RECOGNIZING AMERICA'S JUDICIARY:
A DIALOGUE WITH THE CHIEF JUSTICE AND CHIEF JUDGE ON KEY ISSUES FOR LEADERS OF BUSINESS & THE COMMUNITY

March 20, 2011 - Minneapolis, Minnesota

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DIRECTORS ROUNDTABLE
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Judges, in upholding the rule of law, critically affect every area of American life including the economy, property rights, personal liberty, and democratic values. These distinguished speakers will analyze issues which are not only key for lawyers, but also important for business leaders and other citizens. These include key issues facing business; how companies and other groups can be effectively represented in court; and what resources are needed for efficient operation of the courts to enhance timeliness and reduce the cost of litigation for the parties. Specific topics to be discussed by the distinguished panelists include effective appellate strategies; intellectual property; e-discovery and other technology; and product liability.

A unique series of parallel events with chief justices and chief judges is being held in major cities nationwide. Appreciation is given to guests of honor Chief Justice of the Supreme Court of Minnesota Lorie Skjerven Gildea and Chief U.S. District Judge Michael Davis for their cooperation in this event.

The Directors Roundtable Institute is a not-for-profit which organizes worldwide programming for Directors and their advisors.

GUESTS OF HONOR

Hon. Lorie Skjerven Gildea	Chief Justice, Supreme Court of Minnesota
Hon. Michael Davis	Chief United States District Judge (Minnesota)

DISTINGUISHED PANELISTS

Eric Magnuson	Shareholder, Briggs and Morgan, P.A.; Former Chief Justice of Minnesota
Michael Kane	Principal, Fish & Richardson, P.C.
Rhea Frederick	Client Relationship Manager, Kroll Ontrack
Russell Ponessa	Partner, Hinshaw & Culbertson LLP
Jack Friedman (Moderator)	President, Directors Roundtable Institute

(The biographies of the speakers are presented at the end of this transcript. Further information about the Directors Roundtable can be found at our Website, directorsroundtable.com.)

TRANSCRIPT

JACK FRIEDMAN: I am Jack Friedman, President of the Directors Roundtable Institute. The judiciary of the United States is under-appreciated in many ways. The press and politicians often give the impression that judges start each day with the thought, "I have my social agenda. I can't wait to go to work to impose my philosophy on everybody who comes in front of me." Then, if there's a controversial decision, it's, "Those terrible judges — they're out of touch with the country." So, the judiciary gets a lot of criticism.

Even though there's a belt-tightening environment for government these days, the budget cutbacks have been excessive in relation to the judiciary. We have decided, as a *pro bono* group, to work nationally with the Chief Justices of the Federal and State Courts around the country, to have them talk about some of the important issues that the community should know about. We have the word "Directors" in our name, but we're not limited to getting the message across to business leaders; it can be for the broader community as well.

We're recording this session. The transcript is going to tens of thousands of leaders, not only in Minnesota, but regionally and nationally.

I'd like to present a small story that has special meaning to most. What immediately inspired this series was that Judge Roll, who was the Chief Federal Judge in Arizona, was shot when Congresswoman Giffords was injured. I thought that enough is enough. So we started off the series in Arizona with the Chief Justice of the state and the Chief Federal Judge. The following point was made, which I think is very meaningful: "Why was he there that day? She's a liberal congresswoman, and he was known to be a very conservative person who went to church regularly. Why should two people with such different philosophies be friends, and why did he, on his way to church or coming back from church — stop by to say hello and give his regards to a liberal congresswoman? You would get the impression from the political process

that we're going through right now, that everybody who has a different philosophy is opposed to anyone with a different philosophy, and we're all fighting. In fact, America is a place where people of different ideas generally, on a daily basis, are personally agreeable with each other. I thought that that was very inspiring.

So this is the general spirit of the series, and I think that Minnesota's contribution tonight to this national effort is very much appreciated. We would like to first start with Dean David Wippman of the University of Minnesota Law School. I would like him to say hello and tell us a little bit about what's going on at the law school.

DAVID WIPPMAN: Thank you. Good evening, everyone. I'm David Wippman, the Dean of the Law School. It's my great pleasure to welcome all of you here. I'd like to claim the credit for organizing this evening's event, but that would be hard to do with the organizers actually here! So I'll have to wait until they've left and then claim the credit.

We're delighted to see such a distinguished panel. I want to particularly welcome our two Guests of Honor: Justice Lorie Gildea, Chief Justice of the Minnesota Supreme Court; and Chief Judge Michael Davis of the U.S. Federal District Court, and also one of the law school's alumni; and all of the very Distinguished Panelists who are joining them this evening.

We're delighted to see the topic that this panel will address. They're talking about the rule of law. It's easy to forget, with the kinds of criticisms that we've heard of the legal system and of law schools in recent years, just how important the rule of law is. Where pretty much everything that we do and everything that happens in a developed society, such as our own is affected by it.

So I'm pleased to see that the judiciary can get some recognition, for this and the more important role in fostering the rule of law no one plays a bigger part than our judiciary. We are

extraordinarily fortunate here in Minnesota to have some of the finest judges in the country. I'd like to think the Law School also plays an important role in this regard.

As you know, lawyers are sometimes the butt of jokes and criticism. Law schools this year have gotten their share; there have been four major articles in the *New York Times*, one op ed and two smaller pieces in just the past year alone. They've been critical of things like law school tuition, the nature of law school scholarships, the training that we give law school students, our placement rates, and much more. There is some truth and some justification to some of these criticisms, and we and other law schools are trying to address them as effectively as we can.

Jack asked me to say a little bit about what we're doing here at the law school. We are always trying to expand our service to the community. We have twenty-four clinics here at the law school, and we have expanded those significantly over the last four years. We provide countless hours of *pro bono* legal services to indigent members of the community, and at the same time, we're helping to train our students to be effective representatives and to do their own part towards contributing to the rule of law.

I'd like to think we do it in a broader way. Soren Kierkegaard, a philosopher, once said that life can only be understood looking backwards, but it could only be lived going forwards. I think the same is true of law and legal education. We can only understand law by looking backwards — we study precedents, we try to develop doctrine, we try to understand legal principles — but we do it in service of a life looking forwards. We do it not just to prevail in particular cases, but to try to understand how law can solve problems and serve society in a larger sense. Kierkegaard was not a lawyer, of course, but anyone whose most famous book is

entitled *Fear and Trembling* must know something about law school, so I thought the quote was apt.

We're trying to train our students to be more than simply legal technicians, but to be problem solvers who develop innovative solutions. So much of what we do, and much of what we've been doing over the last four years, is trying to revamp our curriculum to make it more responsive to the demands that our students will face in the twenty-first century. So we and other schools have been doing more in the field of experiential learning. Our clinics, capstone courses, experiential learning seminars of all kinds — we've revamped the curriculum; we have new required courses in the first year. We're expanding what we're doing in the area of law in business, recognizing how important that is, not only to this community, but to the broader society. We've launched a new corporate institute this fall. We've also launched a new criminal law institute.

There's a lot happening, and all of it, really, is designed to be in service to the rule of law. We're hoping that our students will not only be successful as attorneys, but successful as members of their community.

So I hope you will all join me in welcoming the panelists tonight, and you'll benefit, I'm sure, from their expertise. I would look forward to hearing the discussion, but I noticed there is no chair in the front for the dean, so I took that as a gentle hint, and I will be going on to another event and reception in just a few moments. But I envy you. You'll have a wonderful program. Thanks to Jack and everyone else for their part in organizing this. Welcome, everyone.

JACK FRIEDMAN: I want to thank the Law School and the Dean and all the other law schools represented in the audience, which are Hamline, St. Thomas, and William Mitchell.

We'll begin with opening remarks by each of the speakers and then we'll move on to a Roundtable discussion where everybody speaks together.

Lorie Gildea, who is the Chief Justice of Minnesota, will make her opening remarks.

HON. LORIE SKJERVEN GILDEA: Good evening everyone. It's great to be with you today. Thanks to the Directors Roundtable Institute for sponsoring this event.

We are meeting at a time of great change in our society and our state, changes that are having an enormous impact on the practice of law and the business of the courts.

I applaud you for taking time out of your busy schedule to learn about these changes and to learn more effective strategies for dealing with them.

One of the changes we are experiencing now is the aging of our population. According to our state demographer, the segment of our population that is growing the most is the segment of the population who earns the least—and therefore pays less in taxes. And the segment of our population that is growing the least is the wage earners. This shift means that the amount of public resources available to fund government will continue to shrink even after the economy improves.

I will talk with you this evening about how that new reality has been felt in the Minnesota judiciary and how we are adapting to it.

But first I want to say a few words about why you as business people and as lawyers should be thinking about what this change—the older Minnesota—may mean for you and your businesses and clients.

Specifically, what it means for you when you and your business clients find yourself needing to go to court to get a dispute resolved.

One of the promises of Minnesota written in our Constitution is that all Minnesotans will have access to justice—access to the justice that is timely and justice that is delivered without delay. We cannot turn people away when times get tough—we must take all comers.

We also do not in the judiciary generate our own funds—we depend on the Legislature and Governor to fund us so that we may deliver on our constitutional obligations to provide access to justice for all Minnesotans.

The fact is that the state courts in Minnesota have been struggling to keep pace even before the recent financial downturn. As is true for many businesses across the state, the last five years made a bad situation worse.

We feel very fortunate in the judicial branch that the Legislature and the Governor did not cut our budget any more during last year's legislative session. But prior to this current biennium, we had sustained several years of budget cuts. Those cuts were not restored but at least we did not lose any more money, and so we are grateful that we at least stopped the bleeding for a little bit.

Now, the judiciary's budget—which is approximately $275 million a year—constitutes primarily people. In fact, north of 85 percent of our budget is personnel. That means that when our budget gets cut, we lose people. Without people to do the work, obviously, it takes us much longer to get our work done, and so it takes a lot longer to get your disputes resolved. And we all know how bad delay is for business. Delay breeds uncertainty and uncertainty leads to missed opportunity and missed investment and missed revenues.

So, why should you be concerned about an adequately funded judiciary? Well, I submit to you that you should care because you live in Minnesota and more specifically, I submit to you

that you must care because you are business and community leaders and your companies, clients and customers have an enormous stake in ensuring that MN has a fully-functioning court system.

A strong judiciary matters to you because the business community needs a strong judiciary to protect the sanctity of contract, the imperative of property, the primacy of due process, and the security of securities. A strong judiciary is the ally of people who need stability and due process to make plans and to make progress.

An article in *Bloomberg Businessweek* published last Spring, April 28, 2011, makes this precise point. The article is titled U.S. Courts Face Backlogs and Layoffs. The article references a study that was done in 2009 about the economic impact that would be suffered in California by further budget cuts to the court system there. The study, conducted by the research firm Macronomics, focused on cuts to the Los Angeles trial court.

The cuts anticipated there would have required the court to focus many less resources on the resolution of civil cases, with the net effect being that the time to disposition in those cases would grow exponentially. The study concludes that "delayed disposition of cases creates uncertainty among affected businesses," and that "the presence of such uncertainly makes businesses less prone to invest and expand operations."

