THE COURT SYSTEM CAN IMPACT COMMERCIAL TOBACCO CONTROL POLICY

TODAY'S PRESENTER

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THE PUBLIC HEALTH LAW CENTER



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-  Legal Research
-  Policy Development, Implementation, Defense
-  Publications
-  Trainings
-  Direct Representation
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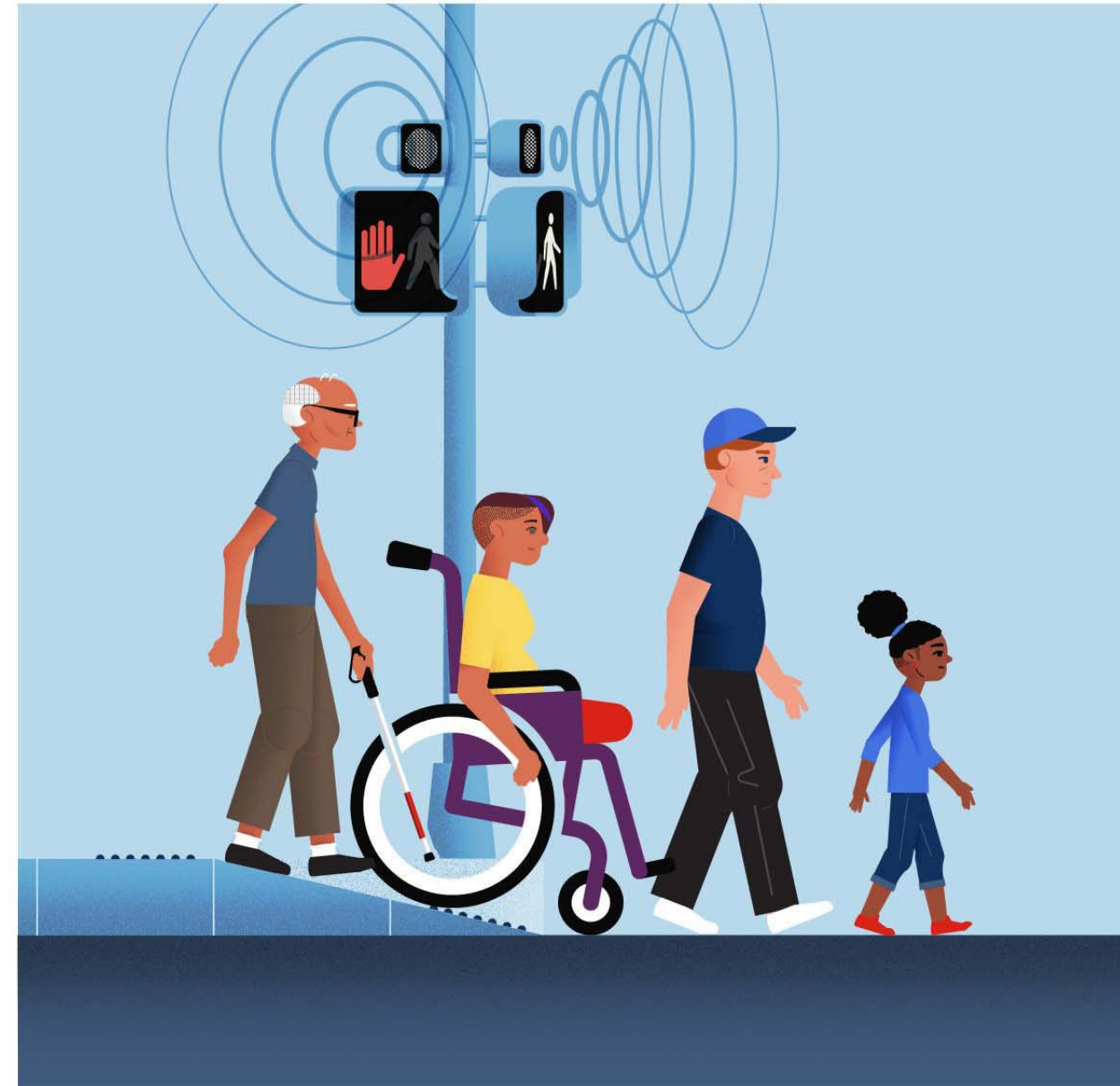
EQUALITY:

Everyone gets the same – regardless if it’s needed or right for them.



EQUITY:

Everyone gets what they need – understanding the barriers, circumstances, and conditions.



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based on work for First Nations Health Authority at Gathering Wisdom VI Drawing Change

Image credit: Sam Bradd <https://drawingchange.com/gathering-wisdom-visuals-for-a-healthy-future/>

LEGISLATING IN THE SHADOW OF LITIGATION

- Litigation can derail legislation
- And litigation is expensive and unpredictable
- So litigation risk can stop a policy before it starts



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WHO MAKES POLICY?

- Legislative Branch
- Executive Branch



WHO MAKES POLICY?

