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

July 31, 2012 – Los Angeles, California

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DIRECTORS ROUNDTABLE
July 31, 2012
UCLA School of Law, Los Angeles, CA

Appreciation for their cooperation is given to Guests of Honor Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, Alex Kozinski; former Chief Judge of the U.S. Court of Appeals for the Tenth Circuit, now Dean of the Pepperdine University School of Law, Deanell Reece Tacha; and Norman L. Epstein, Presiding Justice of the California Court of Appeal (Second District, Division 4). Opening remarks were made by Dean Rachel Moran of the UCLA School of Law. We also thank UCLA School of Law, Pepperdine School of Law, and the Beverly Hills Bar Association for their assistance with this program.

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 have analyzed 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.

A unique series of parallel events with Chief Justices is being held in major cities nationwide. The Directors Roundtable Institute is a not-for-profit which organizes worldwide programming for Directors and their advisors.

GUESTS OF HONOR

Hon. Alex Kozinski	Chief Judge, Ninth Circuit Court of Appeals
Deanell Reece Tacha	Duane and Kelly Roberts Dean and Professor of Law, Pepperdine University School of Law; Former Chief Tenth Circuit Appellate Judge
Hon. Norman L. Epstein	Presiding Justice, California Court of Appeal (Second District, Division Four)

DISTINGUISHED PANELISTS

Richard Williams	Partner, Holland & Knight LLP
Mark Epstein	Partner, Munger Tolles & Olson LLP
Browning Marean	Partner, DLA Piper
Jack Friedman (Moderator)	Chairman, 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: Good evening. We wish to thank the audience for coming, and to thank all the speakers and our honored guests, who are judges and former judges, for joining us to share their wisdom tonight.

I am Jack Friedman, Chairman of the Directors Roundtable which has done 750 events in the last 22 years in the United States and 14 countries. The first event we ever did was by coincidence in this room. When 175 people showed up in the evening, walking in from the parking lot, I knew that we had a winning formula.

I'd like to introduce Dean Rachel Moran, who will speak on behalf of the UCLA Law School. We want to thank her and her staff for all their good work, and the special support and interest that they've showed us.

DEAN RACHEL MORAN: Thank you, Jack. We were extremely pleased when you called to say that you wanted to host the Directors Roundtable here. It was such a perfect fit for our mission and our traditions, and we couldn't wait to be a part of it. So it truly is a great pleasure to welcome you to this evening's panel on "Recognizing America's Judiciary, A Dialogue With Chief Justices on Key Issues for Leaders of Business and the Community." We believe that this forum fits perfectly with our goal of training citizen-lawyers who not only provide clients with the highest level of service but also consider the greater public good.

When the law school building was dedicated in 1951, Roscoe Pound, a former Dean at Harvard Law School who had come to be part of the great adventure of launching a public law school in the burgeoning city of Los Angeles, gave a speech to mark the occasion. He remarked that our law school would be a ministry of justice. He believed that UCLA law professors were

uniquely situated to address the pressing issues of the day with their cutting-edge research as well as through their daily interactions with the best and the brightest students. Pound's hope was that UCLA School of Law would have a transformative impact on the community in Los Angeles, the State of California, the United States, and the world.

Since the heady days of the law school's founding after World War II, we have been true to Pound's vision. We train students for leadership; our faculty produces highly influential scholarship; our programs and centers conduct impactful work; and our alumni, including several on tonight's panel, go on to distinguished careers marked by an ethic of service. In the brief time that I have, I can highlight only a few of these accomplishments, but I hope to give you a sense of the excitement and excellence that characterize life here at UCLA Law.

According to the most recent data we have from the American Bar Association on admissions at top 20 law schools, we draw our students from the fifth largest applicant pool in the nation and the largest of any top law school in California. Recently, our entering class had the sixth highest median LSAT and the ninth highest median GPA in the country. We bring talented young people from all walks of life to learn the lessons of citizen-lawyering, and we work hard to keep the dream of access to a legal education alive for each of them. Again, drawing on the ABA data, among the top 20 law schools, our student body is fourth in terms of the percentage who receive grants, and our grants are the tenth largest in size. These efforts are bearing fruit. A recent study published in the Denver *Law Review* found that of the elite law schools, UCLA law was the *only* one with meaningful socioeconomic diversity.

When these promising students arrive, we immerse them in a rich and stimulating learning environment. We begin with a week-long orientation, which is new this year, that introduces students to methods for analyzing cases, but also acquaints them with important

elements of professionalism. We believe that this experience allows them to begin developing their professional identities from day one. After the first year, students can select from a wide range of courses, including a number of specializations in areas like business law, entertainment law, public interest, law and philosophy, and critical race studies. During their time here, our students benefit from a range of opportunities for hands-on skills training. In fact, the vast majority of them will take some kind of clinical course that prepares them for the challenges of real-world practice. I also want to say that I am very proud that our students engage in a wide variety of extracurricular activities that enable them to be proactive in defining their own values and setting their own priorities. For example, our student-initiated pro bono clinics, known as El Centro Legal, were honored as UCLA's Community Service Program of the Year in 2011.

Our faculty are making a difference not just by teaching and mentoring students but also by shaping their fields. According to a recent analysis published in the *Michigan Law Review* — and I hasten to add, we had nothing to do with it; it was a totally independent study — UCLA Law faculty's recent scholarship was the fourth most influential in the country. UCLA ranked with Harvard, Yale and Chicago for where faculty were when they wrote the pieces and with Harvard, Yale and Stanford for where they are now.

As influential as our faculty's work is among peers and other law schools, this research actually reaches an even broader audience. The American Bar Association put together a list of the 100 most important legal blogs in the country, and UCLA was the only law school to have three on the list. The alumni here can probably guess what some of them are, but for those who are not alumni, they were ProfessorBainbridge.com, the Volokh Conspiracy, and Legal Planet, which is a joint initiative with Berkeley Law on environmental issues. Our faculty regularly testify before the legislature; their articles and books are cited by the courts; and they find their

way onto an array of power lists of thought leaders in a variety of areas.

I am also very proud to say that our programs and centers are having a similar impact. I am delighted to report that recently, the *Hollywood Reporter* — again, totally independently — conducted a survey of entertainment law programs at law schools around the nation and concluded that UCLA Law's was number one. As dean, I really like the ring of that. In explaining why we rose to the top, the survey noted that we had pioneered our curriculum long before other schools did, and this status as a first mover is entirely consistent with our tradition of innovation. We have been pioneers in clinical legal education and in public interest law, and we remain the only law school in the country to have a specialization in critical race studies. We launched the first program at an American law school devoted to issues of climate change law and policy, and we still have the only program that focuses on questions of sexual orientation law and policy. Our newly created Lowell Milken Institute for Business Law and Policy is now setting the pace for training students for careers in a rapidly changing global economy. In short, our programs and centers are at the forefront of law and policy reform, and the work of our faculty and programs is widely cited and regularly recognized with awards and honors.

As important as all of these achievements are, our remarkable alumni, now numbering approximately 14,000, greatly multiply the impact of this law school experience. As a faculty member, I never fully appreciated what law students go to accomplish, but as Dean, one of my favorite parts of the job is going out, meeting alumni, and hearing about what they do with their degrees. The J.D. is an incredibly versatile credential, and we have alumni who have excelled in private practice, public interest, government, and business. Tonight's panel includes three of these highly-accomplished alumni: Chief Judge Alex Kozinski, Presiding Justice Norman L. Epstein, and Jack Friedman. I should also mention that two of our graduates — Jacqueline

Nguyen and Paul Watford — recently were confirmed to the Ninth Circuit Court of Appeals. With their appointments, UCLA Law now has the largest number of alumni on that court of any American law school, having just surpassed Harvard. Judge Nguyen and Judge Watford will be joining Chief Judge Kozinski, as well as Judges Dorothy Nelson, Sandra Segal Ikuta, and Kim McLane Wardlaw. We are very proud of all of them and grateful for the remarkable service they perform.

We also welcome the other distinguished guests of honor and members of the panel, the Honorable Deanell Reece Tacha, Richard Williams, Mark Epstein, and Browning Marean, as well as all of you in the audience who have taken time from your busy schedules to take part in today's dialogue on one of America's great treasures — an independent judiciary that safeguards our rights and liberties and protects the foundation of a sound government and healthy democracy. All of these efforts, in turn, provide the backdrop of stability and fairness essential to a robust economy.

We are proud to host this important discussion, and eager to let the conversation begin. So without further ado, I will turn the podium back over to Jack Friedman, who has done such a wonderful job of organizing this terrific event. Thank you.

JACK FRIEDMAN: As Chairman of the Directors Roundtable, I want to say how we got started. We do programming at no cost to attend for Directors and their advisors on a global basis. The very first of our 750 events followed a conversation that I had with Bill Warren, Emeritus Professor here — I was his research assistant a number of years ago. He said there really was a need for UCLA, both the Law School and the Business School, to bring leaders on campus. We invited leading bankruptcy lawyers from around the country, which was a hot topic in those days (it still is) to come to Los Angeles. The first event was 550 lawyers at the Beverly

Wilshire Hotel. I was followed in this room by the first regular Roundtable program I mentioned earlier, and we've been off and running. When you go through law school, which is hard and demoralizing, if you have one faculty member who has respect for you, you feel it will all go fine. Bill Warren treated me with respect and inspired me, and I want to thank him very much for his influence on my life and my career.

This series of programs with Judges and Justices will be both national and global. I've already started speaking with leaders in Germany, France, Canada, Japan and elsewhere. We feel that the issue of the rule of law is something that needs more recognition on a global basis. Unfortunately, there's a tendency for many people to feel that a judge gets up in the morning and says, "I'm looking forward to going to work today because I'm going to impose my personal values on everybody who comes in front of me." Also, the judiciary is often taken for granted. Citizens don't necessarily have a feeling for what judges and the judiciary are really all about; how important it is for society, here and abroad; and the importance of supporting an effective judiciary including budgets.

In addition to the UCLA Law School, the Dean and the staff, I'd like to thank the people at Pepperdine, who were very nice to us, and also the Beverly Hills Bar Association. The success and importance of the judiciary has been recognized by that bar for decades. I want to thank all these groups.

We're audiotaping each of these events for a written transcript which will be made available to tens of thousands of people in each region as we go through the country and abroad. What's said here will be projected out.

