



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

**July 27, 2011 - Phoenix, Arizona**



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**GUESTS OF HONOR:**

**Hon. Rebecca White Berch, Chief Justice, Supreme Court of Arizona**

**Hon. Roslyn O. Silver, Chief United States District Judge, Arizona**

**DISTINGUISHED PANELISTS:**

**David Rosenbaum, Partner, Osborn Maledon, P.A.**

**Shane Swindle, Partner, Perkins Coie, LLP**

**Jack Friedman (Moderator), President, Directors Roundtable Institute**

REPORTED BY: PAMELA A. GRIFFIN, RPR, CRR  
Certified Reporter Certificate No. 50010

**JACK FRIEDMAN:** I am Jack Friedman, President of the Directors Roundtable Institute. We are a pro bono group that has organized 750 events nationally and globally over the last 21 years. We have never charged a penny for anyone to attend any event ever. I myself have been a volunteer chair for the last 21 years, and that is the spirit with which we pursue our educational programming.

The reason why this particular program is important is that we feel that there has been a disconnect between public service, public policy, and the larger community including business. We don't take positions on any public matter whatsoever. When I use the word "business community and business leaders," I'm really going beyond that. It can also be the nonprofit sector, academics, and others. We try to benefit the larger community, although the business community is what we're primarily identified with.

The courts are the one branch of the United States government that is expected to have independence. The judiciary has the integrity to stand up for the rule of law regardless of the political pressures. So the service of the judiciary is very special in the United States.

On the other hand, if you look at the media, political discourse and so forth, you would get the impression that every judge gets up every morning and says, "I can't wait to get to the office and impose my personal values on everyone I come in contact with today." That is the farthest thing from the truth.

As retiring U.S. Supreme Court Justice Stevens commented, the reality is, I have to make decisions that I personally don't like -- under laws that I would have voted against if I was in the legislature. But my job isn't to be in the legislature. My job is to

have the integrity to do what the law says, even if it's contrary to my personal convictions.

This national series will cover many states. The focus of the series ultimately will be to have an electronic transcript in each region which will lay out for the leadership of the country the key issues; the transcripts together reaching about a million individuals.

We had a similar program with Judge Mary Schroeder five years ago in Arizona when she was the Chief Justice of the Ninth Circuit and Ruth McGregor when she was the Chief Justice of the State Supreme Court and Judge Bales.

I wanted to thank the particular speakers, and we'll have each one speak to make opening remarks, then we'll have a Roundtable discussion among them. We will open it up toward the end to comments and Q and A from the audience and then invite the audience to come up to meet the speakers one-on-one.

I want to thank the judges for making themselves available, the staff and the goodwill of Perkins Coie and Osborn Maledon for helping us and providing their speakers.

Without further ado, I'd like to begin with the Honorable Roslyn Silver. Thank you.

**ROSLYN SILVER:** Well, I'm really happy to see so many friendly faces and people I know in the audience. I want to tell you something that you probably already know as a consequence of our jobs as judges, we don't have the opportunity to interface with the public, and lawyers in particular. I mean, we're shut-ins.

So I participate in these programs as much as I can so I can learn. I am new to being a chief judge as a consequence of very unfortunate circumstances. So I hope in my opening statement here that I'm not going to take a lot of time. I'm going to synoptically tell you what I believe is important in the federal judiciary, where we're moving, where we're going, and what we need to do.

I hope this will be a dialogue as opposed to a monologue, and that you will feel free to ask questions, and don't be concerned about adversity, because you won't be held in contempt. I promise you. I enjoy that. I have learned so much.

As you know, and all I need to say is, is it's a drama in itself. It speaks for itself. The crisis in Tucson in January 8 of this year was the first time in my experiences in 17 years that the Arizona judiciary -- and I mean in a broad sense, that mostly in the federal judiciary -- was recognized as having problems and serious problems. That was because of the media blitz that followed it.

It was a horror. Unfortunately, people have a tendency and maybe it's a natural consequence of being human, to be interested in something sensational.