The study concluded that the results of the anticipated cuts there would be billions of dollars in economic losses. As the *Businessweek* article notes, the damage includes over $7 billion in losses at businesses, which have to hold reserves that cannot be invested elsewhere while their cases are still under way, and the damage also included an estimated $6.3 billion in reduced legal fees.

Now this was a study about California, but just as was the case there, further cuts to the judiciary in Minnesota will likewise lead to increased delays in the processing of business cases.

This will affect the bottom line of your businesses and your law firms and it will affect the bottom line for your clients and customers.

Mindful of our changing Minnesota and the very real potential that the "good old days" of state budget surpluses may never return—we in the judiciary have not buried our heads in the sands of denial.

Instead, we are embarking on an aggressive agenda to redesign our service delivery systems. We are redesigning how we do what we do so that we can do it better and contain costs in this new era of shrinking public resources. I will give you just three examples that you can use when you engage with your legislators on this topic.

The first and by far the most ambitious initiative is centralizing our payable citations through the creation of the Minnesota Court Payment Center. Of the 1.7 million cases the courts handle each year, about 1 million are payable citations—traffic, DNR tickets and ordinance violations. We are completely re-engineering how we have processed these cases by moving the work from the courthouses in our 87 counties around the state to a new, centralized, virtual payment center using staff working from their homes. We are automating much of the data entry and accounting functions involved in recording payments, and distributing fine and fee revenue to state and local government, work that in the past has been done manually by court staff.

The creation of the Court Payment Center allows us to process these one million cases faster and with fewer people freeing more staff up to work on other higher priority cases. It lets customers pay anytime 24/7 online or on the phone. By making it easier to pay by credit card over the Web or phone and by automating the referral of unpaid debt to our collections vendor, we expect to increase revenue collected on these tickets and citations for counties, municipalities, and state government.

The second initiative I want to mention is the virtual Self Help Center. Over the last decade, the number of self-represented litigants has grown exponentially. Our website now provides a tremendous amount of information about the courts, includes forms and instructions and even video tutorials on some of the most common proceedings including conciliation, housing and family courts that provide step by step "how to" instructions. Our virtual Self Help Center can be reached from home computers or from any public library.

There is also a self-help work station in each of our 87 county courthouse locations with computer access to the website and a telephone help line to a call center housed in Hennepin County for assistance by specialized staff. Last year we had approximately 600,000 visits to the Self-help website.

This effort is reducing the public inquiry workloads of local court employees and, because of the specialized self-help staff, improving service to the public.

Third, in January of this year, the Minnesota Judicial Council, which is the policymaking body for the judiciary, took a historic step into the future and voted to move our state courts from paper files to an electronic information environment. This initiative, which we call E-Court MN, will result in significant benefits for judges, court employees, attorneys, and most importantly, the hundreds of thousands of people we serve each year. Electronic court records will allow us to provide convenient, timely and appropriate access to court information for all stakeholders. It calls for all cases to eventually be filed electronically, or scanned to create the electronic court record.

The public has come to expect twenty-four hour access to the other necessities of life, such as banking, health care, reservations and shopping. They expect more of that kind of

convenience from their courts too. In addition, the legislators who fund us expect us to work better, faster, and cheaper. And, we get it.

We, in the Minnesota judiciary, willingly embrace our obligation to prove that we are good stewards with the public money and these three examples I think provide powerful evidence of just that.

The great management expert Peter Drucker said, "The enterprise that does not innovate, ages and declines. And in a period of rapid change such as the present, the decline will be fast."

We in the judicial branch of your state government will not let our justice system decline in the face of the rapid changes underway in our world. We are moving forward, working hard to make our justice system more efficient, more user-friendly, and more able to fulfill our constitutional obligation to provide fair and timely justice for all who come to us.

Thank you for listening.

JACK FRIEDMAN: What is the mix of types of cases that actually get to the Supreme Court?

HON. LORIE SKJERVEN GILDEA: Well, we hear all kinds of cases. Just a rough mix, I would say, if you just wanted to divide it civil, criminal, I think in the last few years, we've seen just a bit more criminal than we have civil. But it's not too far off the 50/50 range.

JACK FRIEDMAN: If it's criminal, for example, the police violated their rights.

HON. LORIE SKJERVEN GILDEA: It could be constitutional claims. First-degree murder cases come automatically to the Minnesota Supreme Court on appeal, so those could raise constitutional claims; they could raise sufficiency of the evidence claims; so they could be constitutional claims, yes.

JACK FRIEDMAN: I happen to live in Los Angeles. I have an anecdote about limited budget, available funds, which the public did not know about until Paris Hilton and Lindsay Lohan were sentenced to ninety days or so each. Each woman got out in seven minutes because the government didn't have enough money to house them. Let's continue with Judge Davis.

HON. MICHAEL DAVIS: Again, good evening to all. I hope you can hear me. I have a soft voice, and if not, raise your hand and I'll try to talk louder.

The last time I was in this room was about two or three years ago, when the dean asked me to come speak to the first-year law students — the fresh faces that were entering this great law school, and were going to embark on a great career as lawyers for the next forty or fifty years. I explained to them, I said — and I'm not talking to the lawyers in this room; I'm talking to the businessmen — look to your left, look to your right. Two of you will not be in business within the next two years. That's the way our economy is running. Our court system is overworked.

It's important for you to understand that there is a difference between state court and federal court. But we work in conjunction with each other. One of the things that we have in this state is a good relationship between the federal and state appellates. In some states, that is not the case. I was a state court judge for close to eleven years, and so I cut my chops in state court. If I know what state court is like, and without the great state courts that we have in Minnesota, my job as a federal judge would be much more difficult. I do have to say, and I have to thank the former Chief Justice Magnuson and Chief Justice Gildea for bringing to the forefront, to the public, understanding that the rule of law cannot be done on the cheap, and that our state courts have to be funded in an appropriate manner so they can handle the vast majority of the litigation that happens in the State of Minnesota.

In federal court, we have the same problems, and as Chief Judge, I'll talk to you a little bit about them. But let me talk to you, the business community, about federal court. My appointment is by the President of the United States, for life, on good behavior, and I can tell you that this district has seven active judges and three senior judges who are working extremely hard. We also have magistrate judges who assist us in our civil and criminal work. We have eight and one-quarter magistrate judges. We have more magistrate judges than we do active judges in this district. The reason why — this district, out of ninety-four districts in this country, is one of the busiest districts in the country. We rank in the top ten for the last five to seven years. We are behind in having judicial positions. Our senators have introduced a bill, and it has gotten out of the Judiciary Committee, and it's on the floor of the Senate, to increase our judgeships by one, along with the southern districts of Texas that are in need of judges because of the border problem, and California, that is in need of judges because of the increase of the population there.

We are one of four districts that has a separate bill because of the needs of what is happening in our district. We are extremely busy. Seventy percent of our cases are civil. So the businessmen that are involved in work that will bring you into federal court, you should understand that the State of Minnesota, the District of Minnesota, is one of the busiest districts in the country, and it's just not numbers of criminal cases floating through; it's complex civil cases that cover our docket, and complex criminal cases that are on our docket.

In our district, we have 37% of our case load is personal injury and product liability cases; civil rights cases are close to 10%; contract cases are close to 10%; prisoner petitions are 7.1%; labor suits are 7%; tort cases are 5%; and intellectual property cases are 4.8%. Other civil cases are approximately 20%.

We'll be talking about intellectual property cases fairly soon, and you should know that our district ranks from, depending on the year, from the third to twentieth in intellectual property cases that are heard. That's surprising to most people, because they think that it should not be Minnesota, maybe New York or Delaware or California. But you know that we have a number of Fortune 500 companies here we have medical devices and companies. So we do have quite a bit of litigation in our district, and we deal with that problem of intellectual properties, patents, copyright and trademarks, in a timely fashion, and during the questioning, we can talk about how this district handles that.

The district has four courthouses. We have one in Minneapolis, one in St. Paul, one in Duluth, and one in Fergus Falls. Three of the four courthouses are the cream of the crop of the courthouses in the United States, dealing with making sure that the attorneys are able to try their cases in the proper manner and having all the electronics and technology that is necessary for them to try their cases. This is built into our buildings. When we built the Minneapolis courthouse and moved in in 1997, Chief Judge Rosenbaum at the time was the spearhead, making sure that our courthouses had the best of electronic devices in the country. Of course, over time, we've had to change and upgrade, and in the last three years, we've remodeled and upgraded our courthouse in St. Paul, and the lawyers who are working for you and the business companies understand that they can try their cases in a very efficient manner in this district.

Now, one of the questions that the business community has is that cases take too long. Well, understand that this is a busy district, and we're praying and hoping that we will get that extra judge, but you know how politics is: it's a long haul and a long process, and there really hasn't been a complete overhaul of the judiciary in the number of judges in close to twenty years. There have been stopgap measures for the border states because of the immigration problem.

Since this is an election year, the chance of us getting another judge is slim to none. So we do have to be quite efficient in how we handle our cases.

As Chief Judge, I have the great opportunity of herding a bunch of cats. Fortunately, in our bench, we have top-quality judges, and we're all on the same page, whether or not we're conservative or liberal, because I'm sure that there's equal justice for all in our district, and that *all* the litigants, whether rich or poor, have their cases tried in a fair manner.

The way we go about that is that we quickly send the civil cases to our magistrate judges, and I told you that we have eight-plus magistrate judges, and I am proud to say that I was involved in selecting every one of them, because I've been on the federal bench for eighteen years as of the end of this month.

We have the best magistrate judges in the country. They help bring in and settle cases that are complicated and should be settled in a timely manner. Understand that it takes two to tango. As a businessperson, your company may have a dispute and you say, "Well, it's clear — we should win, we should get in court quickly, and therefore, it should be resolved." But on the other side, rest assured that the other side is saying the same thing, so the dispute is there.

Our magistrates work extremely hard in settling cases, and understand that 97% of all civil cases are settled. They do not go to trial, whether or not to a court trial or a jury trial. That is the same percentage for our criminal cases, too. So it's important for you to know that we have outstanding magistrate judges who handle the civil discovery disputes, which are quite costly; the eDiscovery disputes are quite costly; and we try to work with the attorneys to make sure that the process is fair but efficient for all who come to court.

The first thing that your attorneys will tell you when a case is filed and it's in federal court, they will tell you it's expensive to litigate in federal court. Unfortunately, it is, and we

understand that. We want to make sure that the court is open to all, and that the costs will not keep you from coming to court or using other processes to litigate or to finalize settlement in your cases.

A case that comes before me will have timelines. We all across this district have timelines. We try to get our cases to trial or settle in eighteen months. The monster in the room or the 500-pound gorilla is the intellectual property cases. We'll talk about that later, and we've got some panelists who will discuss that, and I will jump in and talk to you about, as a judge, I speak collectively for all our judges, that intellectual property, the patent cases, probably are the most difficult cases that our district handles. But we're up to the challenge, and we will continue to handle those cases filed in this district.