Without further ado, we will start with Dick Williams.

RICHARD WILLIAMS: Good evening! I'm Dick Williams. I'm from the firm of

Holland & Knight, downtown, and I want to talk about a pinpoint view of our local judicial system. Later this evening, we're going to be talking about a broader context of the courts in California and the courts in the United States, but let's begin in Los Angeles.

Our Federal District Court here in the Central District is the busiest of district courts in the United States — 15,000 new civil cases last year. Our Superior Court in Los Angeles is, by far, the busiest in the State of California. One-fourth of all California Superior Court judges are in Los Angeles. What a workload they have! The number of new filings last year divided by the number of judges is *five thousand* cases. It's barely above the State average; not as bad as that one poor county that has 7,200 filings per judge, but this is L.A.! It's big-time.

The funding problems of our courts are *really* felt painfully in Los Angeles. In the last couple of years, we've lost nearly $600 million in judicial funding in the State system; and, barring the passage of the tax increase in the November ballot, we will lose *another* $600 million this coming January.

As you know, those of you living here, we have closed courtrooms; we have lost *hundreds and hundreds* of court staff; we have closed many programs; technology is stopped; we are really in a desperate pinch.

So the loss of *another* ten percent of judicial funding across the state, felt hardest here, is going to be devastating.

Fewer cases go to trial. When I started out, lots of cases went to trial! You called yourself a trial lawyer! My first trial was six months long! Incredible! Last year, in the Central District, there was *one* civil trial longer than 20 days. One. There were nine criminal trials longer than 20 days, but only nine. Out of 6,000 cases that came into that court.

So the opportunity that we proclaim in civics classes to our high school youth — "Your

case can go to a trial before a jury of your peers" — is hollowed out by a lack of funding. We really need the business community to join with the bar to staunch that.

Business has a huge stake in the civil justice system. If you take out the individual cases — student loan cases or Social Security cases — seventy-three percent of the civil cases in the United States federal courts have business on one side or the other, or both sides. Seventy-three percent. In the state court system, because of the huge number of criminal cases, including traffic cases, the numbers don't work quite the same way, but among unlimited civil cases, it is still more than half are business cases: contracts, products, and fraud. Issues that are sublimely accessible to jurors assessing credibility, trying to decide who they believe. But it's increasingly unavailable.

So I urge your support for the increase of judicial funding in California and in the nation, and I'm giving you a few pages of materials describing it more fully. There are a few things that can be done before, and without additional funding, that might lubricate the system and move cases along, and I suggest those in pages starting at 3 and 4 in the materials and going onward. But one of them, the Los Angeles Superior Court allows parties to agree to use a service called "case anywhere," to do electronic service, to maintain an electronic docket, to maintain an e-mail bulletin board. When was the last time a judge sent you an e-mail?

Business practices, coming to the courts, allowing them greater flexibility and speed. I want to encourage that. I want to encourage the County Bar Foundation here in Los Angeles to solicit and use charitable tax-deductible contributions to give your judges iPads. Sixty percent of the federal judges have them! Virtually no state judges anywhere in the country, outside of New York City, have those. But if you've got them, what you notice is the judge uses them, uses them for note-taking, for research, for orders, for communications with counsel. It really does

help speed up cases.

For those trials, we want to have them, but we will need the discipline of the clock. There are so many hours that are allocated for the trial of this case, to be split as the judge determines most equitable for the particular matter. But let's say 50/50. You've now got 5, 10, 15 hours, 20 hours, whatever it takes in a given case, to do your opening statement, closing argument, present your witnesses, cross-examine the other side.

I've done these trials by clock. Most of the federal system has done them this way. We've got to do it in the state system. We've got to help our judges with greater flexibility in how they may order the management of cases, particularly before pretrial, when we're trying to dispose of over ninety percent of our civil cases. So we've got to do it in a more orderly way.

Business, you and we will be the greatest to suffer, if we fail to do this.

JACK FRIEDMAN: Thank you. I'd like to have Browning Marean speak next.

BROWNING MAREAN: Thank you. I'm Browning Marean, and I'm on a work-release program from DLA Piper's San Diego office. I don't normally say that in front of judges, but it's the firm's new program for us.

I've been practicing now 42 years, and my sense of what the greatest change that's happened in those 42 years really relates to electronic discovery and the growth of computers, and it is a challenge both for the judiciary, the bar, and particularly for businesses.

But there was a study done at UC Berkeley in about 2003 that said that ninety-five percent of all data in the country was now being produced in the first instance on computers, and the vast majority of it, never printed out. When we began my practice, it was bankers' boxes, and now it's gigabytes and terabytes of data.

Just to give you an example, and maybe this will improve your cocktail party talk, when

people come up to you, you can lay the following fact on them: One gigabyte of data translates to about 75,000 pages of material, on average. It costs about $18,000 from the beginning of a case to the end to deal with that one gigabyte of data. We're now seeing cases that involve terabytes of data, and God help us all if we get to petabytes of data, remembering it goes up a thousand-fold each time.

The big challenge for businesses is to deal with the extraordinary costs associated with it. It is a cash flow hemorrhage, and for the profession, for the legal profession, it comes down to an issue of competence. The case that I handed out, *Apple v. Samsung*, is as an example. If you are not familiar with the field, take a look at what was going on in that case. Disclaimer: My firm represents both Apple and Samsung; we've got nothing to do with this case. But the point of it is, read through it, and you may come up with a hot flash of incompetence when you read it, because you say, "What on Earth are they talking about here?" Yet, I guarantee you, this is the stuff that is going on in civil litigation — criminal litigation, as well — you see it in child pornography cases; you see it in fraud cases, and the like. It's a huge challenge for law schools now, what kind of teaching should law schools be doing to raise up a next generation of students. That's my brief overview.

JACK FRIEDMAN: I want to thank Dick and Browning. Our next speaker is Mark Epstein.

MARK EPSTEIN: I'm going to talk about something different. Now for something completely different, and for those of you who know Monty Python, you'll know where that came from.

It's five o'clock on a Saturday; you're a director of Acme Corporation. The phone rings, and it's the call you've been dreading. It's the general counsel letting you know that you are

now the defendant on the bottom of the "V" in a $10 billion lawsuit alleging that you were asleep at the switch when Acme made the decision to acquire Omega Corporation, which turned out to be the black hole of money. What do you do? You are named *personally* in this lawsuit, and while, yes, you have insurance, and the general counsel was quick to assure you that the courts are friendly, this case will be gone in 30 days (maybe 60, 90…) (maybe next year…), it will be done and you shouldn't worry about a thing. You're trying to remember back to those days when you were deciding whether to buy Omega Company, and you were assured the people were looking at documents and doing due diligence. It seemed like a really good idea at the time. So now, what do you do? What do you hope the general counsel did so that this lawsuit that's just been filed and ruined your whole weekend, is going to get either thrown out, or the plaintiff will lose interest and realize that they're going to litigate it for a while, but they're not going to get any money out of it. What's going to happen?

This is becoming a real problem, because when times are bad, corporate profits tend to decline. Risks that seemed like a good idea at the time, and would have been a good idea had the economy continued to flourish, now look like really, really bad, even stupid ideas in the benefit of hindsight. Yet, if corporate directors can't take risks, our companies don't make money. So what do we do to balance the risks that directors can take, and what would you, as a general counsel, to advise your board against the problem of the derivative lawsuit — the $10 billion lawsuit.

This is exacerbated a little bit because every now and again, one of these cases hits. Just about two years ago, the Delaware Court of Chancery awarded a plaintiffs' law firm attorneys' fees of $300 million in a derivative lawsuit. So, some plaintiffs' law firms are encouraged by this. It's a heck of a payday. I'm in the wrong line of business.

So what do you do? Well, you can read about it in the materials that I sent out, but a couple of things that you can do and that, really, corporate general counsel should do, is to use the strongest tool that a board of directors has at hand. By the time you got the call, it's too late. What you have at hand when you're a director of a corporation is you have the ability to create the record in real time. When you are making the decision, you have the ability, or the company has the ability, to document the decisions that are being made, to document the work that the board is doing to manage and mitigate risk, so that the record is there, right away, when the plaintiffs decide to bring their lawsuit. This is important, because the plaintiffs get free discovery in a derivative lawsuit. They can't file a request for production, but they can file a books and records demand, and the Delaware Supreme Court has said a demand by a plaintiff for books and records is valid, and the corporation has to turn over those books and records, even if the avowed purpose of the request is to bring a lawsuit.

So what do you do? Zen! You embrace it! You embrace Section 220, because you have the ability, if you're the general counsel, to create the record. You can create those minutes that demonstrate that the board of directors did consider the risks; that the board of directors did have a discussion about the pros and cons; that the board of directors did look at the due diligence that was being done. You can create that record by putting it in the minutes, by having board materials, and then when the plaintiff jauntily gives you that Section 220 demand, expecting to find the dearth of information that is going to form the tent pole of their $20 billion complaint and ruin your Saturday, what they get instead is a bunch of documents that show you did your job.

If you can show that, either the plaintiffs won't sue or the courts will come to your rescue with the Business Judgment Rule, which says that courts will not second-guess a board of

directors when it exercises its business judgment. The only thing the court wants to know is that, in fact, the board *did* exercise its business judgment. Only if you are so asleep at the switch that you knew you weren't, that's the only time the courts get involved.

So, the punch line of this — and then I'll let things go, because I was told I only had five minutes, and I've used them, and the red light's not going on, because I'm not in the Ninth Circuit — the punch line of it is that, as a director, if you do your job, and as a general counsel, if you do yours, you can create the evidentiary record that shows that business judgment was, in fact, being exercised. Then, when you get the call at five o'clock on a Saturday, you know that within, maybe 90 days, the case really will be dismissed, and you can apply for that mortgage without having to disclose the $20 million lawsuit in which you are a defendant.

JACK FRIEDMAN: Before we move on to discuss with the judges, I have one question. Twenty years ago, I would speak to general counsel who were corporate secretaries sitting in the boardroom, about what are the pros and cons of having everything detailed in the boardroom rather than just have the records be very general, because of discovery. In those days, the general practice around the United States was the least put in writing, the better. I'm not saying what advice you personally give, but there are three active litigators here now, and the obvious question, from a business point of view, is if legally you have the option of putting a lot of things in writing or not, what are the pros and cons of doing that in today's environment?