- Legislative Branch
 - Congress
 - State legislatures
 - Tribal councils
 - County boards
 - City councils
- Executive Branch



WHO MAKES POLICY?

- Legislative Branch
- Executive Branch
 - President
 - Governor
 - Tribal agencies
 - Mayor
 - State and federal agencies
 - Local health departments



WHO MAKES POLICY?

- Legislative Branch
- Executive Branch

...and the Courts



WHAT CAN COURTS DO?

- Force a party to do (or not to do) a certain thing
- Force a party to pay money
- Applies to private parties *and* all levels of the government



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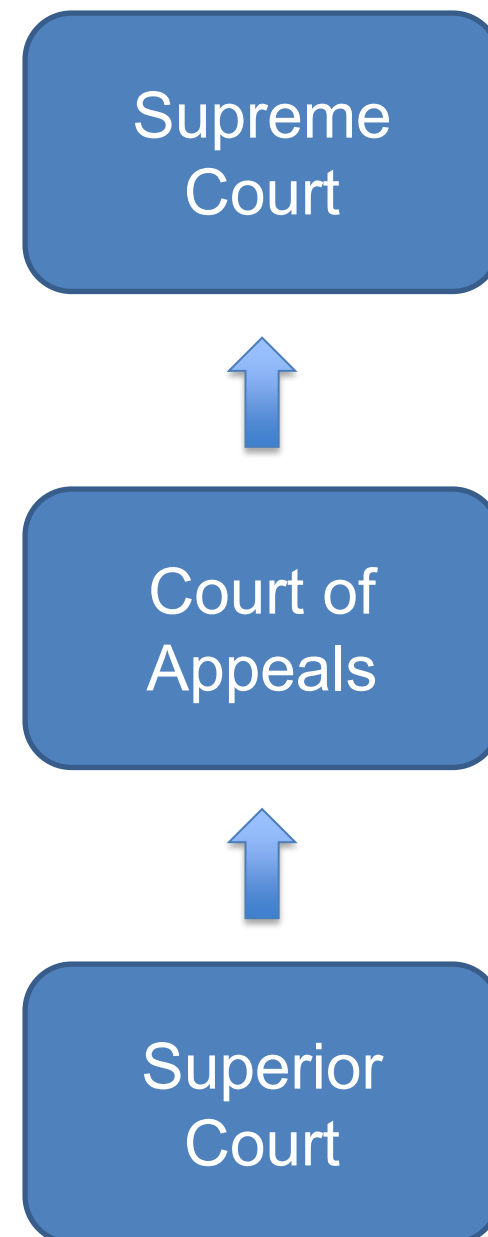
Cities, counties, Tribes, and states can pass policies, but courts have a say, too.