The state is talking about electronic filing. The federal system has had electronic filing for close to ten years, and we're continuing to upgrade now. It's not paperless — I wish it was. Everything's filed electronically, but I'm old school, and so everything has to be printed out for me. But the newer judges can work off the computer before it becomes paperless in that sense. But we, the federal system, has electronic filing, and it works extremely well, and we're always upgrading. We have Judge 29, Jack 29, who is involved in the next generation of our electronic filing, and that will be rolled out in the next three to five years. We are *always* looking for new ways to keep up with business and with the community at large, dealing with technology.

In conclusion, for the lawyers sometimes it's very frustrating to come forward to judges in federal court, but what I've heard resonate about our district that lawyers who travel to other judicial districts throughout the country always want to rush back to the District of Minnesota. Because not only do we still give the lawyers time for oral argument in court to argue their case, but I believe *all* our judges try to give reasoned decisions for their orders, in order to direct the

lawyers to go back and to direct the companies on how they should handle the litigation, whether or not to settle or go to trial.

People's access to justice is just not for business, but is for all, and we are one of the few districts that is trying to make sure that there is equal access for the poor as there is for the rich.

Thank you.

JACK FRIEDMAN: The U.S. Supreme Court, I believe last year, ruled that crowding in the California penal system was unconstitutional. The state had to release many thousands of prisoners. What are other examples of the government having to do certain things, constitutionally, regardless of the money that you have?

HON. LORIE SKJERVEN GILDEA: Well, the obligation is to provide access to justice for *all* Minnesotans. A civil case, criminal case, family law case — I mean, you think about a child who's being beaten up in her home, and we can't get that child into a foster care situation because we don't have the judicial resources. The courts are for everybody, and they need to be available for everybody.

But the reality is that, as your question highlights, there's a constitutional right to a speedy trial in criminal cases, and we had three cases in Minnesota where the defendants were convicted, found guilty by a jury of their peers, and then they raised speedy trial claims on appeal. "It took too long to get my case to trial." The Court of Appeals reversed the convictions in all three cases, because the Court of Appeals held that it *did* take us too long. So there are real consequences.

JACK FRIEDMAN: Are there in the federal courts any requirement that whether you've got money or not, you have to do it?

HON. MICHAEL DAVIS: There's a constitutional right for a criminal case, and a constitutional right for a civil case. So if there is jurisdiction on a civil side for a case to be filed, it doesn't matter whether or not the person is indigent or a multi-billion-dollar corporation — if it's filed, a court has to hear it within a timely fashion, just as in state court, our criminal cases take priority over our civil cases. That's very hard for business leaders to understand that, but under constitution, we have to try someone who's either locked up or not locked up within a reasonable amount of time, and usually that's within seventy days of their first appearance. Because of the complications of the types of cases that we have in federal court, it usually never takes a case that goes to trial longer than seventy days. But they do take priority over my docket. Unfortunately, this year, I've had to continue several large civil cases because of my complicated criminal docket.

JACK FRIEDMAN: So is the conclusion, as a generalization, that cutbacks in court funding is, in the long run, more likely to affect businesses vis a viz criminal cases?

HON. MICHAEL DAVIS: No; it's going to affect everyone.

HON. LORIE SKJERVEN GILDEA: Well, in terms of delaying getting to the result, it's going to take longer, because there are going to be fewer resources to devote to civil cases in the face of budget cuts.

HON. MICHAEL DAVIS: If I can give you an example, during the face-off between Congress and the President in 1996, '97 — whenever the shutdown was, the federal shutdown — rest assured, we don't print our own money in the federal court. If there's no money coming in, we have to shut the court down. But what happened was, because we're an independent branch of government, we took the stance that we were not going to shut the courthouses. However, the civil trials were delayed, just stopped, because we had to take care of the criminal matters.

I've joined the club of chiefs. I can tell you that you lose a lot of sleep trying to figure out our budget. Because our budget for the year 2012, Congress only gave us a certain amount of money, and fortunately, I've been chief for four years, or coming up to four years. Day one, when I came on, I knew that we were going to have a budget crunch, and so we were watching our money very tightly, and not filling every employee, because if we had done that, we would have laid off "X" number of people in the last six months.

The federal budget is being cut just like the state budget; you just don't hear about it as much. We're talking about closing courthouses; we're talking closing libraries; cutting staff; the whole host of things. Everything's on the board to be cut. No different than what the business leaders have had to do with their businesses. This is what we've had to do, too. For me, it's a very painful process, and I know that my two colleagues who were chiefs of the state, their cuts were more severe than what I was faced with, so I know the pain and agony that they had to go through to make sure that quality justice occurs in this state.

JACK FRIEDMAN: I hadn't been thinking about the constitutional aspects of budget cutting for the courts, but I appreciate it now after hearing this discussion. Eric, why don't you speak next?

ERIC MAGNUSON: This wasn't part of my planned remarks, but I do want to talk about this.

I may be the only person connected to the judicial branch even remotely who's more free to speak than a federal judge, because he's got lifetime tenure, but I'm not involved any more as a member of any court.

The judicial budget is roughly two percent of the state budget. That's two percent for one of the three independent branches of government. The difference between a well-funded judicial

branch and one that is struggling to provide justice is less than half a percent, a third of a percent, of the state budget. It's a lot of money, but in the big picture, it's a very small percentage. If you look at the glue that holds our society together, it is the laws that we pass and we live by, and if you don't enforce those laws, you're going to unravel the whole structure of society. You can talk about transportation, and you can talk about health care, and you can talk about everything else, but if our streets aren't safe and people can't turn to the courts for a peaceful resolution of their claims, you might as well start shutting down the whole thing. That's why, when it comes to budget crunch, the courts shouldn't be in one. They should be taken care of first, because it doesn't cost that much, and it's so important. *Then* Congress and the state legislator ought to go worry about everything else.

I think we're introducing ourselves. I'm Eric Magnuson. I'm at the Briggs and Morgan firm, and you're going to have technology presentations here, so I might as well get to mine, if I can find it. Okay. I never know which one of these it's going to be.

HON. LORIE SKJERVEN GILDEA: Surprise us.

ERIC MAGNUSON: Well, I'll surprise myself — that would be even better! Good evening! Glad to be here. You're getting a mixed grill here tonight of commentary. You're getting judicial perspective; you're getting lawyer perspective, business perspective, client perspective. I see myself as kind of the bridge between the judicial perspective and the lawyer and client perspective. I hope some of this is helpful.

You've heard of technology as not a luxury, technology is an absolute necessity in today's business world, in today's judicial world, and legal world. I had someone say to me once, when I was on the court, "I hear you're buying a bunch of new computers, but you're laying people off. How can you justify that?" I said, "Well, I suppose we could all go back — I

have a collection of fountain pens — we could go back to legal pads and fountain pens. It might slow things down.

The point is, to function, you have to have technology. But it costs, and it costs not just money, but it costs, it impacts how we do things. I'm going to talk about that a little bit. This presentation is one example. I'm going to give you about 400 pages of detailed material on the topic we're talking about. It's all on that little link right at the bottom of this page; you can go find it. I've got six or seven slides that are going to summarize it. Now think about it; could I have done that ten or fifteen years ago? Probably not. Is it a good thing? Maybe. It changes how we do things; it changes how we relate to each other. Well, let's take a whirl through it.

If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice. It's what I said. It's a small part of the budget, but it's terribly important. I'm going to talk about the state of the courts, turning to technology, and technology in client advocacy, because you can hear the judges talk about technology and how they use it, but what's it mean for you folks? That's really the key.

There are some presentations here that, if I can get this thing to work, we can talk about. Minnesota and the New Normal. Okay — I've got it on the wrong thing here. See, that's the really great thing about technology: it can make even the smartest guy look like a dufus!

(The presentation can be viewed/downloaded at this link:
http://www.briggs.com/presentation-materials-recognizing-americas-judiciary-03-20-20121/)

AUDIENCE: [laughter]

ERIC MAGNUSON: I once gave a technology performance or presentation, and it was just terrible, nothing worked and the computer kept freezing. This old guy came up to me afterward and said, "That was the best technology presentation I've ever seen." I said, "Really?"

He said, “Yeah — it was clear you didn’t know what the hell you were doing, and you got most of it to work, so….”

Minnesota and the New Normal; we have a great demographer in Minnesota. His name is Tom Gillaspy. Tom wrote a presentation called “The New Normal”. It has become a very well-regarded — and I think this is going to do it now — famous last words!

HON. LORIE SKJERVEN GILDEA: You wanted to touch that screen, didn’t you?

ERIC MAGNUSON: I keep wanting to touch that screen! Alright! This is just what technology is all about. We came over here, we tested it, we worked it — it was just fine.

His quote — he ends with a quote from a great Canadian philosopher. You know the great Canadian philosopher, Wayne Gretzky? Somebody said to him, “Mr. Gretzky, how do you score so many goals?” He said, “I don’t skate where the puck is; I skate to where the puck’s going to be.” That’s what we all have to do.

What you have here on the New Normal is an explanation in more detail of what Justice Gildea was talking about, of the demographic changes. Basically we’re running out of workers and we have more consumers. So the economy has changed. Add to that the fact that there is more demand for services, and you really have a problem.

Now, courts are at the tipping point. I have a couple of articles here that you can look at. One is from the National Center for State Courts, “Economic Impact on the Courts.” It’s actually a compilation of articles talking about how courts across the country are being impacted by the economic impact of how they’re turning to technology. The most recent one was produced by the Rand Corporation, “An Early Assessment of the Civil Justice System after the Financial Crisis - Something Wicked This Way Comes.” Why is that? Because that is what’s

going to be sacrificed: civil justice. Not out of some Machiavellian plan; it's just in the order of things that have to be dealt with, that is one that goes lower.

You can see in the state courts budget article from the 2009 National Center for State Court Services, courts are getting rid of people and they're cutting down hours. They're not doing it because they want to, but as Chief Justice Gildea said eighty-five percent of the budget is people. So when you cut people, you don't have enough time to run the counters.

"ECF on Appeal" is a great article about how the appellate courts are moving towards electronic filing. It's the Additional Stakeholders Functional Requirements Group, for CM/ECF. I call it "ASFRAG". It's a study group by the federal courts on how they can improve the electronic filing for you in federal court. If you click on that, you'll get to a very large report, but you can also find out how you can have some input into the next generation.

"The Impact of Technology on the Court," lists four articles that I think you'll find very interesting. "Word from the Future" really tries to anticipate where courts are going in the future. "E-Filing in State Appellate Courts" will get you up to speed on that.

I think the two articles on "The Cold Record" and "Deference in the Digital Age" should also be of some interest to you.

What's the thing you learn in law school about appeals? That it's a cold record and you defer to the fact finder, right? Why do you do that? Because the fact finder got to see the witnesses in person and could judge credibility. Well, excuse me; today the entire trial record is a digitized recording of the trial! The appellate judges can see the same shifty eyes and nervous behavior. There are actually some discussions about court decisions where the Appellate Court has overturned basically a credibility finding because they got to see the tape, or they got to hear it. It's scary what technology may do to our adversary system.