I had to take a long time because of my requirements for impartiality as to whether or not I interfaced with the media. But after resolving that there were no conflicts and not allowing a free and open discussion, I decided to do it. It has helped. But let me tell you that we had problems before the passing of John Roll, who was a wonderful judge down in Tucson. We had the third largest caseload in the United States.

And then after the passing of John Roll, we had the number one largest caseload in the United States.

When I started 17 years ago, we had the largest caseload in the United States. When I learned that, I asked myself, why did I do this? Particularly because I had been a criminal lawyer, it took me a long time to get up to speed as a civil lawyer.

Why do we, everybody knows. Everybody will say, yes, this is the truth -- I'm sure you're going to nod your heads -- is that, why is it Arizona, and why is it Texas, and why is it the border state and California?

It's because we're a border state. We have immigration issues. We have a broken border. We have had for a substantial period of time the questions that have been looming being asked by the public and by our Congressional leaders: How do we solve this?

A lot of us have watched it, but also -- and this I see as a positive thing -- is we've had a burgeoning population growth and always will do so. I've been a native of Arizona for a long time. I came here, and my parents came here when it was a two-horse town in Phoenix and Tucson in the 1940s. I saw a change as a child with the invention of refrigeration.

I can still remember in second grade when I came home, I walked into the house, and I couldn't believe the difference. I think everybody else felt the same way.

We have been the fastest growing state in the United States for 10 years, although I think Nevada overtook us for a short period of time.

And guess what? Despite the adverse and negative attention we've gotten, we still have that. It doesn't mean it's just coming across the border. There are a lot of very positive reasons to live in Arizona.

When I do naturalization ceremonies, I understand why the people are here. We have a struggling economy, but we have also a good economy. That brings people here from other parts of the country.

Why does it take a horrible crisis like the one in Tucson to get attention to the judiciary?

It's because we don't advertise, and we can't advertise, and we don't want to advertise. We feel privileged to have our position, which is independent, and it should be, the independence that was implanted in the Constitution. Let me divert for a moment and say that no matter what a judge's personal predilection, we all are human. I certainly came from a number of years in the Department of Justice and U.S. Attorney's Office and I had certain points of view.

But I will tell you that I don't know a judge here who doesn't within a short period of time slide towards the center of the room. He may have a different point of view occasionally or maybe at least some of the judges. I hope not, but there is a sense of what's fair.

Certainly, I have changed my mind a number of times. It is a consequence to me of what has been for a very long period of time, since the beginning of this country, the implantation in the Constitution of the freedom we have for fairness.

Let me contrast that with, as you're going to hear from Justice Berch who has a very good reputation as not only a lawyer, but as a judge, and now as a justice and a good friend of mine for a number of years. I think she will say this too.

Sometimes it appears that the federal judiciary is more or has a tendency to be more impartial on the face of it. I tell everybody: That's not because we are born and we've developed more impartiality. It's because we have more constitution, not fortitude. That's just the state system.

This also relates to why we don't advertise. I had the first opportunity to do so with the crisis and felt uncomfortable about it.

But I will tell you that the experience, the only experience I've had with the public that I will share with you is personal to me for the public to learn how impartial the system is, is when they serve as jurors.

They are told by all of us that you're here to speak the truth, find the truth, do justice, and then they have no ambition. They dissolve back into the community.

I tell them that they're judges of the facts, and no one else interferes with that. They have this sense of glow on their face, and they all seem to appreciate it. I hope that they remember it.

Arizona's gotten a lot of bad attention, and we have enormous security issues. I'm not going to go into the background that I've had personally even before this of security issues.



As federal judges you become clinical. I can have a 24-hour guard of marshals at my house, but I've chosen not to. But there are other judges all over the United States, and you've seen it. In terms of problems that we need to address, that's one of them.

We are grateful to have the marshals, but they are busy with transporting prisoners and handling fugitives, and they don't have the technology to assist us in resolving the security issues. I know the state court has the same problem and probably much worse in some respects, because you don't have the federal marshals.