LEGISLATING IN THE SHADOW OF LITIGATION

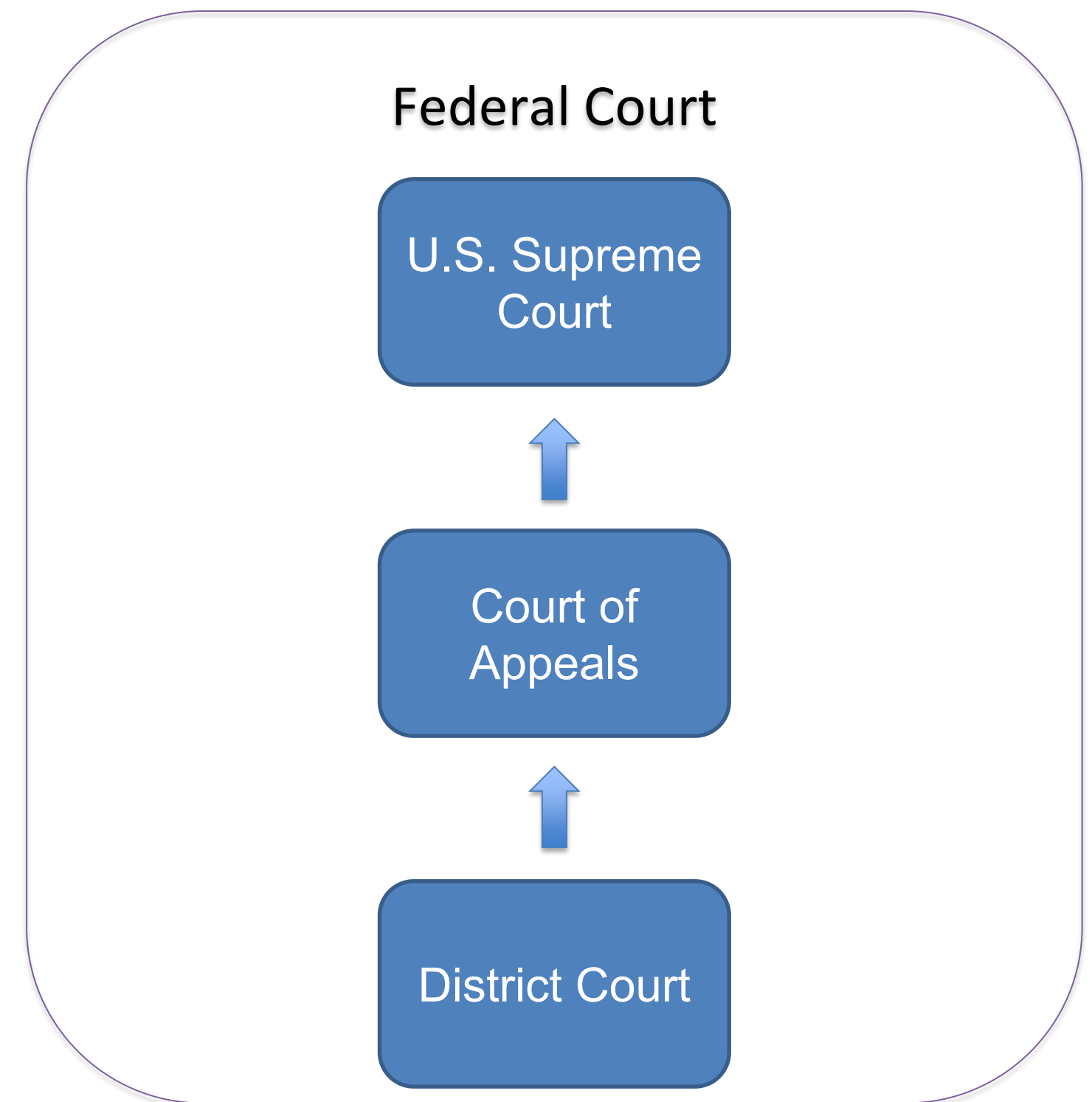
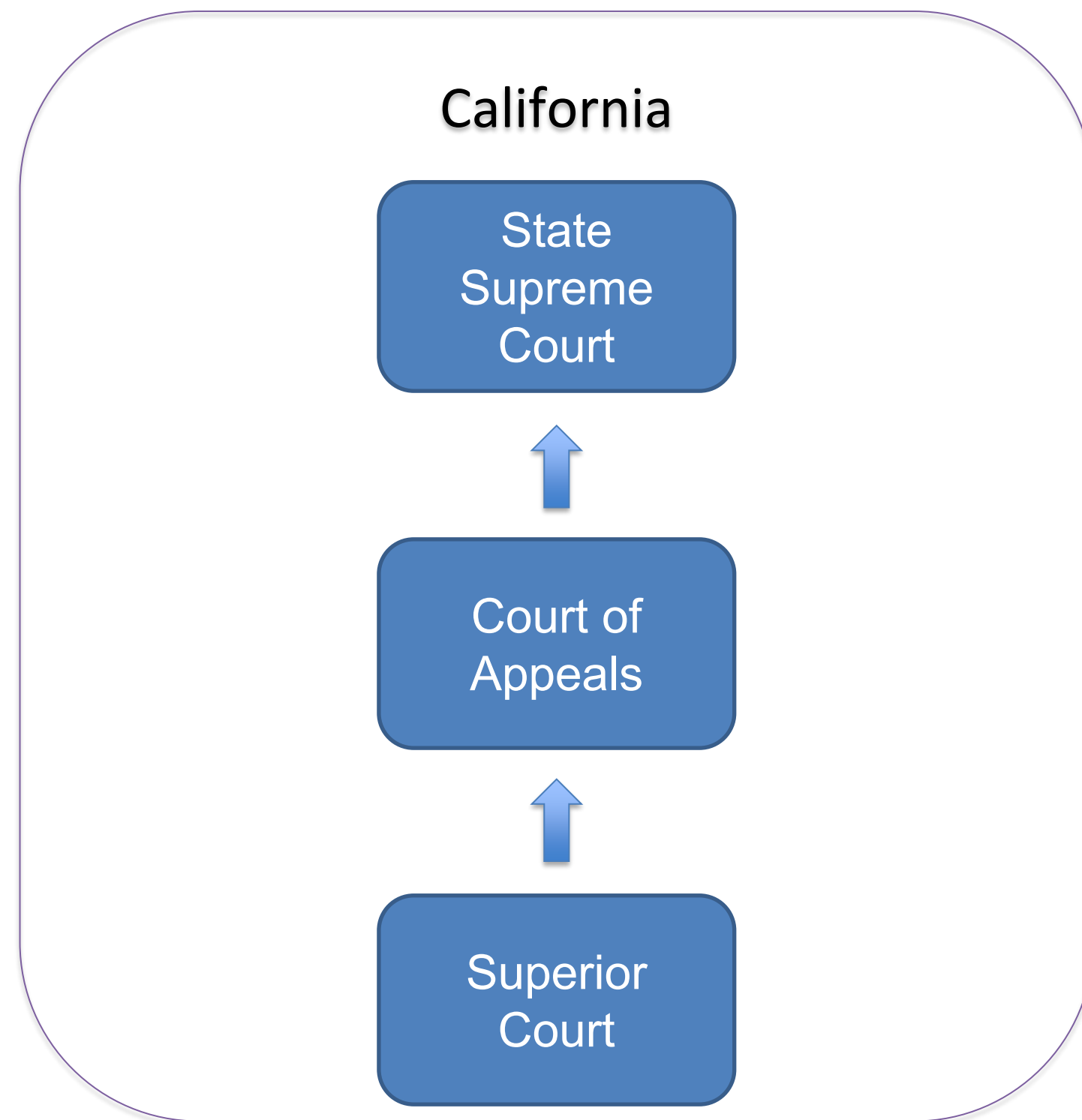