MARK EPSTEIN: I have to jump in with a quick answer, and then I'll turn it over. One of the cases in which I was involved was the *Disney* derivative litigation case, the case in which an officer and director of Disney was sued after being let go after a year, and he had a very large severance package. A derivative lawsuit was filed, got past the Motion to Dismiss, discovery was done, and the case went to trial in the State of Delaware, and one of the reasons

that it did was because the minutes were very, very bare bones. The plaintiff was able to make the argument that there is nothing in the official record that supports the notion that the board did anything to think about the issues, the risks that ultimately came to pass, and a colleague of mine who tried that case with me gave a talk later on called "No More Mickey Mouse Minutes." I can't take credit for it — I wish I could! Maybe in another talk, I will!

But the point is, you don't want the minutes too detailed — it's not a transcript of what is said. You don't want it to go through confidential information that you'd rather not have your competitor know if the 220 demand is out there. But it *can* demonstrate, procedurally, what you've done and the care you've taken, and if the minutes do reflect that, that is going to be strong support for you when you bring the Motion to Dismiss to say that the board actually did think about it.

So minutes should be more than bare bones. But certainly, you want to be careful not to disclose confidential information.

RICHARD WILLIAMS: Absolutely, Jack, and I would agree with Mark here — let's just take a recent example. You're Jamie Dimon. You're chairman of JPMorgan. You're sitting down with your lead independent director at a Sarbanes-Oxley Act creation following Enron. You remember that you must disclose everything material when you certify those financial statements each quarter, or you're subject to huge civil and criminal penalties, including, worst of all, the clawback of your bonus! My God! You're trying to explain to the lead director how you have managed financial risk in your worldwide organization, but somehow never met the London Whale who's now cost you $8 billion! It's too late to do the minutes at that point.

So, adding to what Mark has said, part of the world of compliance post-Sarbanes-Oxley, post-Enron, is the general counsel and the independent directors on the board marry one another.

They really need to spend time together, and they really need to talk candidly with the CEO and the chief financial officer to make sure they know what is actually happening!

MAREAN BROWNING: Where I think the body is buried is in the outside directors' GMail and Hotmail accounts, where they're talking outside of the carefully crafted minutes. Because if you get into those things, you know, one bad e-mail, will ruin your entire case. But that's where it's buried.

JACK FRIEDMAN: How does a company correct the record when somebody has written a really stupid memo? If he or she didn't get approval from anybody, it's just someone giving their opinion, like, "Our clients are stupid and we're taking advantage of them."

RICHARD WILLIAMS: Jack, at Mark's firm and mine, we're very careful to select our clients to de-select ones that would present that problem.

JACK FRIEDMAN: With all the business e-mails that go on in the world today, how do you correct the smoking gun?

HON. ALEX KOZINSKI: Don't delete!

JACK FRIEDMAN: Don't delete? It looks suspicious?

HON. ALEX KOZINSKI: Don't delete! You can't delete anything! Nothing can ever be deleted, and it looks so much worse, because at that point you're trying to delete it! It must be significant!

DEANELL REECE TACHA: Or reform. Don't try to reform it, either. Not only do not delete — do not reform it. I remember a case once where a corporation tried to change the language of an e-mail. That attempt itself was just damning! It was just the indictment, right there.

JACK FRIEDMAN: It wasn't that they had a succeeding email saying, "Your comment

is a personal comment; it doesn't reflect our policy," but they actually tried to pass it off as the original e-mail by editing it.

HON. ALEX KOZINSKI: Whatever you do is only going to make things worse. You cannot make things better. It is what it is. A fact is a fact. A document is a document. A horrible e-mail is a horrible e-mail. *Anything* you try to do to fix it, explain it, modify it, put it in a different light, is going to come back and bite you. It might even put you in jail.

JACK FRIEDMAN: You can't do a refuting e-mail?

HON. ALEX KOZINSKI: Once litigation has started, it's too late. Anything you do at that point will be cast by the opposing lawyer in the worst possible light. It'll get covered up, and the cover-up is always worse than the actual thing itself. The thing itself might pass, might be construed, might be explained in a trial, you might be able to come up with some explanation, but once you start messing with it, then you might as well put out a neon sign and say, "I am wrong! I am guilty! I done wrong!"

JACK FRIEDMAN: Let me give you an example.

HON. ALEX KOZINSKI: You're not going to persuade me! [laughter]

MARK EPSTEIN: I could say something, but I won't!

HON. ALEX KOZINSKI: Don't let him persuade you. He's wrong on this one!

JACK FRIEDMAN: Here's a real-world question. Someone in middle management somewhere writes an e-mail. It is his personal opinion about a client or a product which is damning. Then, later, but not during litigation, it comes to the attention of a high superior. Someone says, "I just ran across this e-mail and I'm shocked by what they said, and it's all wrong." What do we do about it? Do we just write him an e-mail saying, "It just got to our attention that you wrote this e-mail and we want to say, in no uncertain terms, that it is not the

attitude of management or what we think of our clients or our product." But eventually — don't you have to put on the record, somehow, that someone high up happened to see it later, and wanted to denounce it or refute it? Or you just let it go by? You just say, "Well, I'm not even going to write an e-mail telling him that we thought it was junk that he wrote."

BROWNING MAREAN: The quick answer to the question is that the chances of it being irrelevant to a claim or defense in a litigation, or the fact that litigation is not being anticipated, is really a rare event these days. You know, the average Fortune 500 company's got something like 125 major litigations going at any one time, and for corporations, as well as for law firms, the biggest challenge with e-discovery is knowing when the trigger occurs. That is, when you have to stop the deletion of things — that's what this *Apple Samsung* case is about — and so unless you really catch it early and have some of these very sophisticated systems — the financial services community, for example, because of SEC Reg. 17a-4, have certain systems in place where they have to audit what their broker-dealers are doing, and what they're telling their customers. They've got sophisticated systems that will flag inappropriate e-mails, and then they can go and deal with them. But the average company simply doesn't have the time, money, effort or resources to go through and filter out every stupid e-mail that people write.

RICHARD WILLIAMS: So what you find is, first of all, the system operates democratically. If I write a naughty e-mail about Deanell, I promise you that she and her friends will circulate copies of it! It's not one smoking gun.

DEANELL REECE TACHA: You can bet on it! [laughter]

RICHARD WILLIAMS: —it's a firing squad! So, you'll find it. The second thing is, compliance is the law in so many areas now. So, if it was the sexual harassment e-mail, or the foreign corrupt payment e-mail, that's got to be reported up, discipline has to be imposed, the

system has to be sterilized so that it will not recur. If it doesn't happen, somebody higher up is going to pay for it!

So, that's why we're not so concerned about "we do ignore it" — you can't afford to. So many cases are built on it. As Browning was saying, if you're a large company, you've got 125 cases going at once. In every one of those cases, there's a litigation hold saying "Don't destroy the documents that might relate to this case!" Those puppies overlap in time and in scope. That's why, as Browning said, you can't delete anything, ever! Almost. It's nearly that bad for the smaller company. Imagine the start-up, the entrepreneur who knows it all, who's done it all, who's won it all, and now some pipsqueak in the shipping department is raising hell with a naughty e-mail.

You don't tend to get the most mature reaction unless you, as counsel, can get in there and help bring this person to the next generation of management of his or her enterprise.

JACK FRIEDMAN: Let me ask you another question. When a director gets a notice, or information that some serious corporate matter has arisen, I assume they have to be straightened out as to which counsel represents them. The company was named, and each individual was named. Is the usual corporate counsel going to represent individuals too, and of course, who's going to pay the bill as the meter starts running?

MARK EPSTEIN: The company's got to pay the bill. And the answer is yes, you do need to straighten it out, and it's going to vary, to some degree, from case to case. Almost always, at the beginning, the outside directors, at least, will be represented by one lawyer commonly, unless there is reason to believe that some of the outside directors are in a different position. I've always thought, as a practitioner, having the board fracture with different lawyers can sometimes send the wrong message to the court and the wrong message to plaintiffs.

Now, if the case progresses to the point where there's some discovery and they are now coming after my computer to look at my e-mail, maybe then, it's a little bit different. But, at least in the early stages, I think the general counsel would say that there should not be a lawyer for every director; it's a bad idea.

RICHARD WILLIAMS: You do get some difficulties when the director inquires about the quality of the insurance coverage that's available to him. There are many corporate director and officer policies that, for example, do not cover your expenses of your own counsel checking up to make sure what's happening, or the investigative stage of the case, when somebody puts the finger on you. Or once the finger is on you, would you get a Rolls Royce coverage as the ostensibly innocent director? So, one of the problems of being a director, and this includes a director of a non-profit these days — take a large charity or a university — you are really under the same issues. You do not have as deep and thorough insurance coverage as they blithely tell you on the day they congratulate you for being elected a trustee or a director.

JACK FRIEDMAN: I assume that one of the big issues before judges is the credibility of the parties in front of them, whether it's trial or appellate. What are some of the red flags that would be examples of things that are important to judges, in terms of what's being brought before them as arguments or evidence?

DEANELL REECE TACHA: Well, we probably all would say similar things. Obviously, changing positions for litigation is not a good idea. So, having a consistent set of corporate guidelines, or ways of operating would be one important step to take. One of the prophylactics that I was thinking about when you were talking about the bad e-mail situation is training. I have seen cases that, to some degree, turned on the extent to which the corporation trained people about X or Y or Z — their products, for example, in a products liability case; who

is to raise the flag right away? Whistleblower policies and how a corporation works with whistleblowers is important. It's not just about the reaction of the corporation; it is about how the corporation has acted consistently over time. The Sarbanes-Oxley point is so important. That changed the game rather significantly, because Sarbanes-Oxley added to this mix of credibility — the signing on the dotted line that everything that's being reported is accurate — so that is whether it's the Mickey Mouse minutes or any other reporting. I was sitting here thinking, "Oh, my gosh, I've seen so many minutes that said 'We convened at X hour and we let out at Y hour,' and in between, there were three hours, and what happened — we passed one resolution." So, I think there's a very happy medium on corporate records, a happy medium that says, "We considered the real estate values of X." You don't have to say address, you don't have to say properties; you simply say, "We considered it." I think it is very useful to actually name folks that participated in the discussion. You don't have to say what they said, but when you name who participated, you name broader due diligence.