We need to fill the positions, and we need to create more positions. That's why we need help.

Once again, I applaud our Congressional representatives here. We have a bill in Congress now that is designed to add more positions in the Ninth Circuit, many positions in the District Court, in Central District California that are also suffering, but also Arizona, and we need them.

Senator Kyle has joined with Senator Feinstein who has introduced a bill and he speaks to me as often as he is able to do so. He has told me, it's 50/50 whether or not it's going to pass. It has to pass this year.

So we need you. We need your help. The other thing I'll tell you as I have been driven through this problem as a consequence of a crisis and as a chief judge, is the problem with the judges working, and we feel, again, the privilege.

I feel like I won the lottery when I was appointed to this job. If I have to work 50 or 60 hours a week to handle the caseload -- and by the way, the civil caseload in Phoenix is the largest it has been -- except 17 years ago when I started.

This affects everyone, and I'm sure you may be gracious enough not to nod, but we have so many visiting judges. Thank goodness we have nice winters down in Tucson.

There are a list of 25 judges that are handling sentencings and plea agreements and all of that. We have visiting judges in Phoenix.

We have attempted by survey to get feedback to see which ones are doing what we should, which ones are not, to make it easier for you.

But I know full well as lawyers, you'd rather have dealt with the devil that you know, than the devil you don't know. So I'm aware of that, quite aware of that problem, and so are the other judges. We don't know how to solve it until we get new judges. In terms of the public; they are not served. With judges working 50 to 60 hours a week, and particularly in the criminal area and have to delay those cases to resolution, there are speedy trial issues for the defendant. The prosecution wants these cases resolved, and so does the public.

The public wants if the defendants are guilty to be sentenced and to be incarcerated. In the civil caseload, it is so behind. I receive calls: When am I going to get an opinion? I take that seriously and, you know, it's stressful. It's stressful on us. We need your help.

Okay. I will say one other thing and maybe it's a matter of guilt to some extent. I've lived all of my life here in Arizona. We do have a great state, and I wish the bad attention that we've gotten for Arizona would be overlooked.

As I said, I was born and raised here, and there are so many people. It is still one of the fastest growing states despite the economic problems we have here. It may be less than other places that I have heard about, although there are mortgage problems.

We have the most diverse geographical state in the nation. People forget, because they think about the desert, that up north we had the largest forest in the United States, until Alaska became a state. That is the Coconino National Forest, which many people visit in the summer.

We have the largest land mass of Indian reservations in the United States. The Navajo nation, when I worked up there a long, long time ago had 250 Navajo Indians. Now I'm sure it's much larger than that. They are a precious commodity for the state of Arizona. It offers such diversity that other states do not have.

In the federal courts, we have enjoyed a wonderful relationship with the state courts, and most of us know them. Many of our federal judges have come from the state court system.

We have a system of working with them in a formal and informal way. Every one of them has my respect, particularly in the Arizona Supreme Court. They are friends and so we're able to work together.

**JACK FRIEDMAN:** Thank you. When the panelists were having breakfast together, you had mentioned some brief commentary about Judge Roll. I was wondering if you might repeat that as it was very moving.

**ROSLYN SILVER:** Yes, I will.

I've known Judge Roll for 30 years in a variety of different contexts. Let me start with how I first met Judge Roll.

He had been hired by U.S. Attorney's Office down in Tucson just before I was hired. I was down there and tried one of my first cases, and I was scared to death.

John was there and preparing for an oral argument. He went out of his way, which is his nature, to make sure I was much more comfortable. He spent -- despite the time he had, which was precious and limited, to get prepared, he spent half an hour with me, comforting me, because John was one of the most gentle and generous people I ever met.

He was an excellent judge and he was extremely articulate. He was the hardest working judge that I've known in my career. I don't know how he managed to be the chief judge and do all he did.