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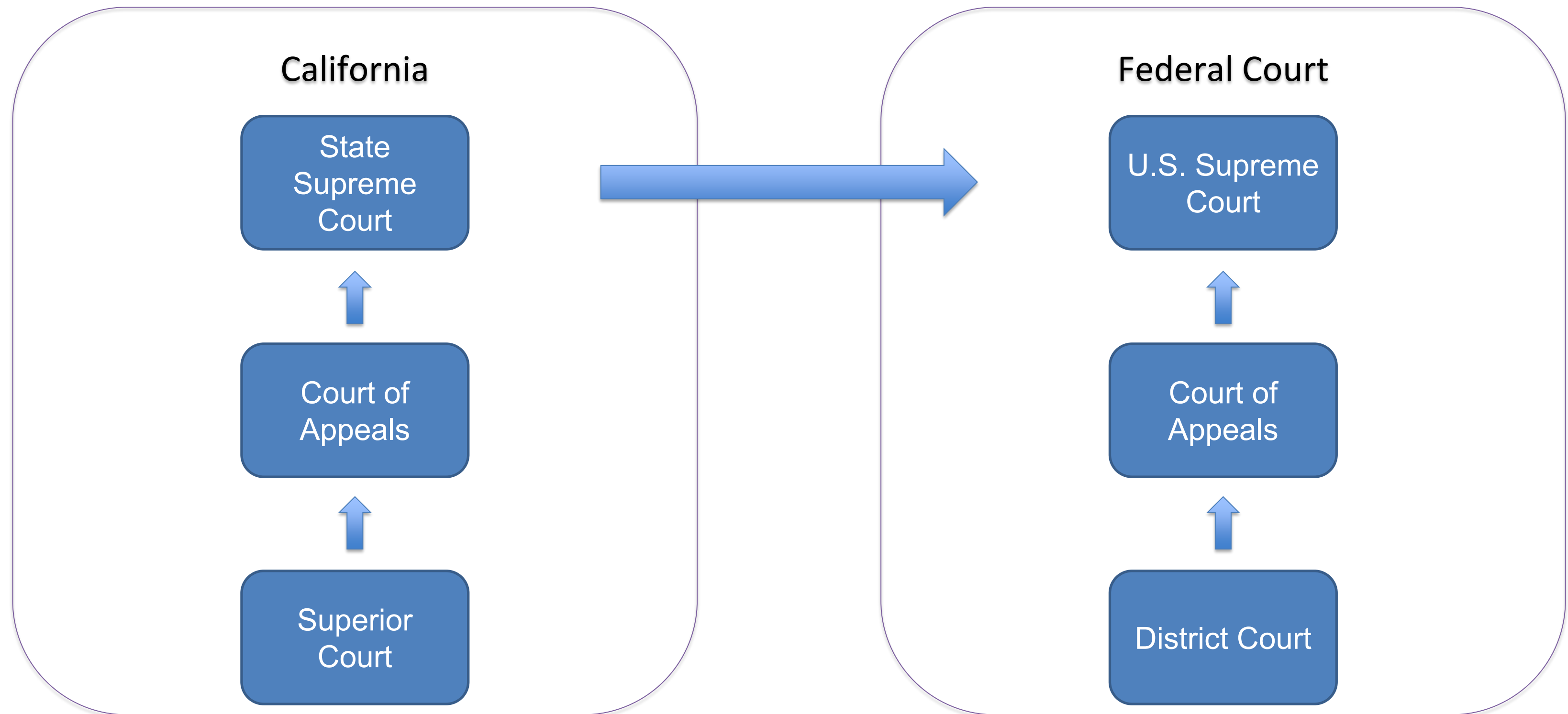
THE LIFE OF A CASE