"Judges on the Internet." One of the reasons I became an appellate lawyer is I really like things to be ordered. I like the box that is the appellate record. I tell my clients, "If it's in the box, we can talk about it; if it's not in the box, we can't deal with it"; and we're done. Now, with the Internet, judges can do research. "Appellate Courts' Use of Internet Materials" is a study by the Law Professor at the University of Arkansas at Little Rock, where she goes and looks at Internet citations and opinions, and then goes back and tries to find those citations. How many of you think citations to Internet web pages are permanent? Nobody? What do you do if you've got an opinion where the judge relies on an Internet web page that doesn't exist? Interesting question.

"The Curious Appellate Judge," "Independent Judicial Research in the Daubert Age" and "When Judges Google" are three articles that argue from different perspectives about whether it is a violation of the Code of Judicial Conduct for a judge to do independent Internet research on facts. Now, you'd think *no* judge would ever do that! Well the fifth one, "Attorneys Must Relitigate Case for Free", shows that's not so. Lawyers try a business case in Federal Court in Illinois. The appeal goes to the Seventh Circuit. Judge Easterbook was on the panel. The lawyers make their argument, and Easterbook says, "Well, you know, we'll take it under advisement, but I have a question for you folks." Now, that's really a bad sign, when the argument's over! Judge Easterbrook says, "You're here on diversity jurisdiction, correct?" They say, "Yes…" And he says, "Well, you know, I got on the Internet, and I looked up some of the information about the businesses that you represent, and I got to the Secretary of State's office, and I realized it's not a corporation; it's an LLC, and I think there are different diversity rules for LLCs, and I'd like you to submit simultaneous memorandum on the question of jurisdiction." They go away and they come back and they submit something jointly that says,

"Well, Judge, it looks like maybe you're right; we missed that; they are not diverse, but, we tried the case and it's already up on appeal, and you've had the argument as we briefed it; why don't you just go ahead and decide it?" Judge Easterbrook says, "Jurisdiction. There's no jurisdiction, and I can't. *But*, let me say" — and this is the really cool part — the opinion is under this link — the opinion says, "I may not have jurisdiction over this lawsuit, but I have jurisdiction over you two, because you are lawyers admitted to the bar in the Seventh Circuit. I order you to try this case to conclusion in the state court and not charge your clients any more money." Okay? You guys really liking technology now?

Here, finally, is a list of other resources on technology; the ABA has a legal resource center; the Colorado Bar Association has a great program, "Effective Use of Technology".

I will conclude with this: I was on a program once with Easterbrook and a Professor Lawrence Lessig from Stanford. These guys are so far above me on this technology stuff, I don't even know why was there. They have a series of law review articles that they're exchanging back and forth on the law of the horse. It sounds exactly like a law review article, right? The premise is, if we didn't change our basic civil laws when we moved from horses to cars, do we need to change our basic civil law structure when we move to the Internet? The question is, does it fit? It seems to me, that's a pretty good segue into the next presentations, because you're going to hear how technology is pushing the limits of patent law; how technology is pushing the limits of product liability law; and how technology is really pushing the limits of discovery. You would think that the folks who wrote the discovery rules, even the most recent iteration, really had in mind that you could produce 50 million documents with the press of the key, but nobody would know what they say? I'll leave that to others. Thank you.

JACK FRIEDMAN: I think you deserved to get the award for "Most Entertaining Chief Justice" when you were serving!

ERIC MAGNUSON: That's not one we strive for!

JACK FRIEDMAN: Michael Kane of Fish & Richardson will be our next speaker.

MICHAEL KANE: Good evening, everybody! My name is Michael Kane, of Fish & Richardson, and I am going to talk about some intellectual property law, if I can get this up. While I'm doing that, I will just comment, following up on Chief Judge Davis' comments. In my practice, which is primarily patent litigation — I've practiced all over the country, in many of the districts that are famous or get a lot of patent cases. The California districts, all three districts there; Delaware; in particular, the Eastern District of Texas and the Western District of Texas; and I will have to say that I always tell people that we're blessed in Minnesota because the federal court judges and the magistrates whom I've dealt with over the years have always been top professionals. So we're very lucky here. As Judge Davis said, I've always felt that, even when they rule against me, which happens occasionally, I felt like I had a fair day in court, they heard me out, they issued a well-reasoned opinion, and whether they ruled against me or not, I feel my client got a fair shake.

We should all feel very comfortable and confident in going to the federal court here. Likewise, I have had my cases in the state courts, as well as Hennepin County, and non-patent cases, and have had exceedingly good experiences there, as well.

As Chief Judge Magnuson indicated, given the change in our society and the technology over the last ten, fifteen, twenty years and the Internet, cell phones, and smart phones, all the things that have happened, intellectual property and patent law has really changed and is very dynamic itself. What I'm going to try to do today is just talk about some of the high points that

have happened over the last five years, try to give you some practical advice and issues that you might consider as you run your businesses or you're dealing with business clients. I'm not going to have a chance to cover anything in depth, but I can at least give you some flags and issues for you.

So, briefly, I'm going to discuss non-practicing entities and patent aggregators, Section 101, opinions of counsel and patent reform.

So, non-practicing entities. What are non-practicing entities? They are entities that own a patent, but they're not in business. They don't sell a product that's covered by that patent. You can see here, it's taken off over the last ten years, to go from approximately less than fifty cases a year being filed around the country by non-practicing entities, to over five hundred; hence, the workload that Judge Davis talks about.

So not all non-practicing entities are the same. Some are *persona non grata* around businesses and around the courthouse. Affectionately, we refer to them as "patent trolls" — they're people who go out and buy patents with the express purpose of making money, of going out and forcing them, and making money off of them. So there are patent holding companies here, such as Acacia or Rembrandt, that go out and buy patents. That's their business. Patent assertion entities. Failed companies that had some technology but couldn't compete in the marketplace, and now they're out, going to go out and assert their patents against companies that did succeed in the marketplace. Then, of course, you get university and research institutions. So even though most non-practicing entities have sort of a negative stigma, obviously universities and research institutions don't.

So, what can you do if you represent a client or are running a business; you likely have or will get a letter from one of these non-practicing entities saying that you've infringed their

patents and they want to take your license and take their money? Well, you can call your lawyers; you can argue with them and pay your lawyers for litigation fees; and that's what you do. But there are proactive steps that businesses can take, and are starting to take place. So you have people going out and actually buying patents or investing in patents, to take those patents off the market so they don't have to face them on the other end of one of these demand letters. So you've got freedom of action cooperatives that are joining the other groups of companies that go out and pool their resources and buy the patents, and then license themselves so they don't have to worry about some patent troll buying those patents and then coming in and knocking on the door, asking for a license. We've got some patent aggregators that are being formed. People are actually investing money. Venture capitalists are forming entities, going out and buying patents. One of the patents I mentioned here, RPX, is investing $100 million a year buying patents. The last company was well past a thousand patents that they now control, either they purchased or they licensed. They have roughly seventy to eighty people who have signed up — it's sort of an insurance policy — everybody from Microsoft to Samsung to LG to big companies like that, and smaller companies. You can essentially buy your way in, pay essentially an insurance premium, and you're guaranteed that you will not get sued by any patent that they have control over. These companies are making that decision as to what is it worth for that insurance policy vs. what I'd have to spend in litigation if I got approached by one or more of these entities for a patent.

Then you see large companies buying patents just outright and smaller companies. Just buying patents outright just to have a war chest, have a defensive posture. One of the most prominent ones recently is the Nortel patents. Nortel is a Canadian company that went bankrupt; they were in telecommunications and had a very large patent portfolio. You may have seen it in

the paper. Google wanted to buy these patents to buttress their Android platform against the Apples and Microsofts of the world. So they started a bidding war at about $950 million from the Nortel patent estate on the bankruptcy. You can see Apple, Microsoft and RIM, Blackberry, didn't like that, and a bidding war ensued, and ultimately, a group led by Apple, Microsoft and a few others ended up buying that patent portfolio for $4.5 billion, to keep Google from acquiring it, at which point Google promptly turned around and purchased Motorola for $12 billion to get access to the Motorola patent portfolio. So, a huge amount of dollars here, and it's affecting the technology that we all use every day.

So, the takeaway there is, these patents are out there; you don't have to just sit and wait for the demand letter; there are proactive steps that you can take as a company, such as advising your clients to do that.

The next thing I want to talk about, briefly, is Section 101. What is Section 101? Well, Section 101 is the portion of the Patent Statute that defines what you can get a patent on. Any new and useful process, machine, manufacture, composition, matter, or any new and useful improvement thereof is what you can get a patent on.

For decades, that was largely just boilerplate from the beginning of the Patent Statute. There was a smattering of case law that says you can't patent the laws of nature, you can't patent a physical phenomenon, and you can't patent abstract ideas. Einstein couldn't patent $E=MC^2$, for instance. So, you can't patent some things. They're just physical in nature — the physical laws of nature aren't patentable. But where do you draw that line? For decades, that was moot. In the '90's, there was an appellate court case that expanded the patent law to conclude business methods could patent, you may have heard of those, and that caused the court to struggle, because suddenly businesses that had thought they were safe from patent infringement on things

like managing a portfolio for a hedge fund, and those kinds of things, suddenly found out people could file patents, and then sue them for patent infringement. So Section 101 became a problem because the courts went back to that as — "Is that really patentable subject matter or not?" There was the *Bilski* case a few years ago that you may have heard about. It got to the Supreme Court. It had to do with hedging the purchases of a commodity. The Supreme Court dealt with that issue and basically said that that particular hedging strategy was not patentable. But the line is still fairly blurry. So the question really was, is this going to become — is this going to stick, or is it going to go away and sort of take away until in five or ten years, nobody's going to be cocky about 101 again. I think, based on recent events, probably not.

A couple of areas of industry that we ought to be thinking about these days are the life sciences areas, medical diagnostic tests, those types of things, because you're getting into this natural phenomena. You're talking about how drugs affect the body. You're talking about treatments for various diseases, and software patents. You end up with these method patents that really cover algorithms, and software is largely an algorithm put into a computer. So the court, if you look at the earlier slides, you'll see that they've outlawed — you can't patent an algorithm. But you have all these software patents that are being issued. So there's attention there.

As it turns out, fortuitously, I guess, can you see the bottom slide there? It mentioned Mayo Clinic had a case against a company called Prometheus that related to a diagnostic test, that went up on the 101 issue. As I read it at the U.S. Supreme Court December 7th, "The opinion issued this morning, Prometheus lost; Mayo prevailed and invalidated the Prometheus patent in a 9-0 decision by Judge Breyer." This doctrine seems to have a lot of life, and if you have clients in the life sciences and software area, you need to be talking with your patent

lawyers to draft claims in a particular way so you can ensure that you don't run into a 101 problem.