Another very important credibility issue in corporate America is who knew what, up the line. The joker who didn't know who the Whale was. You have to know who's making the big decisions along the line and the board needs to be informed. The CEO, for sure, needs to be informed. Records of what's happening along the line are needed. I was sitting here thinking back to big cases that I've had. Some of them were big products liability cases, where some folks are out there on the assembly line and other folks are up in the corporate offices who didn't even know how the widget was made. If they didn't know how the widget was made, they certainly didn't know who was making the widget. Those would be my considerations.

JACK FRIEDMAN: Judge Epstein?

HON. NORMAN L. EPSTEIN: Sometimes, no matter how careful you are, things go

wrong. Most substantial cases that I've seen as a trial judge, as an appellate judge, and as a practicing attorney, there is something wrong on each side. There is some weakness; there is some problem. It's not a slam-dunk. One of the most common errors I see, particularly on appeal, is where one side, having that, knowing they've got a problem with their case, figured they can get away with it by ignoring it. Somehow it'll go away. Maybe the other side won't point it out, or maybe the other side isn't articulate enough to point it out. Maybe the court will overlook it. If you've got a problem like that, no matter how bad it is, you've got to deal with it. It's better to deal with it, take your lumps if you have to, but make the best you can out of it, than try to ignore it and really get slammed.

JACK FRIEDMAN: Would you like to add something?

HON. ALEX KOZINSKI: I don't much know about this stuff, because most of the stuff I see comes in a sealed record. So I don't really have that much experience with what people should do on a day-to-day basis. [laughter]

My wife used to be general counsel for a couple of companies, and I'll tell you, what I took away from her experience was that it's very hard to get business people to focus on the stuff that the lawyers here are talking about, which is very important. They are out and they want to do what they want to do, and compliance is not big on their agenda. It is an obstacle, not a means of accomplishing an end. In a sense, what Mark was saying about creating the record, basically you, the lawyer, have to create the record out of whole cloth. The minutes, you've got to make them sound convincing, like you really did something for three hours. But, you know it didn't happen! But it's good to have a nice little package there and try to put it in. But invariably, because people are sloppy and because people don't care about these things, and because you hire people who become dissidents or become disaffected, you're going to have

something in there that you are really going to hate having in there. No matter how well you prepare, there is going to be that killer thing in there that you have to deal with, and I have to agree with Norm—lots of people try to ignore it, and then they get slammed with it. You've got to deal with it in one way or another.

Now, having said all that, I'm just going to step back and reflect a little bit on the last three quarters of a century, starting with the 1938 rules and the whole procedural revolution of the middle and latter half of the twentieth century. We've become wedded to this idea that if you just have more discovery and more trial and more chances to put stuff before a jury, then you're going to get more justice, and justice consists of everybody getting a chance to tell their case. Well, what happens is, it was getting bad enough as a theory on its own, when we're dealing with paper, but then it ran smack dab into the information age, where everything is done electronically and things are never destroyed. You literally cannot delete anything or erase anything, because nothing ever gets erased, because there are backups and backups and backups and backups and backups and backups and tapes. So there's the process of digging through this procedural archeology, and then Congress goes and helps out by passing things like Sarbanes-Oxley, which creates more paperwork and more trails and more occasions for mistakes and more places to stumble. It's become a serious drag on the ability to do business in this country. It's really one of those things we need to stop and reflect. Procedure is like a religion, this idea that just more procedure and more finding of facts and more discovery and more putting lawyers on a case will get you better justice. It doesn't get you better justice. It gets you more expensive justice. It doesn't get you worse justice. It's one of those things where we, as a society, and we, as a profession, ought to sit back and ask ourselves, "Is it really a good idea? Are we really serving the public? Is this really serving society?" It seemed like it was a pretty good idea to

have discovery, it's a pretty good idea to have full disclosure, it's a pretty good idea to let cases come to trial rather than having them cut off with a Motion to Dismiss or Summary Judgment or because it was a trespass on the case, those common law causes of action. But we've gone too far! We've just gone way too far. At this point, we, as a profession, are a drag in many ways on society and a drag on the people who do things that are productive. They actually create goods and services for the rest of us to consume. It's something to think about.

JACK FRIEDMAN: I assume that you must see in the course of your appellate career, a record that's been established in the trial court where you must think, "Nobody addressed this or asked this question. I'm dying to ask this question." Could you comment from the appellate point of view, what are some of the problems that you see from the trial record, where you don't have the witnesses in front of you to personally ask them a specific question?

HON. NORMAN L. EPSTEIN: Well, of course from an appellate point of view, we don't re-weigh the facts; that's done by the jury, if there is a jury, or it's done by the trial court. We don't re-weigh the facts. [laughter]

But nevertheless, we deal with the facts; we consider whether there's a logical inference or not. We deal with the procedural things that have gone on. We deal with evident error that is often made.

When I attended the Judges College as a new judge, one piece of instruction was, when you make a ruling, never explain why you're making it. Because you may be right for the wrong reason. Except for those rare situations where the law requires that you give a reason, don't give one.

I've always rebelled at that. I don't think our job is to bury error; nevertheless, there is a limit to what you say. But on important rulings, the judge ought to explain why he or she is

doing what is being done. My feeling, as a trial judge, is I would rather have the appellate judge see what I did on the basis of what I'm thinking about it, rather than having it filtered through what the lawyer says when the matter is presented on appeal. But basically, though, at the appellate level, our job is reactive. We cannot control how the trial is going to go; it's already gone. We simply look at the record and apply what we think is the correct law to that record. One of the glories, maybe the chief one, of the appellate system, is that in the main, it's not enough to say *what*. It's not enough to say yes or no, affirmed or reversed. We have to say *why*, and we have to articulate it in a way. No one wants to look a fool, and if what you've said when you've weighed it out just doesn't work, you're going to look foolish, and nobody wants to do that. There is an appellate adage: "If it won't write, it's not right." If you can't write this in a way that's convincing, it's probably because you're wrong.

You ought to go back and think of it again. Sometimes, trial judges may take that advice to heart.

HON. ALEX KOZINSKI: We have a similar saying: If it don't write, get a better law clerk!

[laughter]

DEANELL REECE TACHA: Yes, I wanted to just comment a little bit more on Alex's point, because it's *such* an important one. We have, to some extent, done it to ourselves, this blizzard of discovery. When you're an appellate judge and you are sitting there — it used to be boxes — now it's gigabytes and megabytes and petabytes and whatever else it is! There really is only one or perhaps two issues that are worthy of some kind of appellate review, given standards of review and so on. The judge is looking at *all* of this discovery that a good law clerk will have to go through. It usually ends up that the amount of a record that is relevant to the issues on

appeal is a very narrow part. One of the things that could be done by good counsel for all of these court crises is simply limiting the appellate record by agreement. You can do it at the trial level, too. Many good trial judges are entering good, narrow pre-trial orders, conference orders, very narrowing orders that are agreed upon. That helps everybody. Then, on appeal, it is the same thing. If you could simply agree on what is in the appellate record. I know the Ninth Circuit has absolutely clear rules, and I think my circuit had absolutely clear rules, about what gets certified into the record. It doesn't matter what the rule says; the record is always *way* bigger than what is relevant to the issues on appeal.

One more issue, and this is especially important to the business community. Be very aware of what the standard of review is for whatever issue you're taking up. For a corporate client, for example, if you're — I noted the laughter about "we don't re-weigh the facts." I'm not sure quite what that meant, but — we *don't* re-weigh the facts! If it is just factual, it's a tough way to go! If, however, it is agency action — I come from a circuit where there was a lot of corporation vs. agency action, particularly in the natural resource area — then you've got some big deference issues to overcome. I think that anybody involved in corporate regulatory areas must give a lot of thought to how high the bar is on the standard of review. Clients will want to appeal. But good analysis of the issues and the standard of review is terribly important.

RICHARD WILLIAMS: To add to what both Judge Kozinski and the Dean have just mentioned, there are a lot of things that business can do, and some businesses *do*, that will help control the discovery issues. One thing, business runs on budgets. If you can measure it, you will budget for it, you will control for it, and increasingly, that includes your lawyers (God help us!). Ah! We long for the good, old days! But we've got budgets!

Well, one aspect of that are the costs of discovery. So you, frankly, do your lawyers a

service by helping them in identifying how you might constrain and limit what really may be at issue. Judges at the trial court need to seize control, and need to, in the first 60, 90 days of the case, say, "Folks, what is it we actually need discovery on? Can we do this in a sequence? This is an issue that's of greatest importance; let's do limited discovery on this issue now; then, depending on how it turns out, we'll move to the issue and move to the next issue." Judges have the power, if they will exercise it — and there's going to be at least one side in every case that will be aching for the judge to exercise that power, to try and control and introduce the principle of proportionality, of cost benefit, if you will, to discovery.

BROWNING MAREAN: Further to Dick's point, what we're seeing now, and I'll use Chief Judge Rader of the Federal Circuit has promulgated a protocol for IP cases. They wouldn't work for general civil cases, but they really do appear to be very, very useful in IP cases. So I think, in the Federal court, at least, you are seeing the rise of a whole series of protocols. We're working on a series in the Southern District of California that is an amalgam of some of the protocols around the country.

The challenge in state court in California, we basically adopted a series of rules very similar to the federal rules, with some differences in our *Code of Civil Procedure*, about a year and a half ago. The problem is that you can't get in front of a judge in state court to resolve many of these issues until way down the line, and that's a huge problem and a calculus of whether you go to state court or federal court. If you can get into federal court, you're going to get greater judicial supervision and greater attention to Federal Rule 26(b)(2)(B), which really mandates the kind of proportionality that the Judge was talking about.

RICHARD WILLIAMS: So here's where the budget crisis is really biting at business in California.

There's a separate problem that we're not talking about with regard to these discovery battles, but the *Apple v. Samsung* case is an example.

JACK FRIEDMAN: We'll get back to this big issue. For now, I'd like Judge Epstein to make a few more comments.

HON. NORMAN L. EPSTEIN: Well, I did want to say something about the impact of the budget problem on you and business here. But this last comment ties in as one of the things that might be done.