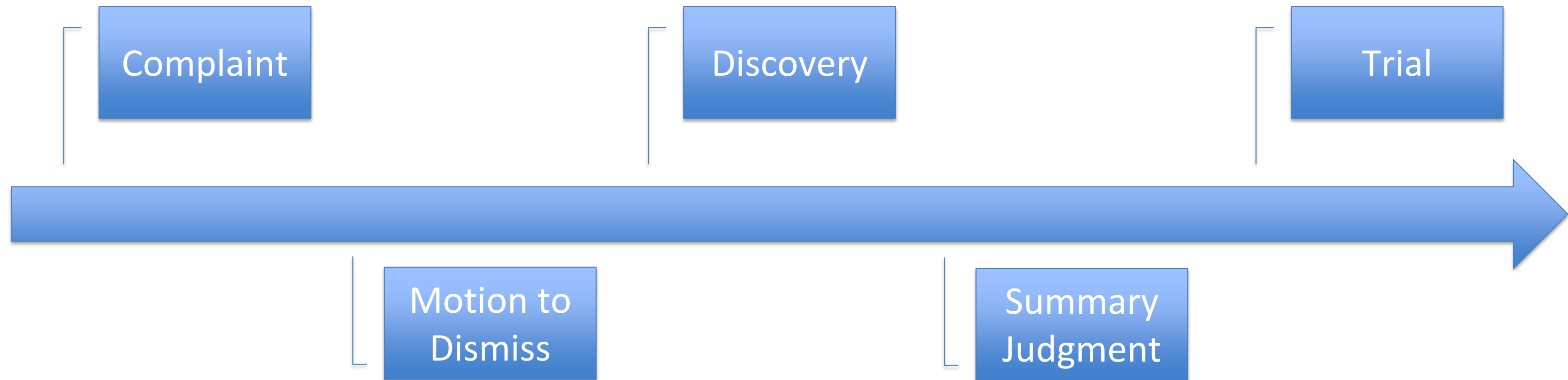
THE LIFE OF A CASE



THE LIFE OF A CASE



SUPERIOR COURT



SUPERIOR COURT

- Complaint
- Motion to Dismiss
- Discovery
- Summary Judgment
- Trial

SUPERIOR COURT

- Complaint
 - Short statement of facts
 - Describes claims
- Motion to Dismiss
- Discovery
- Summary Judgment
- Trial



SUPERIOR COURT

- Complaint
- Motion to Dismiss
 - Asking court to dismiss because claims are deficient
- Discovery
- Summary Judgment
- Trial



SUPERIOR COURT

- Complaint
- Motion to Dismiss
- **Discovery**
- Summary Judgment
- Trial

DISCOVERY

- Available to both sides
- Scope:
 - All nonprivileged* relevant information
 - Includes electronic (email, saved files, texts, etc.) and physical documents
 - Balance against burden and expense
- Types:
 - Written discovery
 - Requests for documents
 - Depositions



SUPERIOR COURT

- Complaint
- Motion to Dismiss
- **Discovery**
 - Expensive
 - Time consuming
 - Potential PR impacts
- Summary Judgment
- Trial



SUPERIOR COURT

- Complaint
- Motion to Dismiss
- Discovery
- Summary Judgment
 - Asking court to dismiss because there's not enough evidence to support claims
- Trial