Prometheus, as I recall, and I'll put a plug in, but my firm represented Mayo in that case, and so I have some familiarity in that I worked on the case, myself, for a while, long ago when it was in the District Court phase. But as I recall in *Prometheus*, this test that Prometheus had covered by this patent was worth about $10 million a year to that company. It's invalid now because of the way the claims were written. There probably could have been a patent written that would have covered that test and allowed them to keep their market position, but because it was written in a particular way, it ran into this 101 problem. So, life sciences companies, software companies — you can write your patents in a particular way to cover your business. If you write them the wrong way, you're going to end up with the patents getting invalidated.

Opinions of counsel. Briefly, if you've dealt with patents before, you know that one of the things that, historically, people do is when they got a demand letter, they got an opinion of counsel, they have a patent infringement and the patent was invalid. It was typically used for the willfulness defense. Willfulness basically being if you're a willful infringer, you're subject to trouble damages. So you have this defense and opinion of counsel to say, "I went to a patent lawyer; he or she looked at it and said the patent was invalid or I didn't infringe, so I'm not willful any more; I may have infringed, but you can't trouble the damages." That has sort of fallen off because the law has changed over the last couple of years to say you can't really use that — the lack of an opinion — against the accused infringer. It used to be that you'd roll into court if you were the plaintiff and you said, "They didn't get an opinion! They're willful!" A prudent businessperson would go out and get an opinion. The court and the law have shifted so that you can't do that. But there's a new spin, potentially, on opinion. It has to do with

inducement. So what's "inducement"? Well, inducement is, you don't infringe, but you cause someone else to do it. Again, this often comes up in the software area, but it can come up in other areas.

So, you sell a software product to a customer, and that customer, when the customer loads the software and runs it on their system, they perform the steps of infringement. So they infringe, not you. You sold them the product; you've given them instructions — load your software, do these steps, get this result. They do that, they infringe. So you have induced them to infringe. It's a direct infringement by a third party. You knew that there was a patent out there, you knew that if the third party did what you told them to do, they were going to infringe. The law has gotten a bit tighter in that they really focus now on this intent element. You have to know that not only did you encourage them to perform the following steps, but that if they do that, they will infringe. So, the law is a bit unsettled now, but as the law develops, you may see situations where parties can come in and defend and say, "I can't be guilty of inducement, because I have an opinion of counsel that says that when my customers use the software in the way that I tell them to, they won't be infringing." Or the patent's invalid, so they don't need to worry about that. So you can actually eliminate liability for these past acts, not just eliminate the willfulness defense.

Again, the lack of opinion as being no longer relevant evidence of intent with respect to willfulness, so you may not need the opinion now so much for the willfulness, although it can be helpful at trial if you do have it and it's consistent with your trial themes; it can help avoid that finding of willfulness and its potential exposure to troubled avenues.

So, again, you may want to look at your clients, and your business may want to look at getting opinions on key patents, particularly to avoid this inducement problem.

Finally, I'll talk briefly about the Patent Reform Act that was passed and signed into law by Congress this year. President Obama signed it in September. Just a very high-level Section 102. The United States has traditionally been a first-to-invent country, so if the first inventor gets the patent and another inventor, a later, second inventor files first, the first inventor would win that race, if he can prove that he's the first inventor.

Most of the rest of the world is what they call "first-to-file". So the first entity or person that files the patent gets the patent. It doesn't matter who invented it first.

One of the big changes is that we're shifting our patent system to be more like the rest of the world. There's a prior user defense that was expanded. I mentioned earlier there were these business method patents that came into play, and Congress put what is called the "prior use" defense in to help businesses deal with these business method patents, because the concern was, you've got a business, they're out there, they've been conducting some activities, internal, confidentially, so they're not public, for, say, twenty years. Suddenly, someone issues one of these business method patents and says, "Guess what? Your internal processes, they're non-confidential, so they're not prior art for purposes of patent law, now infringe." The Congress created what they called the "prior use defense," saying that if you had been conducting this business method prior to the filing of the other person's patent, you could continue as a personal defense. The patent might be valid and enforceable against the rest of the world, but if you can show that you had practiced that business method, it was not enforceable against you. In the new statute, they've expanded that defense, now, to include all patents — not just business method patents. So for all patents that are issued after September of last year, the purpose personal defense, prior use defense, is available.

So if approached by somebody on patents that were issued after that date, you should take this into account. Generally, if you're talking to your patent counsel about the patent format and the law, and then the changes in the laws that come about from "the first to file" and how that makes our system more similar, now, to the rest of the world.

With that, I'll finish up and will take any questions later. Thank you.

JACK FRIEDMAN: I will ask for Rhea Frederick from Kroll Ontrack to speak.

RHEA FREDERICK: Thanks, Jack! So, who needs a seventh inning stretch? I see a few people standing up. Seriously, stand up, stretch your legs. I can't sit still for this long, and I don't expect anybody else to. While you're doing that, I'll ask for a little participation — everybody please answer one question; I promise it will be easy.

So, who in the audience is a practicing attorney right now? All right. That wasn't too painful, right? Who is here because they work for a law firm currently? Who is here from a corporation? A lot of others. Okay, fantastic! I wanted to understand that a little bit, going into my presentation, because I want to ultimately understand who you're talking to, right? I got the technology topic, and so I brought my presentation with me on paper. How's that? Assess the irony of that while you listen to me.

I wanted to set the stage a little bit by talking about how we got here and where we are today with regard to electronic discovery.

I graduated from law school twelve years ago, in 2000. When I was a law school student, not one minute of my law school education was spent on electronic discovery, technology in the courtroom, or any of related subjects. Ironically enough, I was just participating in a luncheon discussion today about the creation of a certification course at a local law school for electronic discovery. So, we're inching our way in the right direction and starting to educate lawyers more

about electronic discovery and technology-related topics. I think that's a positive trend. Quite honestly, it's a positive trend because most of us, I imagine, have fully embraced technology in our personal lives, right? Almost all of us are forced to use e-mail, instant messaging and things like that in our business lives. So, technology has become a very pervasive part of what we do all day, every day. It's only natural that it's affecting the discovery process, as well.

I got into this industry about eight years ago, and in the last eight years, there has been an incredible growth in this space. There's been not only revenue growth for companies that are offering products and services in this space, but there's also been a huge maturation in the market in terms of the amount of information and education that lawyers, paralegals and legal technology professionals are gaining. That's also a very positive trend, because we're seeing a more refined way of tackling this problem, right? The problem being, how do we deal with the proliferation of data in our business lives, in the context of litigation? It's a difficult challenge. Everybody's first concern when we talk about technology and discovery is the price tag. What is this going to cost? There's no doubt about it that cost is a major factor. There are absolutely cases that settle based upon perceived or anticipated electronic discovery-related costs. There's no doubt in anyone's mind that how much folks are spending on this is growing, year over year. There are lots of statistics out there to suggest that.

One recent stat that I was reading in preparation for today's presentation was that the number of cases in the last three years where 2.5 terabytes of data were collected for one matter has grown by 17% in the last three years. Does anybody in the audience, know what 2.5 terabytes of data represents?

AUDIENCE: A lot. A lot.

RHEA FREDERICK: A lot. Yes. Simply a lot. Let's break it down a little bit. 2.5 terabytes is 2,500 gigabytes. On average, one gigabyte represents about 60,000 pages. Think about that. Multiply 60,000 pages by 2,500 gigabytes and you are left with 150 million pages collected for one matter. That is an enormous amount of information that one has to manage in the context of a piece of litigation. The concept of management is really important, too, as we think about the industry and how it's evolving, because really, it has become a project in and of itself. The concept of electronic discovery, and how one is preparing for electronic discovery in a given matter, really needs to be managed as one would manage the development of a new product, the launch of a new service or a new marketing campaign. There needs to be a lot of players that come to the table to really put their heads together and think about what the appropriate strategy is for any given matter.

In addition to data volume growth, we've seen another interesting trend in the last two to five years that has picked up steam in the last two years. We're getting a lot more engagement from the corporate market when it comes to eDiscovery decision-making and involvement. That's a very positive trend, and I'll tell you why.

When it comes to the management of data, who's the best to take care of that job? Is it the company itself? Outside counsel, is going to struggle on any given engagement when they're brought into a matter, when everyone's hair is on fire, and they're asked to identify the data sources that are available and relevant to the litigation at hand. Unless that outside counsel is your sole outside counsel, which is pretty rare for most organizations today, outside counsel is going to struggle to get their arms around the data — where it lives; who owns it; who has access rights; how difficult is it to collect that information; how much is it going to cost to collect that

information; how much time is it going to take to collect that information; who exactly owns the information. There are a lot of questions that need to be answered.

At the very front end of the problem — the problem being, how do you manage electronic discovery — is data management, in and of itself. The corporation is in the best place, the best position, to manage their data, their corporate records. We're seeing some great growth in terms of specific job types that pertain to electronic discovery. We're seeing directors of electronic discovery. We're seeing managers of electronic discovery. We're seeing more engagement and involvement with IT, with records managers, with folks in the legal team, with security, with compliance, with all kinds of roles within the organization, to really get engaged and develop a good strategy and process for that company. Again, when we talk about costs, that's where a company can really drive their costs down: getting ahead of discovery by properly and effectively managing your data before that complaint gets filed.

That brings us to the question of what happens when the complaint does get filed. There are a lot of decisions that have to be made when a complaint is filed, and one of those really goes to what the judges were talking about tonight with regard to the time it takes for a case to actually come to trial, contrasted with the date of the filing. Most discovery rules and the case law that supports them are suggesting very strongly that when that complaint is filed, that is your absolute trigger to start thinking about preservation. Preservation is still one of *the* most challenging items that any attorney has to tackle with regard to electronic discovery. Most of the electronic discovery related case law that's out there still deals with sanctions. The majority of sanctions-related case law still has to do with preservation issues. It's still an area of opportunity for many attorneys and for many corporations.

How do we think about effective preservation? It's a big challenge because if you're outside counsel and your relationship is with the AGC of litigation at a corporation, and you're coming in and saying to them, "In order to be truly defensible on this matter, we need to preserve all of this stuff." That "all of this stuff," a simple statement, quite often represents a very expensive proposition to the corporation. They'll start hearing that from IT, from their directors of security, from anybody who will be involved in the actual act of preserving that data within the corporate IT environment.

It's a big issue. There really needs to be a balancing test. Folks need to weigh the pros and cons. Deference needs to be given to cost vs. best practices. Quite honestly, at the end of the day, what often is the trigger for most decisions with regard to what needs to be preserved, it becomes an issue of risk. Risk tolerance from one corporation to the next varies widely. On any given day, I'm helping clients manage major litigation. There is still a lot of head scratching and a lot of concern about what exactly is going to be preserved in a given matter. Even with recurring clients who've dealt with this time and time again, it's still a big pain point for a lot of people.

Risk tolerance is an important variable. But again, it goes into what the judges were saying earlier: it is taking a longer amount of time for that case to actually get to trial. Obviously, the longer a corporation has to preserve their data, the costs continue to increase during that preservation timeframe.