When we have a crisis, such as the one we do now, one of the silver linings is it forces the courts and counsel and everyone else, or it should, to take another look at what they're doing and see if they can find a better and more efficient way to do it. One of the things Los Angeles Superior Court has instituted is called the "Efficient Litigation Stipulation Program". It is like a "tentative tentative." If you have a discovery battle, the lawyers can come in and talk to the judge informally — "Well, what do you think about that? What do you think we could do about this? How can we handle this?" The judge will give a "tentative tentative." "Well, if I was faced with that, generally, I think this might be pared down, and see what you can do." The lawyers will go out, and they have been in Los Angeles in the courts that do this — they're doing it in Central Civil, downtown — and see if they can't pare it down. We have a direct calendaring system in Los Angeles County and every one of the Superior Courts on Civil except one district that doesn't, but all the others do.

So, everything's going to be before that judge. If this is what the judge wants you to do, it's something that you ought to seriously consider doing, and, indeed, if it works, it's something that ought to save your client money and speed things along.

From what I've understood, it's working pretty well. It works better with some judges

than others, but they're all trying, and this is an example of an innovative thing that, for whatever reason, we hadn't been doing before, but that we're doing now, it ought to make the system a little better.

JACK FRIEDMAN: Judge Kozinski, could you comment a bit about the budget and budget constraints. Also, is there investment in new technology at the federal level?

HON. ALEX KOZINSKI: Well, we've had cutbacks, but we're in reasonably good shape. Our biggest shortfall is appointment of judges. We have certain districts in particular where we badly need new judicial positions created, such as the Eastern District of California, Arizona, and a couple of other places in the country. There's an emergency bill going through Congress that is supposed to create judicial positions in those districts. It's stalled, I don't know where it's going, but it's not going forward. That's very bad, because cases get stuck. But in general, we are in considerably better shape than the state courts. We don't lack technology; I think we have too much technology, myself! We have quite a bit of staff; each circuit judge gets five staff members, district judges three, plus they have the courtroom deputies and they have their court reporters. So, we're doing reasonably well, and we have quite a bit of flexibility in the way we allocate resources. Within a circuit, I can shuttle judges back and forth. Some districts have more cases than others, and we often ask for volunteers, again, to help us out. I don't want to compare to what the state system is facing, but I think we are doing reasonably well.

JACK FRIEDMAN: What does the Chief Judge of the Ninth Circuit have to do, by the way, that's in addition to what other Judges on the court do? I know that you still sit on cases, but I assume that you also have a big administrative burden.

HON. ALEX KOZINSKI: No, there's a manageable administrative burden. It's not

huge. We have very good staff. We have very good support. All of my colleagues are very happy to pitch in by serving on committees. So I have no complaints whatsoever.

The main difference in the Ninth Circuit is that the Chief Judge of the Court of Appeals is also Chief Judge of the entire circuit, including all the district courts and bankruptcy courts. So there's a big administrative burden connected with that. But it gets carried by staff, and I have a few decisions to make. I do misconduct complaints, which is an unpleasant additional task. The one difference is that the Chief Judge of the circuit sits on all en bancs. The Ninth Circuit, unlike other circuits, has a limited en banc, which means we draw 11 judges at random to sit on every en banc, except for the Chief Judge who is on every en banc. So I have a higher en banc burden than my colleagues. But I still sit on district courts; I still have a regular stable of cases. I'm on motions this month, and I hear motions. So it's really far from overwhelming, and you only do it for seven years at most.

I was a circuit judge for 21 years before that. I had any number of really excellent chief judges. They let me do my work by doing their administrative chores. So my time in the barrel came. I'm happy to serve my time and serve my colleagues and try to remove as many obstacles from the paths of my colleagues so they can do their jobs. I've got two or three more years left, and I'll be happy to give it up when the time comes. The next Chief Judge of the Ninth Circuit will be truly superb, just an incredibly good judge and good person, and he will be a great Chief Judge, Sid Thomas from Montana. He is terrific, and he will be just a superb Chief Judge.

So I think we can do better. I think it will be nice to have a few more judges. But we just had all but one of our positions filled, most of them with UCLA graduates. I'm including Paul Watford, my former law clerk, so I now have two colleagues who are my former law clerks!

This is not the time for us to complain. I think we are very grateful that we're in the

shape we're in.

DEANELL REECE TACHA: I just wanted to add to your question, have the federal courts invested in some ways of being more efficient, and the answer is certainly yes. They have kept up, as Judge Kozinski said, with technology. The biggest thing that I saw over my time was the move to electronic case management and case filing, and that sped everything up. For a while, there were a lot of hiccups with it, and I think you had the hiccups in the Ninth Circuit, but by now it's pretty much a given that there's electronic case management. There are hidden benefits to that. The benefits are not just that you can file electronically and that you can retrieve electronically. Judge Kozinski and I just talked about it earlier. We did our work a little bit differently. By the time I left the Court, I was working on two computer screens. I would be reading a brief, but then I would hyperlink right to the place in the record, or right to the case that was cited, and it sped my work up just enormously. The other thing it did was that I could see immediately where some lawyer had left out, ellipsed, exaggerated, or made the brief sound like the case said one thing when the facts were different. So, I think judges are now in a position, because of all the technology, to very rapidly see where lawyers have been less than candid in what they do.

HON. ALEX KOZINSKI: I do have a note of skepticism about electronics. There are some good things that come from it. I don't have two screens. I barely look at one screen. I do have a typewriter. I am skeptical, and I heard somebody today mention about how if we just give iPads to state judges, how much more efficient they would be. I see what happens on this side of the iPad, which perhaps the lawyer there didn't. What I see is judges checking their e-mail, reading the news, so electronics are something that one ought to be really careful about. I don't look at records on the screen. I actually have them printed out, and I look at the real pieces

of paper, and when I want to talk to a lawyer, I say, "Here, I'm holding in my hand this piece of paper; tell me, and it's on this page of the record, and let's talk about it." I find that I can get it and I can get the same response as my colleagues who are sitting there trying to find on that little screen, trying to sift through documents and trying to find the thing they are looking for. Sometimes they do it more quickly. You can search, and I'm not saying there are not some advantages to it, but it is not a panacea, and what happened, the Tenth and Ninth Circuits were the first circuits in the country, perhaps the first courts in the country, but certainly the first federal courts in the country, that had e-mail. We had e-mail in 1984 — I got there in '85; it was well-established.

DEANELL REECE TACHA: Eighty-five. I got there in '85.

HON. ALEX KOZINSKI: You got there in '85.

DEANELL REECE TACHA: I'm as old as you are! [laughter]

HON. ALEX KOZINSKI: You're a Reagan appointee!

DEANELL REECE TACHA: I'm a Reagan appointee!

HON. ALEX KOZINSKI: Okay, got it! For some reason, I thought you were appointed as a teenager by Carter!

DEANELL REECE TACHA: Thank you very much! I'll take that!

HON. ALEX KOZINSKI: So, when we got there, in '85, they already had it. I know they go back to at least '84, '83; this is before anybody had heard of e-mail. We had it. Because we are big. With the Ninth Circuit, with the Tenth Circuit, we needed it and it was a huge improvement. I remember when I was clerking, we used to get all the opinions and things by mail, and this was a huge improvement. We do some teleconferencing. The teleconferencing is a good thing! But what I found was, judges would say, "Well, I don't really want to go sit; I've

got something else I'm doing; I'm going to appear by teleconference." It creates a temptation to stay home rather than having judges in the courtroom, appearing. It's a struggle. Technology creates temptations and distractions, and has pitfalls.

How many people here have their e-mail with them right now, this minute? Not me! My view is, if they want me that bad, they'll find me! If not, what could happen? Somebody get executed. No, I'm kidding! [laughter]

MARK EPSTEIN: It's different when you're a practitioner!

HON. ALEX KOZINSKI: No, no, no! I agree! It's very sad that it's different when you are a practitioner, once you have this Blackberry or blueberry or whatever it's called. [laughter]

MARK EPSTEIN: They call it the "ball and chain"!

HON. ALEX KOZINSKI: I call it the 'bell.' People on my staff, they want me to have an iPad, they want me to have an iPhone or a blueberry, all those things, and I say, do you remember the fable about the cat and the mouse? The cat was chasing the mouse, and one day, the mouse said, "You know, let's make peace. I bought you a gift. This beautiful bell that you can put around your neck." The cat put the bell around its neck, and then every time it would go running after the mouse, the mouse would hear it coming! So I need another bell around my neck? If they really need me, they'll find me; I have a cell phone, but just grudgingly. It never rings, thank God! If it rings, it's usually my family, or almost always my family. But it's very sad for lawyers that clients think that if it is eleven o'clock at night, or it's in the middle of your birthday party or your kid's bar mitzvah or something like that, they can call you, and they've got to have an answer right there and then. That's something else we, as a profession, need to do, is disabuse people of the notion that we are on call 24/7. We are not emergency room

doctors. We are legal professionals and people can wait.

I'm more skeptical about the beauties of technology or the advantages of technology. I think technology creates as many dangers and as many pitfalls and as many distractions as it solves, and I don't think we're going to solve the budget crisis in the California courts by giving them iPads. What we need is to give them more resources. They need more judges, they need more courtrooms, they need more of all the things that courts need to do their business. I don't think iPads will solve the problem. [applause]

RICHARD WILLIAMS: Amen! Amen! I don't want to be thought as suggesting as an alternative, the iPad, versus paying some judges, hiring some judges. But I do think that those of us who begin to use them find they make our lives easier, and that this ought to be a benefit extended to the judiciary. I yearn for the day when clients didn't think you were on call 24/7. Those were halcyon times that I had no idea were coming to an end.

JACK FRIEDMAN: There's a specialized app that I saw in the news. It's an "I've been arrested" app. Believe it or not. If you're a demonstrator, such as "Operation Wall Street," they have a specialized app which you barely touch in case police are putting handcuffs on you. You pre-program everybody you want to know that you've been arrested. On the assumption that you can't even press a button, but if you somehow can get in the vicinity of your phone, it will go out to everybody saying "I'm arrested, find me at the jail!"

HON. ALEX KOZINSKI: You can use one of those for your clients! Then they won't bother you! They'll think you're in jail!

MARK EPSTEIN: I don't know if they'll think that's a good thing!

JACK FRIEDMAN: The point is that modern technology lets you do almost anything with anybody you might want to.