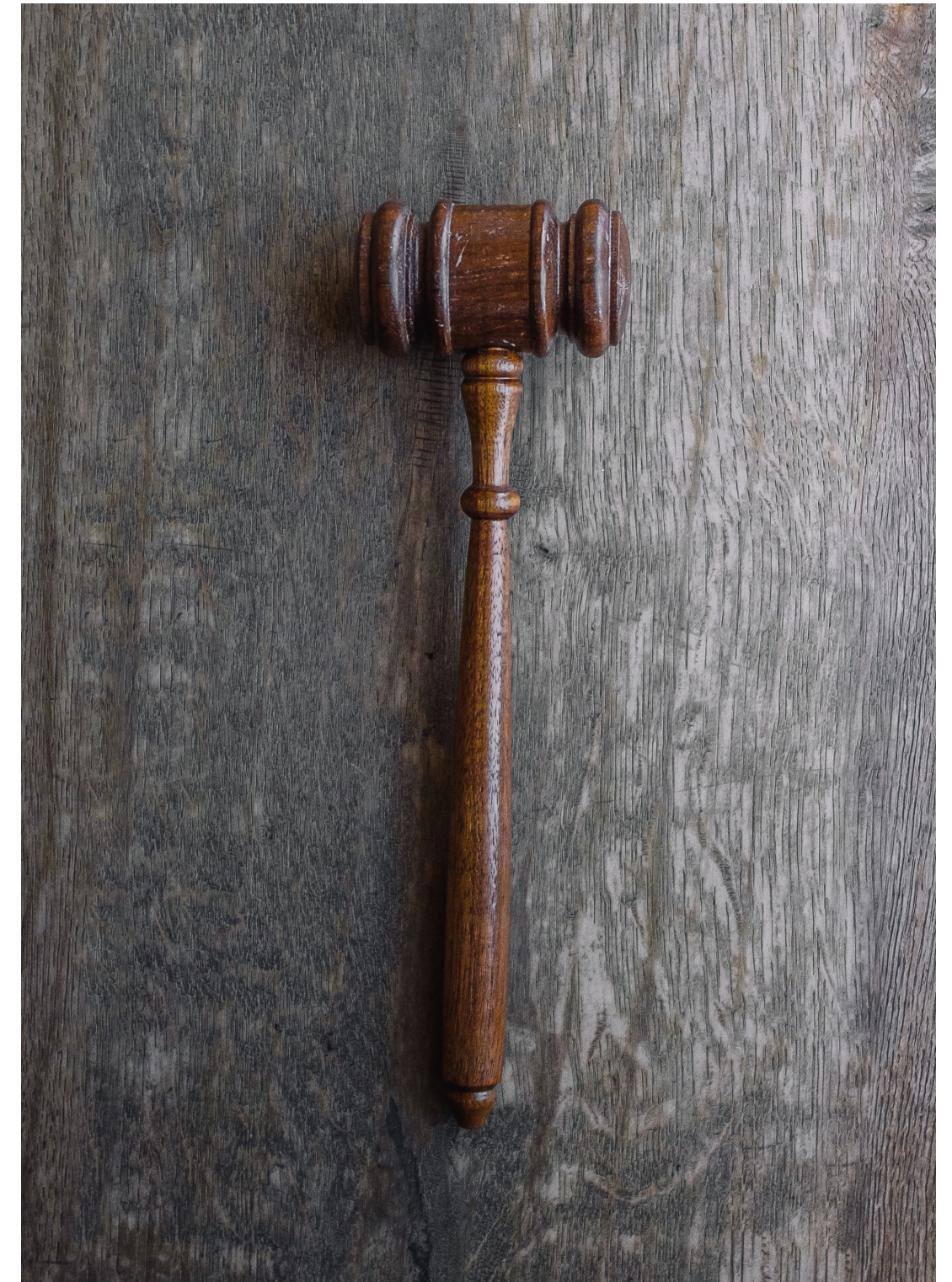


Photo Credit: Wesley Tingey

SUPERIOR COURT

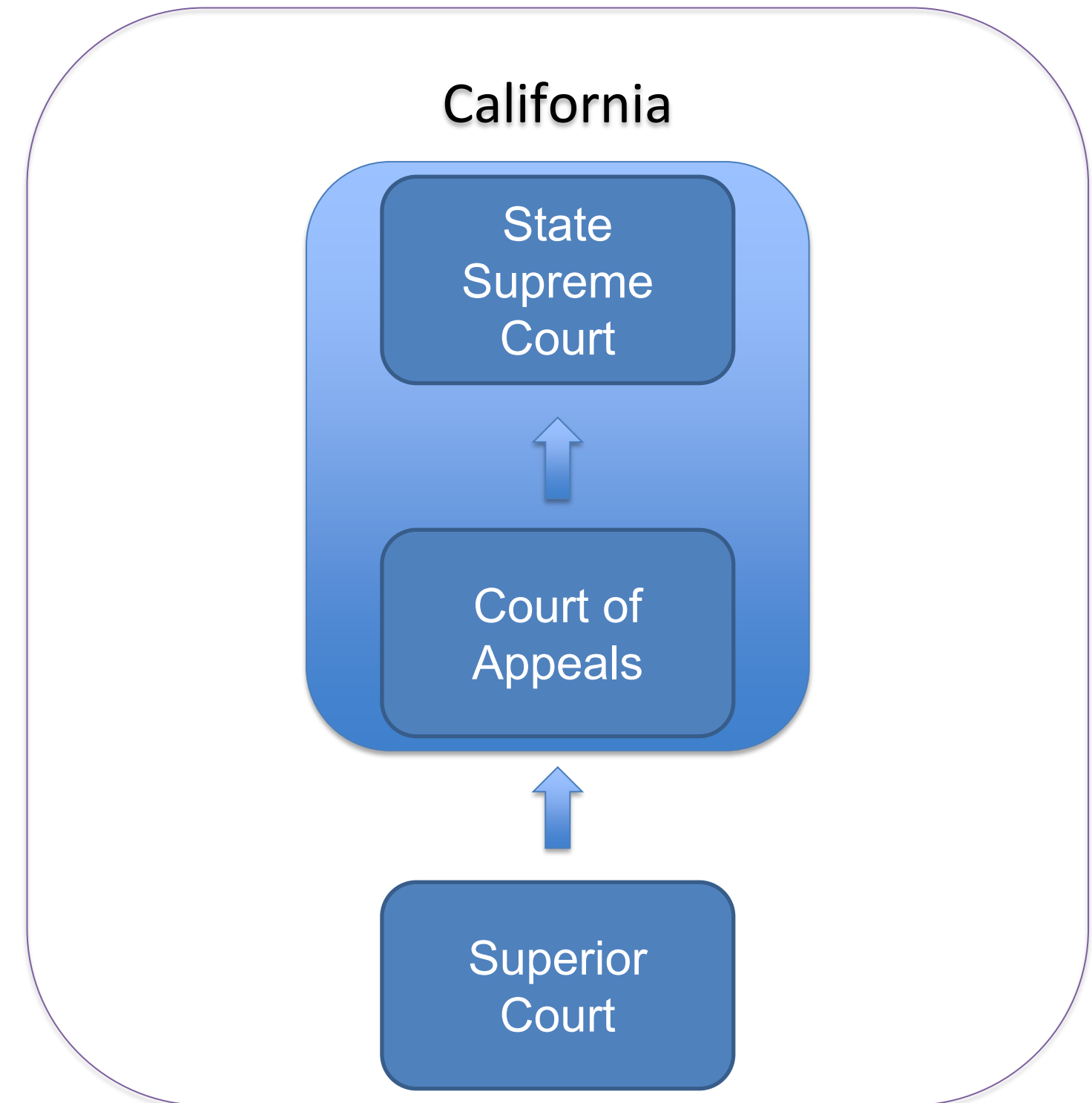
- Complaint
- Motion to Dismiss
- Discovery
- Summary Judgment
- Trial
 - Judge or jury
 - Expensive to prep.