Let me give you another example of the quality in his character. John was a very conservative Republican. It was interesting at the memorial to learn about how he grew up. He was earlier in his life, a very liberal Democrat. So somewhere there was this transition and he was a very devout Catholic.

On the day, January 8th, when he was killed, he went to church, which he did every day. On his way back, he stopped at the rally, or the give and take, I guess, at the Safeway only to meet Congresswoman Giffords. Let me just tell you the difference.

She is and was a Democrat, maybe a blue dog Democrat. Nonetheless, she was a Democrat and had been so all her life. She was a woman, and she was Jewish.

He went there for no political agenda. He didn't want to talk about the differences they had on policies and procedures. He went there for five minutes to thank her for everything she had done for the judiciary. She had been an advocate for us along the way and had supported us. So that's the character of John Roll.

We all miss him very much. We were in shock for a long period of time, particularly down in Tucson. As you know, immediately afterwards the entire district was recused at my request. There was no adversity to that decision I made. That was because of the grief we suffered, because of who he was, of the type of character he had, and the person he was. There are many memorials for him. We just had the groundbreaking ceremony in Yuma for the new courthouse, and we are honored, and it has been essentially honored in his name. There are many other things that are coming along the way.

He had a wonderful family, very close relationship with them. He and his wife met in high school as sweethearts and had been married for almost 45 years.

**JACK FRIEDMAN:** I want to thank you.

Just for the record, this entire national series comes from the fact that after that sad event, we decided that it was time to recognize the sacrifices that people make in serving in the judiciary and how important the judiciary is. So that's one of the side effects, this whole national effort, from that occasion. So thank you very much.

**ROSLYN SILVER:** Well, thank you, Jack. I am very pleased and honored to be part of this group.

**JACK FRIEDMAN:** We have a tradition that we don't spend a lot of time giving all the qualifications of the speakers, because we can spend a whole morning with their achievements. So I just give the minimum comments as we go on one by one, and I'll be introducing our other speakers in a moment.

Our next speaker is the Honorable Rebecca White Berch, who is the Chief Justice of the Supreme Court of Arizona.

**REBECCA BERCH:** Good morning. Thank you, Jack, for inviting me.

This roundtable provides a wonderful opportunity to talk about all the things that are going on in the courts -- all courts, federal and state. Courts at all levels from the Supreme Courts down to those that adjudicate traffic tickets and minor violations are facing many of the same issues: budget cuts, legislative attacks, negative media, increasing attempts to polarize or require the election or appointment of partisan judges, and lack of citizen understanding of the role of the courts.

As I was preparing my remarks this morning, I bore in mind that this is a Directors Roundtable, basically a business forum. As I look out, I recognize about half or three-quarters of the audience, and I see a lot of lawyers. So while this is a business

forum, my comments will be business-directed or directed to lawyers who engage in business-related work. Many of the things that drive your businesses are the same things that drive our courts: technology, time, and money. I'll tackle just a couple of the things that arise from technology, time, and money in the courts, and look forward to your questions later on.

One of the things that I do as Chief Justice of the state court system is to create a strategic agenda. I won't go into detail in this now. You can find it online by Google-ing the Arizona Supreme Court. We're the first entry.

This strategic agenda is required by statute. It's called Justice 20/20. I like the title for a number of reasons. "20/20" denotes clear vision. So this is our vision as we move forward.

Hindsight is also 20/20. As we were planning the agenda, we took a look at where we have come from and used that information to help us plan where we should go. So it provides that background and stability. We're building on the good things that we've done, and we're moving forward. I liked that we were creating a five-year strategic agenda. The problem with the one-year strategic plan is it can sometimes cause you to think and do things that are short term.

I wanted to think longer term. Especially since, as I explained to our prior Chief Justice, I wanted to be Chief Justice when there was a lot of money. I wanted to be able to do lots of good things. I wanted to be able to say yes to people when they asked questions. Like others at the court, I thought a strategic plan was even more important in tight economic times, and I think it's proven to be so.