BROWNING MAREAN: I wanted to mention one other problem that we're facing, particularly now in the federal courts. Today, in San Jose, in front of Judge Lucy Koh, *Apple v. Samsung*, opening statements were given, an hour and a half per side. Yesterday, the jury was chosen. On this case involving the construction of thirteen patents, utility patents, methods patents — I'm sure you're all familiar with the distinction — one of the jurors is a pizza man who came to this country from Iran and for whom English is not his first language. Another of the jurors is a retired preschool teacher who admits she does not know anything about technology, and is really unhappy with the widespread social media. But these two folks are among the ten who will have the burden of dealing with patent nuclear warfare. Last week, Judge Posner in Chicago dismissed, with prejudice, *Apple v. Motorola Mobility*, finding that this was nothing but a nuclear slanging match where one corporate portfolio of patents was being used to bludgeon another corporate portfolio of patents. He found there was really no provable damage that either side, in its claims and counterclaims, would ultimately be able to show, and that, frankly, there was no merit, and only an imposition on the courts.

I suggest to you that that is an increasingly common problem in our intellectual property law, that it is being used for purposes for which the structure was never created. It was meant to give us public goods. The access of a public to technology, not to create gigantic monopolies that would wham away at one another. But they really do constrain the resources of our courts.

JACK FRIEDMAN: Judge Epstein?

HON. NORMAN L. EPSTEIN: I wanted to talk about something different for a moment. I read in the legal newspaper less than a year ago that the court in San Joaquin County — that's Stockton — was going to close Small Claims. They wouldn't hear small claims cases any more. I got a chill on that. It's something like closing the ER in a hospital. Or they're not

going to hear family emergency matters. Or they will hear them later. What we're talking about with the impact of the budget cuts is something that seriously erodes not only the quality of justice, but the existence of justice itself. If the court can't hear the matter, or can't hear the matter within a reasonable time, doesn't have the resources to deal with it, then you seriously jeopardize the system of justice.

The new presiding judge of the San Diego Superior Court said, just a few weeks ago, talking about the impact in San Diego, he said, "If you want to see a real deal killer for business, it's closing the courts, or sharply curtailing access to the courts." Where people have a small claims matter, where people have a major business matter, it's going to occupy a great deal of time. In Los Angeles, as you probably read, some 56 courtrooms have been closed. The reason is because it is the only way to save significant money with these cuts, and the number is $652 million so far, in the context of an annual budget for the judiciary, a little north of 2 billion, 652 million over the last couple of years, it's a terrible impact. It's going to be very serious.

So, what do we do? We have 56 courtrooms that are closed. What are you going to do with the judges? Well, a lot of the judges are assigned to do settlement. That's good. We've got a lot of cases. Anyone who's had any experience with this knows that if you are trying to settle a case, if you're a judge, the best argument you have is that if you do not settle this case now, you're going to trial tomorrow. Or a month from tomorrow. Whatever it is, you are going to trial. If a judge cannot credibly make that statement, then the chances are that most cases won't settle, or if they do settle, they'll settle for what is really an unfair amount one way or another, depending on who feels in the greatest jeopardy. It works together.

It has impact on just about everything else. There will be some rethinking, I predict, if things continue as they are and get a little worse, if the budget initiative or the tax initiative fails.

People may rethink the institution of a jury trial. Why do we really need it? The British got rid of it during World War II, except in criminal cases, and when the war was over, they decided that wasn't such a bad deal! We don't really need the jury system, even though it was invented in our country. So they have gotten rid of juries, except in defamation matters, in civil cases. Well, maybe we can do that here. Or why do we need twelve people on a jury? Why not ten? Why not six? Why not three? Why not restrict it so that you don't have it in this kind of case or that kind of case.

Or alternative dispute resolution. Thank God we have it. The courts would indeed be inundated without it. But a lot of these cases have ADR and something close to an adhesion contract — that presents some problems of its own. If your client really would prefer to have this go before a court, we have a respected court, good judges. He'd rather go that way, or you have the kind of case that doesn't lend itself to arbitration, or you're looking for equitable powers that an arbitrator generally cannot exercise, well, then what do you do? There will be more pressure on the ADR system; there will be more pressure to rethink the jury system; maybe part of it ought to be rethought. But, if so, it ought to be rethought on the merits.

The courts should take advantage of this, and I hope they will, to try to do the most they can, the best they can with what they've got. But I think even if things turn around and get better, they're not going to get as fully funded as they were. What we're going to have to get used to is the new normal. That's true of judges, it's true of litigators, whether it's personal injury or business litigation or just about anything else. In terms of litigation, there are a lot of cases that have priority, and they have priority over most business cases. Family law matters, dependency cases, all criminal cases, and some other classifications of cases. Those things just have to be done, or society doesn't function.

We're talking about core values, about core items, and these are things to think about. I don't know that the business community can help by making donations. Incidentally, a number of years ago, when the Court of Appeal for Orange County, that's Division 3 of the Fourth District, was created, the local bar was going to help out by donating a law library, and it turned out there were some serious legal problems about that. It was opined by able counsel that it might be unconstitutional for the court to find itself dependent on the bar for a law library. I don't know if that would be true of iPads or not. But some of these problems are there and have to be thought through.

In order to get through this — and somehow we will — the courts, and all of you and many others, are going to have to work together as best we can, find efficiencies wherever they exist, and just do better! [applause]

DEANELL REECE TACHA: I just want to pick up on that theme. I've done this around the world, talking about what is the rule of law, and why should you care? Why should you care whether we protect the rule of law in this country? Well, I could give you some real war stories from the emerging republics around the world. But I'll tell you, when you teach young people about the rule of law, it is about whether we have a transparent system that everybody knows about and everybody trusts. If it is not transparent they will not trust it. If we start toying with the jury system very much — now, there may be marginal ways that we can do it — then we will take the community out of the courtrooms and we will be farther and farther away from what they know.

It is also about predictability of the law. I could not agree more about the problem of adhesion contracts. Earlier, we talked about whether the law has changed; the substance of the law has changed. Well, contracts have changed a great deal over my career, because now, in

almost every contract, there is an arbitration clause. So you go out of the courts — you've got the standards of the American Arbitration Act and so on — but you're pretty much out of the courts in those. You lose transparency. You lose predictability. What do you want more in an economic institution like a business than predictability of the law?

So, why should business care? This is the whole system upon which this economic system depends. If we are not out there as advocates for the courts and for the rule of law, we are a generation away from losing all of those things. So I have become something of a preacher on this subject, because — and I'm going to tell you one quick war story. It was in Albania in the early '90s. Two federal judges, a corporate counsel, the president of the ABA — we went to Albania to try to help them construct a constitution. At that time, there was only one western hotel in Tirana and I was in the elevator. At that time, I was blonde — I was blonde-haired, blue-eyed, going up this elevator with two very tall, blond-haired, blue-eyed big guys. They took a look at me, and they said, "What are you doing here?" This was right after the Velvet Revolution. I said, "Well," cheerily, "I'm here to help them build a constitution." Those guys wanted to take me out to dinner. They were two Swedish engineers whose company had owned the drilling rights for *years* off the coast of Albania, but because there was no court system and no predictable judiciary, their company could not invest in the drilling that it would take off that shore. For me, that has stood for why the rule of law is just critical to the economic underpinnings of not just this nation, but the world.

JACK FRIEDMAN: Dean Moran has a tremendous responsibility for keeping her whole school going, so I don't know how many meetings she has day and night! Dean Tacha, I want to ask you about what's going on at your school, too, and also some observations about legal education in today's environment.

DEANELL REECE TACHA: Well, I left the judiciary to come back. I had been in academic life before I went to the bench in 1985. I decided to leave the bench to come back to legal education — as only a recovering federal judge can do — thinking that perhaps in this time of a perfect storm in legal education, there was something about my experience and my history that maybe at the margins, I could work with a new generation of lawyers. That's what we're doing at Pepperdine.

Rachel Moran is doing a wonderful job here. She has a lot of great statistics. I'll tell you one we've got. We're always at the top of the national list for student-oriented services in education. What are we about? We are about serving the next generation of lawyers. So how do we do that? We provide great teaching and a lot of practical experience to equip them for the professional life of a lawyer. Many of our great faculty members are here. E-discovery is a good example! There are so many ethical issues and conflict issues. We need to provide the kind of experiences that real lawyers have. These are experiences that make students ready for whatever employment circumstances they will experience; giving them good theoretical grounding; providing experiential opportunities; partnering with the bar. I question whether we should continue to create internal experiential opportunities. There is a place for clinics. There is also a place for expanding legal capacity by providing externs and interns. You and others in the profession could be matched with very bright students who are finding it very difficult to find jobs. Tomorrow, I am going up to San Francisco to talk about bar admission requirements. I am on the task force that the California Bar has appointed to consider modifying bar admission requirements. That's a big job.

I predict that because of the issues in the profession, there will be some questions about what we have done to ourselves in regulatory and educational accreditation thereby driving costs

up and resulting in our students having such remarkable levels of debt. We're working on all of that.

JACK FRIEDMAN: I wanted to mention an historic note on business law here at UCLA. A little over twenty years ago, the interests of many students were on all kinds of *pro bono* law, which I hope still remains. The interest in business law-related courses was rather low. For example, one professor wanted to focus his third-year seminar on how to write and interpret covenants in business contracts, bonds, etc. — which is incredibly practical. The number of students who wanted to take it was one (me).

In recent years, the interest in business law subjects is so great that they have an administrator, one of whose duties is helping coordinate cross-registration with the business school.

This increased interest even preceded the downturn in the economy.

I'd like to open the discussion up to the audience for any question or comment.

Hi, Dan, how are you? This is Dan Fisk, who is one of our Honorees. We gave him a global honor when he was general counsel. Dan, it's nice to see you.

[DAN FISK (AUDIENCE):] Thank you, Jack. Great panel, great discussion. A couple of comments. One with respect to the constraints of the budget for the judiciary. I call to your attention some of the great work that's been done by the Atlantic Legal Foundation in New York. I've served as Chairman *Pro Bono* for the past 15+ years. They have marshaled the influence of the business community in New York to help the judiciary in New York who haven't had salary increases for over ten years. They would probably more agree with the situation than anyone here in California. They work closely with Judge Judith Kaye, who used to be the head of the New York State Court, and made a big difference in attracting the attention

of the business community and putting some pressure on the state legislators to help out the judiciary with respect to compensation and other budget needs.