We are also seeing another interesting trend in data resource management. Five plus years ago, almost no corporate entity with the exception of massive serial litigants were outsourcing electronic discovery services directly. Historically, most buying decisions were managed through a law firm. Nowadays, corporations are recognizing that their role in the

process, and the idea of bringing the process and the filtering of data, the management of data, in-house, can vastly affect the cost of this. So that is, again, a very positive trend.

When we think about what else is going on out there in the world with regard to technology — a lot of the new technological innovations have a substantial impact on discovery. We're talking about things like Facebook, anything in a social media environment. We're talking about things like cloud computing, where we have to think about challenging issues of ownership, control and privacy. We've seen this interesting evolution — as all of us carry mobile devices nowadays — this interesting evolution away from a corporation controlling that device procurement. More and more organizations are allowing their employees to pick their device of choice and then your friendly I.T. guy or gal, will sync it up to the corporate network for you.

Now, on its face, that may seem very employee-friendly. It may seem like it's a decent idea. But in the context of eDiscovery, that can be a nightmare. When it comes to having to collect information from a vast array of devices, you're creating substantial challenges from a cost, time and aptitude stand-point. It forces companies to spend more money, and honestly, create more risk for themselves, when they permit practices such as this.

When we think about how a corporation is balancing current technologies that are available and duties with regard to electronic discovery, it can be a challenging proposition. There's a lot that needs to be considered with regard to current policies and policy analysis. Oftentimes, companies are woefully behind in revising their policies to really reflect current usage of technology across their organization. I bet most organizations nowadays have not updated their computer use policies to say anything about social media, yet we're seeing a lot more interesting case law talking about what a person might say, who's an employee of a

company, about their company publicly, on a social media web site. It's becoming an interesting dialogue out there.

Again, policy revision, in-sourcing data management, and practical engagement in the corporation are really positive trends that we're seeing in the electronic discovery space. There are some amazing technologies that are also available, not only externally to the market, but in the market, as well. There's a new thing that's really the buzz word this year at all the trade shows in the industry, and it's called "technology-assisted review." It's the concept of not letting computers do all of the review and all of the work, but letting the computers, the software, the algorithms that were mentioned earlier by Michael, help and facilitate the review process.

What that means is you start with the intelligence, the subject matter expertise of your lawyers. They initiate the process and train the system. Then the system makes suggestions. The real easy way to relate this is to think about a time you purchased something online, and as soon as you purchase that, it says, "You may also like…", or the last time you watched a movie on Netflix, and it says, "You might also like to watch…" It's similar to that. You had to, as a consumer, see the system, tell it what you like, tell it what you want to buy and then it makes suggestions back to you. Technology-assisted review works very much the same way. You have a team of intelligent reviewers who log onto a system and look at a database, and they'll read an e-mail, and they'll say, "That is responsive to Interrogatory No. 1." The system learns that, and it starts making suggestions. "Well, this document is also responsive to Interrogatory No. 1," and on and on and on it goes throughout the data set.

That's just one example of a lot of technology advances. The reason why something like that is so advantageous is because it's helping the legal teams stop the review without having to review those mountains of e-mails we talked about at the beginning of my presentation.

It's not an untested process. Most technologies that are available to the market are vetted and validated and there are statistical algorithms that have been applied to many other industries and that are just being applied to the legal industry recently.

The moral to the story is, always remember that you have a duty of competence as an attorney and that the more you educate yourself about what's available to you from a technology standpoint, the more that you embrace technology in your practice, the better off you're going to be in fulfilling that duty to your clients.

Thanks very much.

JACK FRIEDMAN: Different courts are struggling over the question of how much leeway you give one side to say, "We've responded to the other side with algorithms and without reading every single one of 50 million documents." So it's an unsettled area.

RHEA FREDERICK: It is.

JACK FRIEDMAN: Any additional thoughts on how to reduce the costs of eDiscovery?

RHEA FREDERICK: You know, there are many ways to reduce costs, and quite honestly, the technology-assisted review point that I was just making has been instrumental in helping my clients cut their review costs in half. When you have technology that says, "I have a million documents in this review database," and it tells you — half-way through, as an example — "there are no more relevant documents in this database," your team can then query and validate that presumption to make sure that the remaining set is truly not responsive, and then you can stop your review.

Document review is the most expensive part of any piece of litigation, the vast majority of the time.

JACK FRIEDMAN: Will many courts let you do that advanced shortcut?

RHEA FREDERICK: They will. There's a big case out there right now that's deciding this exact point, *Da Silva Moore* in the Southern District of New York.

JACK FRIEDMAN: Our final speaker is Russell Ponessa, who will introduce his topic.

RUSSELL PONESSA: Good evening, I'm Russell Ponessa, from the Minneapolis office of the law firm Hinshaw & Culbertson. I want to thank Jack for putting the program together and for the featured speakers and the other presenters, for allowing me to take part in such a program, and to all of you for being here tonight. I also want to thank the University of Minnesota, a place that will always have a fondness in my heart, for hosting the event.

If I could, just for a minute, engage in a little bit of nostalgia, I, like Chief Judge Davis, have a memory of this conference room in this law center.

Mine, unlike Chief Judge Davis, is from the other side, about four rows up. In 1984, I was a second-year law student here in this conference room, and my professor — fortunately, it was Irving Younger, one of the leading trial lawyers in the country — I was fortunate for that experience, and for my education at the University, because it played no small part in my decision to have a career path as a trial lawyer. I learned a lot from Professor Younger, and I learned that being a trial lawyer — to me, at least — is a great experience.

My topic tonight: Personal jurisdiction following the June, 2011 Supreme Court decision in *McIntyre Machinery, Ltd. v. Nicastro*. While my topic, and the decision in *Nicastro*, involves a product liability case, and while my focus is on product liability manufacturers, sellers and distributors, the importance of personal jurisdiction and the impact of *Nicastro*, or *McIntyre*, as it is described in the case law now, goes well beyond product liability lines. It applies to *any* company in *any* business that gets sued *any*where other than its home state.

(The article related to this case can be viewed/downloaded at this link: http://www.hinshawlaw.com/personal-jurisdiction-in-the-wake-of-j-mcintyre-machinery-ltd-v-nicastro-your-product-ending-up-there-is-not-enough-05-24-2012/)

I'm going to give you a little law; I'm going to give you some examples; and I'm going to give you some advice; all of which I hope will leave you with the takeaway from *McIntyre*, which is for a product manufacturer, seller or distributor, the fact that your product reached a distant state or a foreign country and gave rise to a lawsuit does not, in and of itself, subject you to personal jurisdiction in that court.

Now I'm going to go to the rule of law, and I loved that when the Dean said that — it makes it sound so darned important, doesn't it? The rule of law. That's really what I look to when I represent my clients, who often aren't on the best side of the facts, unfortunately.

So what is personal jurisdiction? It is the power of a court to render judgment against the defendant.

What it means is, where can you lawfully be sued? What's it based on? The Constitution of the United States. The Fourteenth Amendment, Due Process clause, says to state courts, "You shall not deprive any person or company of" that famous phrase, "life, liberty or property without the due process of law."

So what the heck does "without due process of law" mean in the context of personal jurisdiction? Well, the Supreme Court told us what it means in the landmark case of *International Shoe v. Washington* in 1945. It's up there. I won't read the screens to you; you can all read them yourself. But the main takeaway is that a company that is sued in that non-forum state, not its own state, must have certain contacts with that state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

I can tell you, from my practice, I don't often get to talk about the constitutional rights of my clients, but this is one instance where I do, because personal jurisdiction is founded on the Constitution. There are two takeaways from that: First, the due process right is a constitutional right of the party being sued, *not* the party suing — you'll see quite a bit of discussion about that in the case, law — but it's the constitutional right of the party being *sued*, and, second, it's the *conduct* of the party that's sued that determines whether it's subject to jurisdiction in a non-forum state.

Now, that standard in *International Shoe* proclaimed in 1945 changed over time. There started to be a shift within the jurisprudence with the introduction of the concepts of reasonable foreseeability and stream of commerce drawn from the 1980 Supreme Court decision in *Worldwide Volkswagen v. Woodson*. In the thirty years since *Worldwide Volkswagen v. Woodson*, there appeared to be a trend toward the *Worldwide Volkswagen* concepts of foreseeability and stream of commerce, such that a company that placed a product into the stream of commerce was subject to jurisdiction anywhere that product foreseeably ended up.

The Supreme Court's decision in June of 2011 now stands against that trend. The facts are important, and so if you look into the facts of the case, you see the holding there on the screen. The facts are important, because in *McIntyre*, Robert Nicastro, he's a citizen of New Jersey. He's working at his job in New Jersey, and he's injured using a shearing machine made by J. McIntyre, Ltd. Now, J. McIntyre, Ltd. made the machine in Great Britain; J. McIntyre is incorporated and operates in Great Britain. The machine was sold into the United States by an independent distributor, a separate company which, notably — and you'll see, when I talk about the other factors that matter in the courts' decisions on personal jurisdiction — this independent distributor was out of business and bankrupt well before Mr. Nicastro's injury. So

there was no one else to sue but J. McIntyre. Mr. Nicastro did, in the state courts of New Jersey. J. McIntyre said to the courts, "No. You lack jurisdiction over me. I'm a Great Britain company, and I don't have substantial contacts or minimum contacts with the State of New Jersey." The state courts of New Jersey said, "No way, J. McIntyre. You're subject to jurisdiction here." The Supreme Court of New Jersey agreed. Then the United States Supreme Court accepted review. It had been a while since the Supreme Court had looked at specific jurisdiction in the context of a product liability manufacturer; a number of years — probably since 1987, with the *Asahi Metal* decision. That was a case involving the California Supreme Court exercising jurisdiction there, before the Supreme Court revisited specific jurisdiction. In *McIntyre*, six justices — it was actually a split decision, 4 plus 2 to 3 — so six justices, both the plurality and concurring opinions, found on those facts, based on the standard for jurisdiction as proclaimed in *International Shoe*, that there was no personal jurisdiction over J. McIntyre in the state courts in New Jersey.

Now, there was a vigorous dissent by Justice Ginsberg, and the position of the three dissenting justices was that J. McIntyre *is* subject to personal jurisdiction.

So, what *J. McIntyre* did, through the plurality and concurring decisions, is to set forth a standard that really returns us to *International Shoe*, and says that due process requires minimum contacts and purposeful availment of the jurisdiction in which you're being sued, and at least the concurrence, written by Justice Kennedy in *McIntyre*, rejected the concepts of foreseeability and stream of commerce as alone enough to subject a company to jurisdiction in a non-forum state.

So why is *McIntyre* significant to my clients, product manufacturers, product sellers, product distributors — both domestic and foreign? Well, it's significant, because in 2010, $2 trillion of foreign goods were imported into the United States. Nearly *all* of the electrical

appliances, household appliances, stoves, refrigerators, you name it — they're not made here. They're made overseas. So that's why, in the context of product liability, personal jurisdiction is significant.