So we limited our strategic agenda to only five goals: Strengthening the administration of justice; improving operational efficiencies; improving communications; protecting children, families and communities; and improving the legal profession. That's it. Every initiative fits in as an agenda item under one of these five strategic goals.

Now, I won't go through each of the goals. Instead, I want to focus on just a couple of them, because I think they dovetail well with what the business world is doing and working on. I mentioned earlier that technology is a driving force for change and innovation in business, and it is in courts as well. Many of the largest and most impactful plans and projects that we're working on are in the technology field. Budget affects everything that we do. I'll talk separately about the budget in just a moment.

As you all know, technology's tremendously expensive. Unless you have your head in the sand, you know that Arizona is facing tremendous economic difficulties here.

To finance technology projects, usually you save up a bunch of money, and then you contract with some company to do the work. You pay them some up-front money, and make progress payments as you go along.

We started saving up to do this in the late '90s, but in 2002, the legislature looked around for pots of money and said, there's a pot of money sitting at the courts, so they swept it. We saved up the money again, and they swept it again.

It became clear to us that we were never going to be able to save up ahead of time as you would do if you were planning a big purchase in your business, or in your family. You'd save up some money; you'd buy that car. You save up some money you do



whatever you want to do for your business. It became clear to us that we were being forced by circumstances to go on the modern American plan, which is to buy it on time. We are now paying for our E-filing system through the imposition of user fees.

We're rolling out a statewide case management system, because the way the courts are funded, we don't get most of our funding from the state of Arizona. In fact, our budget used to be 2.2 percent of the state budget. To show you how serious things have gotten, we are now down at about 1.25 percent of the state budget.

So for those of you who have been watching how this deficit has been working in the past few years, you'll know that they could wipe out all the funding for the state court system and not touch the state budget deficits that we've had in the last few years.

Now, of course, constitutionally they can't wipe out the state courts. But the budgets have been bad, and we're working on rolling out our technology while budget times are very tight. We must set up a statewide case management system first, because you can't do statewide E-filing until you have a statewide case management system.

We're pretty much done with the case management system. We're now rolling out E-filing. For those of you who practice in Maricopa County, you should know that E-filing is now mandatory for subsequent civil filings in all cases for all lawyers.

Technology – once it's in place and the training is complete – is providing many efficiencies for the courts. We hope you are having a similar experience.

Some of the efficiencies for all of you, we hope, are reduced runner costs, reduced service of process costs, and the ability to file around the clock, every day of the week.

You have the ability to file from the beach in San Diego, if you should need to do that. It has other advantages as well, some of which didn't become as clear to me until I joined this court.

Some of the cases that we do are very large. We have capital punishment in Arizona. The death cases often have extensive records. I can see some former law clerks in here. The practice was, when we got assigned a capital case, for our law clerk to go down the hall, get the file, put it on several carts, wheel it down to our chambers, and tab everything.

Then if defense counsel was working on a brief and wanted to see something in the file, our poor law clerks would have to de-tab everything, pack it back up, put it on the cart and take it back down to the clerk's office.

Then you get guys like my colleague, Andy Hurwitz, who always wants to read something in the record. He'll come down the hall and say, "I need to see something."

As an ethical judge, what do I have to say? "You have to read it in my office or designate the pages you want. I'll photocopy it for you, but I'm not turning loose any transcript that's been checked out to me." So it really was very inconvenient.

With technology, everything's there in cyberspace. We can all be looking at parts of the record at the same time. Nobody's holding it or tabbing it. It's just there. Everybody has access. There's no moving the files around.

We do petitions for review electronically now. We used to have somebody come down the hall every week with a cart and give us a stack of paper. That's all done online

now, so it's convenient for us and for members of the clerk's office. We hope it's convenient for you, too. That's the direction in which we're moving. It also ties in very well to electronic discovery which I know Shane and David will be talking about later. So you can have these tie-ins that make the courts a more convenient business environment for you.