So, I'd be happy to liaise with any one of you on the panel, or whomever, to show you the template used by the Atlantic Legal Foundation to get some results in New York. That's the first comment.

Second comment, I find it interesting, you're focused on what a bane technology is. We've found all the bits and bytes, so many bytes, that we're all getting indigestion! In fact, I think technology may also be a solution. Now, I served for 20 years as general counsel for a computer sciences corporation before becoming a partner with my friend Browning, there on your panel, for about three years, and I'm currently on the board at Orange Legal Technologies. I know what Orange is doing — they have cutting-edge technology for dealing with electronic evidence that can literally reduce the cost in half, predictive innovations. These kinds of things are going to be a help so that the technology bane is perhaps less of a bane and more of a boon, in terms of realizing justice and employing the rule of law.

So, I hope those comments are helpful.

HON. NORMAN L. EPSTEIN: On your first comment, for the California Judiciary, I will be delighted to accept your card when this program is over, and see what we can do to avail ourselves of the experience in New York. Thank you.

RICHARD WILLIAMS: Assembly, former Assemblyman Joe Dunn, State Senator, is in charge of a coalition trying to rally business and the bar in favor of more judicial funding, and that's an excellent source.

You're certainly right that technology has real opportunities in predictive coding. This technique of selecting words, seeing if by sifting through documents you can find pertinent

materials, is a milestone, is a great, new thing. It is new. Only a few years old in our federal system, and particularly with only a few cases really trotting it out, it has its limitations, like any adolescent. It hasn't quite reached maturity. It does have the problem, as we have more lawyers and more documents, we have more potentially privileged documents. One part of the training of law students, in our generation, it was to look at paper boxes. Now, it's to look at double screens. But you still get to do the same task in trying to figure out, does this have to be produced? Should it be produced?

DEANELL REECE TACHA: Everybody's given you commercial messages. This problem is much deeper than just the business community, to supporting the courts right now. Another thing that your Chief Justice is doing along with Joe Dunn — and I somehow got on that task force too — is California has entirely abandoned civics in middle schools. So what has happened is we are rearing a generation who doesn't even understand what the courts *do*, or why we don't decide on our personal preference. So Justice O'Connor will be in California — she's on a big national crusade for this — but she'll be in California early next year, because we're working very hard in Sacramento to turn that around.

JACK FRIEDMAN: Is she going to be in Southern California, or only Northern California and Sacramento?

DEANELL REECE TACHA: I'm not at liberty yet to say. I'm not sure about that.

JACK FRIEDMAN: We did a judicial program in Arizona at the Sandra Day O'Connor Federal Courthouse, in the Ninth Circuit room by the way. In any case, sir, go ahead.

[AUDIENCE MEMBER:] Thank you. I'm UCLA Class of '68. I've seen the school change, but there have been some buzzwords that came from the panel that I wanted to agree with, and that was "rule of law" and "predictability", and I want to add one, that's "consistency".

I think some of our courts are their own worst enemies, and San Diego, I think they think they're on their own fiefdom. If every court, if courts would follow the state law — I practice throughout the state. My practice is commercial litigation. In order to do that, you have to be able to follow the law. For counsel, let's set down the rules, the court sets down rules, the case law sets down the rules. You go to San Diego, and they say, "We don't want it that way; we want to add our own little requirements to it," which takes up more time; there are more rejections by the clerks; it takes up more time. So in that regard, that that's one way that the budget crisis can be helped.

And one last thing, that you mentioned: I belong to an organization that promotes creditors' rights. We wanted to create a gift to a student who graduates from the creditors' rights program, and I wanted to come to UCLA and talk to those classes and explain the importance of creditors' rights. They don't offer a creditors' rights program here any more. Professor Warren was one of my professors, and he wrote the *Commercial Code*. It was very instrumental in the area.

To me, it's what I think is the crux of some of the legal problems that the attorneys get involved with are no longer being stressed in — I don't know about other law schools, but at least UCLA.

JACK FRIEDMAN: I want to thank our speakers. [applause]

Every comment by the judges and justices had to do with their great concern over attaining justice. As you noticed, not a single comment had anything to do with personal agendas to do a particular thing or imposing their views.

I want to thank everybody for coming, this is part of a world effort to educate the business and general community on the judiciary. Thank you very much.

ALEX KOZINSKI
Judge, U.S. Court of Appeals for the Ninth Circuit

Judge Alex Kozinski serves on the United States Court of Appeals for the Ninth Circuit. Appointed by former President Ronald Reagan on November 7, 1985, Judge Kozinski has won support from various political groups with his common-sense decisions, libertarian instinct and humorous writing style.

Born in Romania, Judge Kozinski emigrated to California with his parents when he was twelve years old. He received his undergraduate degree from UCLA. After graduating from the UCLA School of Law, he clerked for Judge Anthony Kennedy on the United States Court of Appeals for the Ninth Circuit, and then for Chief Justice Warren Berger of the United States Supreme Court. He spent a few years in private practice before joining the White House Counsel's Office during former President Ronald Reagan's term.

Judge Kozinski began his judicial career as the Chief Judge of the then newly-formed Court of Federal Claims. At age 35, he was appointed to the Ninth Circuit by former President Ronald Reagan, making Judge Kozinski the youngest U.S. Appeals Court judge in the country. One of Judge Kozinski's highest profile cases has been Mattel, Inc. v. MCA Records, Inc., in which the Ninth Circuit dismissed a lawsuit by Mattel against Danish pop group Aqua for dilution of the Barbie trademark in a song that lampooned Barbie. In that case, Judge Kozinski concluded his opinion with the words "[t]he parties are advised to chill".

Judge Kozinski is a renown essayist, and has won admirers across the political spectrum with his clear and witty writing. His writings have been featured in such publications as Slate, The New Yorker, The New Republic and The National Review.

Deanell Reece Tacha

Biography

Deanell Reece Tacha (pronounced Tah-ha) has had a distinguished career in higher education and the federal judiciary.

Dean Tacha is Duane and Kelly Roberts Dean of the School of Law and professor of law. Previously, she was a Circuit Judge, U.S. Court of Appeals for the Tenth Circuit, since January, 1986. She served as Chief Judge from January 2001 through 2007. Dean Tacha earned her bachelor of arts degree from the University of Kansas in 1968 and her juris doctorate from the University of Michigan in Ann Arbor in 1971, and was a White House Fellow (1971-1972).A native of Scandia, Kan., Tacha received her bachelor's degree with honors in American studies from the University of Kansas and her law degree from the University of Michigan.

President Ronald Reagan appointed Tacha to the U.S. Court of Appeals for the 10th Circuit in December 1985, where she currently serves as a federal appellate judge. She became chief judge of the 10th Circuit on Jan. 1, 2001.

Named a White House Fellow in 1971, she was assigned as special assistant to Secretary of Labor James D. Hodgson. The following year, at the conclusion of her fellowship, she joined the law firm of Hogan and Hartson as an associate in Washington, D.C. Two years later, she returned to Kansas to engage in private practice. In 1974, she joined the KU School of Law faculty, becoming associate dean of the law school in 1977. In 1981, Tacha was elevated to the university position of Vice Chancellor for Academic Affairs.

Judge Tacha was a member of the U.S. Sentencing Commission from 1994-1998. She also chaired the Judicial Division of the American Bar Association in 1995-96. From 1990-1994 and from 2001 to July 1, 2005, she served as chair of the U.S. Judicial Conference Committee on the Judicial Branch. Tacha has been a national Trustee of the American Inns of Court Foundation since 2000 and currently serves as the president of that organization.

She is a past chair of the Appellate Judges Conference and a former member of the ABA's Commission on Women in the Profession. Having served as national president of

the Kansas University Alumni Association, Judge Tacha is also on the Board of Trustees for Saint Paul School of Theology in Kansas City and remains active in numerous professional and civic organizations.

In 1992, Tacha received the KU Alumni Association's Fred Ellsworth Medallion for extraordinary service to the university and received its most prestigious award, the Distinguished Service Citation, in 1996.

Tacha's parents are former Kansas Republican national committeewoman Marynell Dyatt Reece and Harry William "Bill" Reece. Her sisters are Mary Lou Reece, Jane Ann Reece Ewy and Saralyn Reece Hardy, who is director of KU's Spencer Museum of Art.

Tacha is married to John A. Tacha. They have four children.

Judge Norman L. Epstein

Norman L. Epstein is the Presiding Justice of Division Four of the Second District Court of Appeal in California. He was appointed to this court by then-Governor Deukmejian, taking his oath of office on April 12, 1990. He was retained by voters on the November 7, 2006 and the January 8, 2007 elections. He was appointed Presiding Justice by Governor Schwarzenegger on September 17, 2004. His current term expires on January 7, 2019.

Education

Norman Epstein received his bachelor's degree from UCLA in 1955 and his law degree in 1958.

Legal career

Justice Epstein began as the Deputy Attorney General in 1959. He worked as the chief counsel for California State University from 1962 until 1975, when he was appointed to the Los Angeles Municipal Court by Governor Reagan. Governor Brown appointed him to the Superior Court in 1980. He has also served as a member of the California Judicial Council and the California Judges Association.

Richard T. Williams

Partner

Richard T. ("Dick") Williams is a partner in the General Commercial Litigation Practice Group in the Los Angeles office of Holland & Knight, and a member of the firm's Antitrust, Class Action and Product Liability Teams. In several dozen federal and state trials, both jury and non-jury and in arbitrations, both domestic and international, Mr. Williams has represented foreign governments and a wide variety of domestic and international corporations.

Complex Litigation. Mr. Williams has been directing a multi-office team of Holland & Knight lawyers defending a large raw-materials supplier defendant in federal and state False Claims Act litigation involving thousands of transactions for more than 15 years with numerous states and municipalities as intervenor plaintiffs, and several hundred additional real parties in interest. He and his team have obtained dismissals with prejudice of a majority of the FCA claims against our client.

Mr. Williams led a team of Holland & Knight lawyers that obtained the 15th largest jury verdict in the United States in 2002, as well as the 32nd largest jury verdict in 2001 (rankings according to the *National Law Journal*). Mr. Williams and his team represented a Japanese real estate developer suing top tier Japanese and Korean construction companies for breach of contract and negligence in their work on a 240-unit, 12-story luxury condominium hotel and resort in Guam that partially collapsed, owing to defects, following a large earthquake in 1993. After an eight-month trial in a courtroom specially built by the parties to handle this matter, the largest trial in Guam's history, the jury unanimously awarded our clients compensatory damages of $73.4 million and, following a separate trial, punitive damages of an additional $73.4 million.