What I want my clients to reconsider now, in light of *McIntyre*, is where can they be sued? Secondly, where can the companies they do business with be sued? If you're getting the final product from somebody else, where can that company be sued? If you're buying a component part and putting it into a product and selling that, where can you sue the component part manufacturer, or where can someone else sue the component part manufacturer? Where can the product distributors and retailers be sued? Often, because of the stream of commerce, all those parties are subject to lawsuit.

Now I'm going to give you a couple of examples. I call it — corny — "A Tale of Two Fires; If They Build It, Will They Come?" My point is, if somebody else builds your product and you get sued, will that somebody else show up and defend that product? Will they be subject to personal jurisdiction, like you are, in that forum? I'm going to tell it through a couple of fire cases that I handled.

The first was a tragic mobile home fire on a cold, winter night in St. Paul. There was no central heat, no running water, no smoke alarms in the mobile home. The fire started in the middle of the night and it quickly got out of control. The father, awakened by the fire, gets up, gets one of his children out of the mobile home, goes back into the mobile home for his wife and other child, and they all three die in the fire -- a tragedy.

The fire scene is examined afterwards, and there are no less than eight electric space heaters found in the mobile home. They were heating the mobile home solely with electric space heaters.

The family's lawyers from Texas get involved; they target a space heater sold by a California corporation — my client — as the cause of the fire. That heater, sold by the California corporation, was made in China by a Chinese-based company with really no contacts within the U.S., and sold into the U.S. by a distributor out of Hong Kong, FOB Hong Kong — free on board Hong Kong — that was also Chinese-based. That's one case.

Another fire case: in Minnesota, a house fire — again in the winter — this time, working smoke detectors; parents awaken to the smoke alarms, call 911, are able to get their children out of the house safely. The fire department arrives quickly, but in the upstairs bedroom, off the kitchen where the fire originated, there are two elderly grandparents. They get to the grandparents, the firefighters remove them from the home, but because of their age and their health, one of the grandparents later dies. Another terrible tragedy with a fire in Minnesota.

In this house, there were many ignition sources in that kitchen, the area of origin. In this instance, the family's lawyer targets a hot and cold water dispenser made by — or sold, I should say — by my client. It's sitting in the opposite end of the kitchen as shown in this photograph. That hot and cold water dispenser was also not made in the United States; it was made by a Chinese manufacturer.

Now you've got two different fires, two different, but similar, fact patterns in terms of the product's stream of commerce.

I'm going to ask for a little indulgence and go sideways just for a minute, because first of all, I'm going to tell you about the first two pieces of, I'll call it "evidence" — information — that came in to me in the first mobile home fire. The first was a letter that my client wrote to the law firm in Texas, and the names have been changed for good reason here. It's called "ABC International" in the letter up there. What I want you to note is the date of the letter. It's written

on, I believe, March 5, 2008. It's referring to a letter that the company received just two days earlier from the law firm in Texas. Not uncommon. The letters usually read, "Dear Company, Your product just caused a terrible fire and we're going to sue you. Put your insurance company on notice and get ready."

Well, this company, my client in California, they weren't very sophisticated. They thought that what they were told was what happened! So they write back within two days, and what do that say? "We regret that the tragic fire was caused by an ABC International space heater." Not what I probably would have told them to say. So that's the first side lesson: Get your lawyers involved after the Notice of Claim!

The second piece of information my client sent me was the product. I always want the product. I'm a product lawyer; I want to know what the product is, how it works, how it's made — what its warnings say — everything about it. I need to take it apart; I need to see it. So they send me the product. There it is: a space heater. Take a look at the graphics on that space heater. What does it look like is coming from the space heater — fire? It couldn't have been *that* space heater that caused this fire. Not the one with the fire coming from it.

First of all, and I mean no disrespect to the tragedy that occurred with regard to this; it's just an example that came from those cases, so I can talk to you about the little things — about using marketing and advertising from a Chinese manufacturer that doesn't always think about you selling your product in the U.S. — I can tell you, that letter and that box with those flames was there every time you walked in the courtroom. I saw it every time I dealt with those lawyers. Fortunately, after three years, we were able to establish that the ABC space heater was *not* the cause of the fire, and it was in fact not energized at the time of the fire. Well, energized — electricity flowing through it. Maybe it was plugged in and that cord was de-energized during

the fire, or maybe it wasn't plugged in. So after all that, three years later, that's what we ended up with.

Now I'm going to go back just for a moment and black this out to talk to you about the end of the "tale of the two fires," and what happens with personal jurisdiction when you don't ask yourself, "Where can I be sued? Where can the company I'm getting my product from be sued? Where can the companies that I sell my products to be sued?"

Well, in the mobile home fire, the family sued in Minnesota and sued my client, a California corporation with plenty of contacts with Minnesota. They direct-sell into Minnesota; they advertise in Minnesota; they were subject to jurisdiction in Minnesota. The family also wanted to sue, and we wanted them to sue, the Chinese manufacturer of the heater. They designed it; they made it; they should stand behind it, and the distributor, as well. But because of the due process requirements of minimum contacts and purposeful availment, those companies weren't subject to jurisdiction in Minnesota. So there my client is, the California corporation, left to defend a product it did not design or manufacture. Not a result you want if you're thinking about the outcome.

Now, the house fire case, how was that different? Well, that hot water dispenser was sold by a major brand U.S. company, and it was subject to jurisdiction in Minnesota; advertised in the state, a lot of direct sales in the state — no doubt it was subject to jurisdiction in the State of Minnesota. But what about *that* Chinese manufacturer? Again, that Chinese manufacturer was not subject to jurisdiction here, by law, because it did not have sufficient minimum contacts or take advantage of the State of Minnesota such that it would be within the exercise of due process to be subject to personal jurisdiction. But the outcome was very different, because my client, the major brand U.S. seller of those products, thought about it ahead of time and when it contracted

with that Chinese manufacturer, it said, "I'll buy it from you, but you've got to agree that you're subject to jurisdiction where I am, with insurance, and to stand by and defend and indemnify me if that product is the subject of a lawsuit." Big difference. Big difference, for what can often be a small or middle-sized company buying a product from a foreign manufacturer.

So that's the "tale of two fires," and now I want to go back to *McIntyre*. Give you some more law and I'm just about done.

So, what the plurality and concurring decisions in *McIntyre* say to me is that there must be something more than the foreseeability that your product can end up in any one of the fifty states. Well, what "something more" is there? Well, there's direct sales into the state; designing the product for the state — that does happen; advertising direct to that state; advising and servicing users in the state; or control over distributors and sale agents in that state. Usually, if you have any one of those, you've got the "something more" — your product being there, plus that "something more" will subject you to jurisdiction.

Finally, I want to tell you at least what I see, as a trial lawyer appearing in front of our courts, as to what other factors matter. They're not so much legal factors, but they matter — I call them "human being factors", and I take them into account when I handle my clients' lawsuits. What other factors matter? Well, where's the plaintiff from? Is the plaintiff from the forum state? Well, that matters to the decision maker, sometimes. What's at stake? That's the next one. Is it a serious injury or death? Are there safety issues with the product or an industry? "What's at stake" matters in determining if somebody's going to be let out on personal jurisdiction grounds, or if a court's going to say, "I don't have personal jurisdiction over this defendant."

Lastly, and what I see, and I've looked at a lot of decisions in the product liability area, what matters is, does the plaintiff have someone else to sue? If they do, well, you're more likely to get out of that lawsuit on personal jurisdiction grounds. You can understand that. But the point, then, goes back to why I submit that *McIntyre* is so important. Because in *McIntyre*, all those factors were present. The plaintiff was from the forum state. Substantial rights were at stake, and there was no one else to sue. But what mattered to the plurality and concurring Justices of the United States Supreme Court was the due process of law. It was the requirement that life, liberty or property should not be taken away without due process, without minimum contacts and a substantial availment of that forum. That's why that decision signals a shift, or may signal a shift, in the trend that I was sure was going to go the other way on personal jurisdiction.

So, as a product manufacturer, seller, distributor, ask yourself: "In light of this decision, where can I be sued, and where can the companies I do business with be sued?"

HON. MICHAEL DAVIS: That was a seismic change, and there was a companion case with that coming out of Taiwan, a part sold to California. It was a seismic change in what the Supreme Court did, and in the law of personal jurisdiction. It's still up in dispute and whether they are right or not, it behooves you to take a look at the dissent.

RUSSELL PONESSA: A quick comment on what Judge Davis was referring to. Not all the districts and not all the circuit courts have read it the same way. Some are still going back to, and saying that it didn't signal an end to foreseeability and the stream of commerce, but I can tell you, of the twenty-eight product liability cases since *McIntyre*, more than half have let the defendant out of personal jurisdiction, and that, I would submit, was not the case before.

HON. MICHAEL DAVIS: It was *McIntyre* that did not have another forum to pursue.

RUSSELL PONESSA: Right. Other than going to Great Britain and trying to sue there.

JACK FRIEDMAN: I have a quick question: A company has a web site; doesn't do advertising anywhere; takes orders from people all over the world who happen to read the web site; and say, "I'd like to buy your product; I'll send you a check." Is there personal jurisdiction everywhere in the world where they sold one thing?

RUSSELL PONESSA: I can answer this for Jack. What the decisions are saying are that if you just have a passive web site where your product can be viewed, where you can access it but where you can't order the product, that's not going to give you personal jurisdiction. Once you start taking orders from that web site and direct-selling out to that location, and I'm sure Chief Judge Davis would agree with that — that you are going to be subject to personal jurisdiction. But it's an evolving area, just as some of the other speakers have talked about. I love the "law of the horse," that's really true. We're still using the same law; the "law of the horse" in the age of the automobile. So, whether that will change the face of personal jurisdiction, I can't tell you for sure.

JACK FRIEDMAN: Thank you. This discussion is a contribution of Minnesota to the national awareness of the courts. The sophistication and professionalism of the judges and the Bar was demonstrated in the variety of issues. The need for proper respect for the courts and support for their budgets is clear. Thank you very much.

Lorie S. Gildea
Associate Justice, Minnesota Supreme Court

EDUCATION

B.A. Degree, with distinction,
University of Minnesota Morris, 1983

J.D. Degree, magna cum laude, order of the coif
Georgetown University Law Center, 1986

LEGAL BACKGROUND

Prior to being appointed as Associate Justice on January 11, 2006, Gildea served as a judge in the Fourth Judicial District, Hennepin County.

Before being appointed to the bench in September 2005, Gildea was a prosecutor in the Hennepin County Attorney's Office (2004-2005), Associate General Counsel at the University of Minnesota (1993-2004) and in private litigation practice at Arent Fox in Washington, D.C. (1986-1993).