Other things that we're doing, just very briefly: Arizona, a couple years ago became an "admission on motion" state. That means if you graduated from an ABA credited law school, passed the bar, have adequate character and fitness, and met other conditions set forth in our rule, you can take your Arizona law practice license, and because we now have reciprocity with 30 states, gain admission in another state without retaking the bar exam. We're just about to get 31, but we're not quite there. That's a tremendous advantage. Frankly, at my age the thought of taking a bar in another state, gives me the Kathleen Sullivan adverse reaction.

We're also moving in Arizona to a uniform bar exam, the UBE. For those states that choose to give the uniform bar, exam takers will be able to take the bar in one state and use the score in several states. You'll be taking the same bar exam given in other UBE states, so the score will be portable. So those are some of the business things that we're thinking about and doing in the courts to make the lives of Arizona lawyers easier and to facilitate practice across state lines.

But no discussion of the courts can be complete without talking about two other interrelated things. One is the legislature and the second is budgets. Although we're the third branch of government, we're entirely dependent on the legislature for our funding. A

lot of people say, well, you have all those exorbitant court fees. It's true that fees can be high. But judicial salaries are not paid from court fees.

There's an obvious due process problem with having the courts interested, too interested in how much of a fine judges assess those who come in front of them, or whether we choose to assess a fine or send a violator to jail.

I think I mentioned our budgets have been cut quite a bit. Like many Arizona businesses we've had to lay off quite a few people. Nonetheless, we have managed to maintain our core court function, our constitutional and statutory function to promptly and fairly adjudicate cases.

There are several ways I could go here, but let me just talk about our relationship with the legislature and some of the things that have gone on at the legislature. I won't talk in detail about them, but let me give you a flavor for what the courts face. Just by way of background, I think some people have forgotten their civics. They don't understand what the courts are or what their role is.

Many members of the public think that judges are representatives of the people. So, for example, they want to have elected judges so that judges can represent them.

But we're not a representative branch of government. It's not what we're supposed to do. Our job is to construe laws, to judge constitutionality, and to adhere to the rule of law. Our job is not to decide how Republicans feel about this or how Democrats feel about that.

I have construed laws that I personally thought were perhaps not wise – or well drafted. I would not have voted for them if I were in the legislature. But my job is simply to construe them, not to strike them down because I don't like them or wouldn't have voted for them. That's not what we do.

So this year, I think based in part on that misunderstanding of the role of judges, we saw nine attack bills against the courts. They ranged from requiring direct election of judges to requiring unfettered gubernatorial appointment of judges coupled with senate confirmation, and then senate reconfirmation at the beginning of every term to make sure you were still ruling correctly. There was even a court-packing plan.

My experience shows me that wild judicial activism really hasn't been a problem in the Arizona courts. Let me give you just a couple examples.

Several years ago, former Chief Justice Ruth McGregor and I decided that we would take a look at every case from the Arizona Supreme Court starting in 1998, the year she joined the court, until 2008 or 2009.

We had our clerks survey every case that the Supreme Court had authored in which there was a dissent, looking to see whether the court had ever split completely on party lines.

Do you know what we found? Basically, there were none.

There was one. We brought up a judge from another county to sit in place of a regular sitting justice who couldn't sit for some reason. In that case, we happened to have

a dissent that was of one party, and the majority was of another. That's the only case in 13 years. That pattern still holds true.

The other example that I like to give was about three or four years ago I was in San Diego. We had an elections case come up quickly while two of us were out of town. That left the three justices back at the court, the three Democratic judges. A case came up in which a Republican representative who was alleged to have not been present when signatures were gathered for one of his petitions.

Now, in some jurisdictions, it would be your nightmare as a Republican legislator to have your case of whether the signatures on your petitions were valid to go to a panel consisting of three Democratic judges.

The decision was 3-0 in favor of this person. Let me just suggest that if the two Republicans had been on the panel, that might not have been the result. It might have been the only case in which we split 3-2 the other way.