Class Actions. For 35 years, Mr. Williams has been involved in resisting class actions in cases both state and federal. Presently, he is defending a major manufacturer of consumer goods against multi-billion dollar claims by a putative nationwide-class asserting design and manufacturing defects. He has swiftly resolved several actions, involving cruise lines, writing instruments, and stereo speakers, each claiming deceptive practices under California's broad Unfair Practices Act, avoiding class certification in each. In the

antitrust field, he has defended pharmaceuticals manufacturers against claims by classes of retailers and consumers, as well as defeating claims by ice cream store franchisees against their franchisor. On behalf of air carriers, he helped litigate and then negotiate settlement of the restitution of billions of dollars of overcharges by crude oil producers; he helped win judicial approval of the massive settlement and then administered approval of claims and distributions of funds to air carriers. He has represented air lines and other companies in resisting employment discrimination class actions. He has represented officers and directors of publicly-traded companies in the pharmaceuticals and adult education fields against investor class allegations of securities fraud.

Antitrust. Mr. Williams has represented oil refiners and gasoline retailers against civil and criminal antitrust claims of price-fixing, defended pharmaceuticals manufacturers against price fixing allegations, defended a large ice cream franchiser and a leading bicycle transmission manufacturer against tying actions, prosecuted and resisted attempted monopolization claims with respect to petroleum products pipelines, and patented bicycle components. He has represented companies accused of international, as well as domestic, anticompetitive activities. Mr. Williams has defended camera manufacturers against Robinson-Patman lawsuits and defended companies in a variety of industries against deceptive trade practice and unfair competition claims. He has counseled businesses on pricing and distribution practices so as to minimize and avoid litigation risks.

Product Liability. Mr. Williams effectively represented a major tire maker in overcoming claims of defects in several lines of its products, both in national and state class actions. As well, he has defeated class claims involving pricing of prescription pharmaceuticals and resolved class actions involving telephone test sets. Mr. Williams has also represented defendants in a variety of breach of warranty and negligence actions.

Construction Litigation. Apart from the Guam litigation noted above, Mr. Williams is presently representing the owners of overseas commercial buildings seeking insurance reimbursement for earthquake damage; he has represented commercial and residential building owners in several construction cases involving defects of design and construction, and breach of contract, warranty and negligence claims.

Commercial Litigation. From a two billion dollar breach of contract action involving crude oil production, to frustrated computer software development contracts, to misappropriation of trade secrets actions, Mr. Williams has handled many varieties of commercial litigation. He has represented landowners in eminent domain matters, and an international labor union in imposing a trusteeship upon one of its local unions. Mr. Williams has won judicial review of administrative agency decisions, both state and federal, involving energy rates, forest firefighting helicopter contracts, and the operation of correctional facilities by private corporations.

Tax Litigation. Mr. Williams has litigated sales tax and tax exemption issues involving California sales taxation, defeating class actions brought against a large pharmacy chain and, separately, against a quick-service restaurant chain. He has also litigated dormant

commerce clause issues affecting state fees and taxes for an international tobacco company. In addition, he has handled audits of worker compensation premiums and state disability insurance premiums.

Honors & Awards

- Southern California *Super Lawyers* magazine, Antitrust, 2009
- Corporate Counsel Edition, *Super Lawyers* magazine, November 2009
- *The Best Lawyers in America* guide, Commercial Litigation, 2007-2009, 2013
- Who's Who In America
- Stanford Journal of International Studies, Managing Editor

Memberships

- Association of Business Trial Lawyers

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Practice Areas

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Education

- UC Berkeley (J.D., 1985) Order of the Coif, note and comment editor, *California Law Review*, 1984-85
- UCLA (B.A., 1981)

Clerkships

- Judge Stanley A. Weigel, U.S. District Court, Northern District of California, 1985-19
- Justice Edward Panelli, California Supreme Court, 1986-1987
- Justice William J. Brennan, Jr., U.S. Supreme Court, 1987-1988

Bar Admissions

- California

Mark H. Epstein

MARK EPSTEIN is a partner in the law firm of Munger, Tolles & Olson. His practice focuses on complex litigation matters including trials and appellate work.

Some of Mr. Epstein's representative matters include:

- The defense of senior executive of a major corporation in a derivative action stemming from that executive's tenure as president of that corporation. The matter was ultimately tried in the Delaware Chancery Court over a three-month period and was one of the longest trials in that court's history. The court found in the executive's favor on all counts, ruling in a 180-page opinion that the executive had acted properly in all respects. Mr. Epstein then successfully defended the judgment in the Delaware Supreme Court.
- The successful defense of a hotel and casino owner accused of fraud and unjust enrichment surrounding a failed $1.25 billion condominium development project. The matter was tried over a five-week period and resulted in a defense verdict on all counts.
- The successful defense of a real estate venture partner accused of fraud and misrepresentation by his partner. The matter was arbitrated over a two-week period and resulted in a defense verdict and an award of almost $1 million in attorneys fees against the plaintiff.
- The defense of a dispute concerning the ownership and value of certain intellectual property rights. The matter was tried over a two-week period. The plaintiff has appealed the judgment.
- The representation of a law firm in a fee dispute/malpractice matter. The matter was arbitrated over a three-week period after which the arbitrator awarded the firm all of the fees sought, did not find any malpractice and awarded the law firm its attorneys' fees in bringing the action.
- The successful defense of a number of law firms accused of malpractice in various trials and arbitration proceedings.
- The defense of a nationwide paper, packaging, and office supply distributor in a wage and hour class action.
- The defense of a major airline in an action against it by a major financial institution involving alleged improprieties concerning the co-branding of a credit card.
- The representation of California's Native American Tribes in the California Supreme Court litigation challenging an initiative approving Tribal gaming.
- The representation of a number of leading research institutions, universities, hospitals and patient advocacy organizations as *amicus curiae* in the trial court and California Court of Appeal in the defense of the California Stem Cell Research initiative.
- The successful representation of pipeline company in the federal and Alaska state trial and appellate courts in a wage and hour class action.
- The representation of the Los Angeles County Bar Association as *amicus curiae* in the California Court of Appeal in a matter relating to the rules governing conflicts of interest.
- The appellate representation of a major entertainment company challenging an adverse jury verdict. The Court of Appeal (in two separate appeals) ultimately reduced the judgment by 80 percent.
- The representation of a major investment company in post trial proceedings in the U.S. District Court and the 9th Circuit following an adverse jury verdict in which the company was found liable for fraud. The courts ultimately reduced the jury's verdict by approximately 75 percent.
- The representation of the Securities Investor Protection Corp. in a trial in the U.S. Bankruptcy Court and on appeal against the owners of various accounts who had engaged in short sales of stock. Mr. Epstein recovered a judgment in excess of $5 million from the short sellers, which judgment was affirmed on appeal.

Beyond his regular practice, Mr. Epstein is engaged in a number of *pro bono* activities. In addition to his regular *pro bono* matters, he currently serves on the board of directors of Public Counsel and the board of directors of the Los Angeles Education Partnership. In addition, he acts as general counsel to Coro Southern California. Mr. Epstein has also served as special counsel to the Los Angeles Police Commission and was deputy general counsel to the Independent Commission on the Los Angeles Police Department ("Christopher Commission"). He has also taught appellate practice as an adjunct professor at Loyola Law School.

Mr. Epstein received his undergraduate degree in Political Science from the UCLA in 1981, and his J.D. degree from the UC Berkeley in 1985. Mr. Epstein also graduated from the Coro Fellows Program (Los Angeles) in 1982. Prior to beginning his practice at Munger Tolles, Mr. Epstein served as a judicial clerk to the Honorable Stanley A. Weigel, U.S District Judge for the Northern District of California, the Honorable Edward A. Panelli, associate justice of the

California Supreme Court and the Honorable William J. Brennan, Jr., Associate Justice of the U.S. Supreme Court.

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J.D., University of California, Hastings College of Law 1969

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ADMISSIONS

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SUMMARY PROFILE

Browning Marean is a senior counsel in DLA Piper's San Diego office. He is a member of the Litigation group and is co-chair of the Electronic Discovery Readiness and Response Group. Mr. Marean concentrates his practice in the areas of electronic discovery, professional responsibility and knowledge management. He is admitted to practice in California and Texas.

Mr. Marean joined DLA Piper (then Gray Cary Ames & Frye) in 1969. He serves on DLA Piper's Technology Committee and is an emeritus member of the California State Bar Law Practice Management Committee and the San Diego County Bar Association's Legal Ethics committee. He is on the ABA Tech Show Planning Board and a member of the Sedona Conference.

Mr. Marean is an internationally known teacher and frequent lecturer on various topics including electronic discovery, international discovery, records retention, knowledge management and computer technology. He is co-author of the 2010 edition of *Electronic Discovery and Records Management Guide, Rules, Checklists and Forms*, published by Thomson West, and *Conducting Discovery in an Electronic World: Electronic Data and Discovery*, published by California Civil Discovery Practice. He has been named a San Diego Super Lawyer.

Mr. Marean received his law degree from the University of California, Hastings College of Law and his undergraduate degree from Stanford University.

SEMINARS

Frequent lecturer on such topics as computer technology and its application to efficient practice and matter management, risk and decision analysis, legal ethics issues, director and officer liability, emerging securities fraud developments, knowledge management, and the selection and use of expert witnesses

WEBINARS

- February 2009, Live from LegalTech NY

PRIOR EXPERIENCE

- Military Service: U.S. Navy; 1960-1966, LTJG, USS Lucid (MS0-458); Vietnam Service Medal

COURTS AND FORUMS

- All California state courts
- All Texas state courts
- United States District Court for the Southern District of California
- United States District Court for the Central District of California

- United States District Court for the Northern District of California
- United States Court of Appeals for the Ninth Circuit

MEMBERSHIPS

- Chair, San Diego County Bar Association Technology Committee
- Former Member, Executive Committee of the Law Practice and Management Technology Section, State Bar of California
- San Diego County Bar Association, Ethics Committee

Jack Friedman
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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.