Photo Credit: Robert Linder

APPELLATE PROCESS

- Guaranteed one appeal
- Discretionary review by Supreme Court
- Limited to legal questions
- Lengthy



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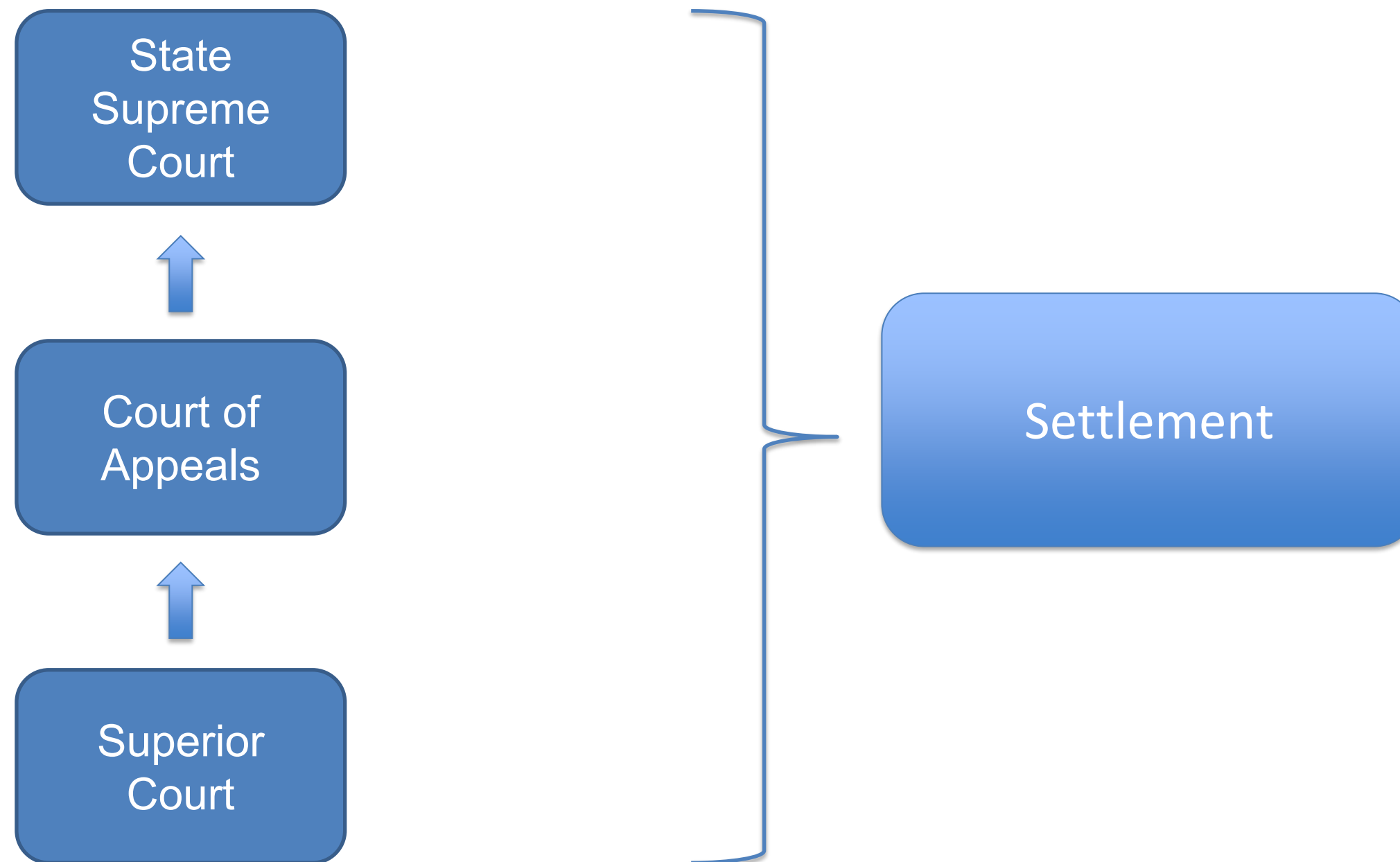