COMMUNITY INVOLVEMENT

Minnesota Sentencing Guidelines Commission (May 2001-November 2004)
Board of Directors, YWCA of Minneapolis (July 2000-June 2003)
Advisory Board, MINNCORR Industries (June 2000-June 2002)

PROFESSIONAL AFFILIATIONS

Minnesota Supreme Court Advisory Committee on Rules of Civil Procedure (2004-2006)

Minnesota State Bar Association

Member, Council (formerly Executive Committee) (July 1, 2003-Present)
Member, Assembly (formerly Board of Governors) (2000-Present)
Member, Governing Council, Civil Litigation Section (2000-2006)

Hennepin County Bar Association

Member, Board of Directors (2000-2004)
Chair, Finance and Planning Committee (2002-2003)
Co-chair, *The Hennepin Lawyer* Committee (2001-2002)

CURRENT SUPREME COURT ASSIGNMENTS

Chair, Supreme Court Gender Fairness Implementation Committee
Liaison, Supreme Court Board of Legal Certification
Liaison, Supreme Court Advisory Committee on Juvenile Protection Rules
Liaison, Minnesota State Bar Association

Biography of Chief Judge Michael J. Davis

Judge Michael J. Davis was appointed by President Clinton and took the oath of office on March 30, 1994. He became Chief Judge of the District of Minnesota on July 1, 2008. He was the first African-American Federal Judge in Minnesota. Judge Davis graduated from Macalester College in 1969 and the University of Minnesota Law School in 1972. He served as a criminal defense lawyer at the Neighborhood Justice Center in St. Paul, Legal Rights Center in Minneapolis, where he is currently a board member, and as an Assistant Public Defender in Hennepin County. From 1983 to 1994, Judge Davis was a Minnesota state court trial judge. He has been an Adjunct Professor at the University of Minnesota Law School for the last 27 years. He has lectured at Oxford University and the FBI Academy. In 1999, Chief Justice Rehnquist appointed Judge Davis to the United States Foreign Intelligence Surveillance Court for a seven-year term. Judge Davis received an Honorary Doctor of Laws degree in 2001 from Macalester College, and in 1989, he received the Outstanding Alumni Award. He was awarded the 2004 Judicial Professionalism Award by the Hennepin County Bar Association. Judge Davis served as President of the Minnesota Chapter of the Federal Bar Association 2004-05. Omega Psi Phi Fraternity, Inc. Epsilon Rho Chapter recognized Judge Davis as the 2005 Citizen of the Year. He is on the Board of Trustees for the University of Minnesota Foundation; an Advisory Board Member of the Jack Mason Law and Democracy Initiative, a project of Books for Africa; and is a member of the Sigma Pi Phi Omicron Boulé Fraternity. Judge Davis is married to Sara Wahl and they have two wonderful sons.

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Eric is a shareholder in the firm of Briggs and Morgan, Professional Association. After serving as Chief Justice of the Minnesota Supreme Court from 2008 to 2010, he rejoined Briggs' Business Litigation Section, and is a member of the firm's Appellate Practice Group. Eric practices principally in the areas of:

- Appellate law
- Business litigation

Eric's practice has focused almost exclusively in the state and federal appellate courts for more than 25 years, and he is regarded as one of the most effective and respected appellate lawyers in Minnesota and the 8th Circuit.

Appellate Law

In his more than 30 years of practice, Eric has developed a strong presence in appellate law. He has handled hundreds of appeals involving a wide range of issues, including the constitutionality of the public school finance system, employment law, trust and probate matters, trade secrets, business contracts, corporate fraud, insurance law and professional liability.

Eric's approach to client service involves collaboration. Working as a team member alongside general counsel and other private practice attorneys (both inside and outside the firm), he works to ensure the best possible representation for the client. He provides a full range of appellate consulting services, from evaluating appeals and procedural issues, to reviewing and critiquing briefs, and providing moot court review, all in addition to fully briefing and arguing cases himself.

Eric regularly speaks on technology and appeals, including electronic filing for appellate courts. He has served as an associate professor of law at William Mitchell College of Law and the University of St. Thomas School of Law.

He also writes and edits federal and state appellate treatises, including West Publishing's *Minnesota Practice: Appellate Rules Annotated*, Minnesota CLE's *Eighth Circuit Appellate Practice Manual*, and Matthew Bender's *The Art of Advocacy: Appeals.*

He is the founding president of the 8th Circuit Bar Association, a fellow and past president of the American Academy of Appellate Lawyers, and a longtime member of the American Bar Association, serving as co-chair of

the Appellate Practice Committee of the Section on Litigation and in the same capacity for the Appellate Advocacy Committee of the Tort Trial and Insurance Practice Section.

Eric is admitted to practice in Minnesota state and federal courts; the U.S. Court of Federal Claims; the 6th, 7th, 8th, 9th, 10th and Federal Circuit Courts of Appeals; and the U.S. Supreme Court.

Business Litigation

Although he is primarily an appellate lawyer, Eric regularly consults with trial attorneys on complex procedural and substantive issues in anticipation of appeal. His comprehensive legal consultation covers all aspects of pre-trial practice, monitoring the course of trials to ensure that proper record is made, and handling significant post-trial motions and arguments.

Eric has been selected continuously by his peers for inclusion in *Best Lawyers in America*, and has been recognized in the *Annual Guide to Appellate Law in America*. He has been listed in *Minnesota Super Lawyers* and was recognized as one of the designation's top 10 in 2007, before joining the Minnesota Supreme Court. He also was listed as one of the state's top 25 appellate lawyers in 2005, and recognized as a leading attorney by *Benchmark Litigation: Appellate*. In 2000, Eric was honored as an "Attorney of the Year" by *Minnesota Lawyer*.

After graduating *cum laude* from William Mitchell College of Law in 1976, Eric clerked for the Chief Justice of the Minnesota Supreme Court, the Honorable Robert J. Sheran. He joined Briggs and Morgan in 2007 after practicing nearly 30 years with another Twin Cities law firm, where he was successful in establishing a broad-based appellate practice. After a short time with Briggs, he was named the 21st Chief Justice of the Minnesota Supreme Court in June, 2008.

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Fish Bio | Experience | News

Michael Kane is a principal in Fish & Richardson's Twin Cities office. He uses his technical, business, and litigation skills to obtain the best results for clients involved in patent and trademark litigation. Mr. Kane specializes in complex patent litigation with a particular emphasis in the areas of pharmaceuticals, biotechnology, and electrical and medical devices. He has successfully handled complex litigation matters in district and appellate courts in addition to reaching excellent results through mediation and arbitration.

Before joining Fish & Richardson, Mr. Kane was an associate with a St. Paul, Minnesota law firm, where he focused on patent and other types of high technology litigation. From 1981 to 1992, he worked at Enron Corp. in a variety of engineering and contract negotiation positions.

Admissions

Minnesota 1994

United States Patent and Trademark Office 1996

United States District Court for the Western District of Wisconsin

United States District Court for the Western District of Texas

United States Court of Appeals for the Federal Circuit

United States Court of Appeals for the Tenth Circuit

Supreme Court of the United States

Education

BS, Iowa State University of Science and Technology 1981
Mechanical Engineering
with honors

JD, University of Minnesota Law School 1994
magna cum laude

Services

Litigation
Patent Litigation
Appellate
Hatch-Waxman

Sectors

Chemicals
Manufacturing
Medical Devices
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Based in Minneapolis, Minn., Rhea N. Frederick serves as a client relationship manager for Kroll Ontrack. Ms. Frederick has eight years of experience providing information management solutions that are consistent with industry best practices. She works regularly with Fortune 500 corporations to develop the most defensible, efficient and cost-effective approach when facing discovery or regulatory demands. An expert in the trends and legal responsibilities associated with electronic evidence, Ms. Frederick guides her clients through all phases of the Electronic Discovery Reference Model, ensuring compliance and efficiency at every stage. Her approach is comprehensive, candid and mindful of budget requirements.

Before joining Kroll Ontrack, Ms. Frederick was a regional sales manager for Quorum Litigation Services, where she was responsible for developing and managing relationships with law firm and corporate clients in the Mid-Atlantic Region.

Ms. Frederick received her J.D. from Suffolk University School of Law, Boston, Mass., and her B.A. from Emmanuel College, Boston, Mass.

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Practice Areas

- Products Liability
- Commercial Litigation
- Toxic Tort

Industries

- Manufacturing
- Insurance & Reinsurance
- Construction

Education

J.D., *cum laude*, University of Minnesota, 1985

B.A., University of Minnesota, 1981

Bar Admissions

Minnesota

Russell S. Ponessa

Practice Focus

Russ Ponessa is an experienced trial lawyer whose practice includes products liability, tort, toxic tort and chemical exposure, general business and commercial litigation matters in state and federal courts throughout the country.

Mr. Ponessa has spent more than two decades handling a wide variety of single- and multiple-claim lawsuits, often serving as coordinating and trial counsel. His clients include manufacturers and sellers of consumer, industrial and health care products and services, construction professionals and contractors, national insurers and claims administrators.

Representative Cases

Mr. Ponessa's representative cases include:

- *Dakota West Credit Union v. CUMIS Ins. Society, Inc.,* 532 F. Supp. 2d 1110 (D.N.D. 2008).
- *Hughes v. Black & Decker,* 2007 WL 10768 (D. Minn. Jan. 10, 2007) and 2007 WL 624333 (D. Minn. Jan. 24, 2007).
- *Wagoner v. Black & Decker,* 2006 WL 2289983 (D. Minn. Aug. 8, 2006).
- *Yoder v. Honeywell Inc.,* 104 F.3d 1215 (10th Cir. 1997).

Professional Background

Mr. Ponessa is certified as a Civil Trial Specialist by the National Board of Trial Advocacy and the Minnesota Civil Trial Certification Council. He holds the AV® Peer Review Rating from Martindale-Hubbell, its highest rating for ethics and legal ability.

Mr. Ponessa joined Hinshaw & Culbertson LLP in May 1997. He has been included on the Minnesota *Super Lawyer* list annually since 1998 (based on survey of lawyers and judges published in *Minneapolis/St. Paul* magazine and other Minnesota legal publications). In addition, Mr. Ponessa was selected for inclusion in the area of Personal Injury Defense: Products, in the 2009 and 2010 editions of *Super Lawyers Corporate Counsel*, focusing on "The Top Attorneys in Civil and Criminal Litigation."

He is a member of the American Bar Association (Health Law Section, Tort and Insurance Practice Section), the Minnesota State Bar Association (Litigation Section), the Defense Research Institute (Product Liability and Fire Loss Committees) and the Minnesota Defense Lawyers Association.

Publications and Presentations

Mr. Ponessa has written publications of interest to insurers and product manufacturers, and is a frequent speaker, instructor and adjunct professor on topics involving trial practice and jury matters.

Courts

U.S. District Court, District of Minnesota
U.S. District Court, District of Colorado
U.S. Court of Appeals, Eighth Circuit
U.S. Court of Appeals, Tenth Circuit

Jack Friedman
President
Directors Roundtable Institute

Jack Friedman is an executive and attorney active in diverse business and financial matters. He has appeared on ABC, CBS, NBC, CNN and PBS; and authored business articles in the Wall Street Journal, Barron's and the New York Times. He has served as an adjunct faculty member of Finance at Columbia University, NYU, UC (Berkeley) and UCLA. Mr. Friedman received his MBA in Finance and Economics from the Harvard Business School and a J.D. from the UCLA School of Law.