LEGISLATING IN THE SHADOW OF LITIGATION

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THE LIFE OF A CASE



SETTLEMENT AND PREDICTING OUTCOMES

- Factor chance of success and impact of a good or bad outcome

Settlement Amount = Chance of Success x Value of Outcome

Hypothetical:

- 50% of winning given facts and law
- Winning would earn \$1 million
- Should settle for anything above \$500,000

SETTLEMENT AND PREDICTING OUTCOMES

- Whether to settle and for how much is a judgment call
- Chance of success includes:
 - Strength of legal argument
 - Assessment of facts and evidence
 - Disposition and tendencies of judge and juries
- Value of the case includes:
 - Potential money damages
 - Value you attach to intangible things (like being able to enforce an ordinance)
 - Strategic value beyond the case

SETTLEMENT AND PREDICTING OUTCOMES



Photo Credit: Tingey Injury Law Firm

- Most cases settle, **but not all of them**
- Because litigation is inherently unpredictable, and reasonable people can disagree over likely outcomes and the value of those outcomes

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Photo Credit: Will Porada

LEGISLATING IN THE SHADOW OF LITIGATION

- Litigation can derail legislation
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- **So litigation risk can stop a policy before it starts**
 - Litigation is expensive and time consuming
 - Losing has real impacts on policy
 - Bad precedent has cascading effects
 - Outcomes are hard to predict
 - **Industry** knows this and threatens litigation to get its way



Photo Credit: Will Porada

ADDRESSING LEGAL RISK

- Work with your attorneys
- Assess risk tolerance
- Factor legal risk into decisions
- Protect privilege



Photo Credit: Christin Hume

ADDRESSING LEGAL RISK

- Work with your attorneys
 - Attorneys general, Tribal counsel, city attorney, in-house counsel, and/or outside counsel
 - Form a relationship; listen to their guidance
- Assess risk tolerance
- Factor legal risk into decisions
- Protect privilege



ADDRESSING LEGAL RISK

- Work with your attorneys
- Assess risk tolerance
 - Industry is litigious
 - But some policies might be worth it
- Factor legal risk into decisions
- Protect privilege

ADDRESSING LEGAL RISK

- Work with your attorneys
- Assess risk tolerance
- **Factor legal risk into decisions**
- Protect privilege

COMMON CLAIMS


- Preemption
- First Amendment
- Takings
- Procedural

THE FIRST AMENDMENT AND COMMERCIAL SPEECH – HAZARDOUS TO PUBLIC HEALTH?


MAY 31, 2018


Moderator:
Mark Meaney, Public Health Law Center

Presenters:
Julie Ralston Aoki, Public Health Law Center
Ted Mermin, Berkeley Center for Consumer Law & Economic Justice
Rachel Bloomekatz, Gupta Wessler PLLC

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 American Lung Association
California

December 2020

NAVIGATING THE TAKINGS CLAUSE
While Ending the Tobacco Epidemic



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PREEMPTION

NOVEMBER 2020

DILLON'S RULE, HOME RULE, AND PREEMPTION

Local communities are central to achieving effective, equitable public health outcomes. Policies informing the best practices in tobacco control today are products of imagination, experimentation, and innovation at the local level.



When a community is considering adopting a public health policy, the threshold legal question to ask is whether it has the authority to adopt the particular policy. Determining a local government's power to adopt a public health policy can be a complex legal subject that involves interpretation of constitutional provisions, statutes, and court decisions.¹ The purpose of this publication is to lay out the legal landscape of local government authority and to address legal factors policy makers should consider when contemplating adopting public health measures. Additionally, because local governmental authority has a great bearing on how courts interpret state preemption of local laws, this publication also explores how different types of authority at the local level — Dillon's Rule and home rule — affect the judicial interpretation of preemption statutes, using examples from recent cases. This publication should be read along with the Public Health Law Center's other resources on the preemption doctrine.²

Localities as Laboratories of Innovative Public Health Policies

Effective and successfully implemented local public policies are often adopted by other localities, as well as governments at higher levels. The current momentum towards sales

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ADDRESSING LEGAL RISK

- Work with your attorneys
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- Protect privilege
 - A communication (written or oral);
 - Made between an attorney and their client;
 - In confidence;
 - For the purpose of seeking legal advice.



Photo Credit: Christina@wocintechchat.com

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Which is why we should work to manage and reduce risk.

Public health is worth the fight.

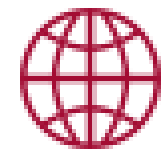
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