The point simply is the issues that we get are usually legal issues not political issues. The Court doesn't decide these on a political basis and we don't divide along political lines. When you get an issue such as whether sand constitutes machinery or equipment for purposes of a tax exemption, it's just not intuitive how the Republicans would vote or how the Democrats would vote on the issue. We don't know. We don't care. By and large the cases that we decide, the law will dictate the conclusions.

Now, we do have choices in which cases we take. We have discretionary jurisdiction.

So the cases that come to us are by and large fairly difficult cases. They're cases in which reasonable minds can disagree as to the appropriate result, but they're not cases that fall along political lines.

So we're not your representatives. We hope we're doing a good job, but we hope we're doing a good job within the constraints that we have.

A bill that was advanced this last session, if one were being uncharitable, one might call a court packing plan. I'll let you decide.

As everyone here probably knows, we have a supreme court with five justices. We're a small supreme court nationally. In fact, one study says that we're the smallest Supreme Court for a state of our size and diversity. Frankly, I wouldn't mind having a few more members on my court.

The problem is we're in a terrible economic crisis. So I was surprised last year when I was alerted that the senate judiciary committee was hearing a bill, calling for an increase in the size of the Supreme Court from five justices to seven justices.

I went over to testify. I said that I was surprised by the bill, and was surprised to be surprised by the bill. I'm head of the third branch of government. If the legislature thought there was something wrong with my branch of government or that it needed substantial revision, they might have considered talking to me -- even once.

I pointed out that we're not behind in our work. From the time we hear a petition for review, if we grant review, we'll give the parties 20 days to file simultaneous supplemental briefs. Twenty days after that, we hold oral argument, and within 60 to 90

days after that, we come out with an opinion, unless there are dissents and unless the opinion is incredibly complex.

We are one of the most current supreme courts in the nation in terms of our casework. So they had identified, to my way of thinking, no problem that needed resolution. So it struck me that they must be looking to appoint a couple new members to my court.

That was defeated in committee, my one victory last year. But it shows the kind of thinking that's going on.

We heard from people, "Well, you folks thwart the will of the public. You struck down a statute as being unconstitutional."

In some ways that sentiment is correct. Since we have a representative democracy. I take it as a given, that when our representatives pass a law, that represents the will of the public. So if we strike it down, have we thwarted the will of the public? I suppose we have.

Is that a problem? Not if the law was unconstitutional. It's what we're supposed to do. This goes back to *Marbury v. Madison*. It goes back to the foundations of our country.

Alexander Hamilton and our founders were absolutely clear that one of the things that we need to have in our country is an independent judiciary, not one that's subject to the whim of the King, in case you vote in a way that the monarch doesn't like. It's one of the things our Founders were fleeing from.



Take a look at the Declaration of Independence: That document several times references the equality of individuals, the need to have independent and impartial courts. It is truly part of the core of our nation.

By not teaching civics in our schools, I hope we're not stepping back from our understanding of these foundational premises.

**JACK FRIEDMAN:** Thank you.

Before we move on, I just want to ask you this: Why is the funding of courts of interest to the business community? That can be whether they appear in court as litigants, and it can also be just in terms of having a good rule of law more generally.

**REBECCA BERCH:** Well, very clearly, you see across the nation the effect of this down economy. In some states they're closing state courts one day a week. In other states, they're slowing down the pace of adjudication.

I looked at this at one point because I was trying to figure out which cases have priority. Clearly criminal cases have priority, as do juvenile cases, severance or termination of parental rights cases and adoptions. As you can imagine, those kinds of cases have priority. If you look at the list of priorities in Arizona statutes, many other kinds of cases get priority as well. But for all of you in the business community, your cases are general civil litigation cases and, by and large have no priority. So if it gets to the point budgets affect how quickly we can process cases, those cases lacking in priority start to fall to the bottom of the list. We will necessarily have to process first those with the higher priority.

So why should you care? You should care because having the ability to have the courts there as a backstop even if you don't have to litigate on a regular basis provides a safety net for the business community.

You should be able to feel confident knowing that if you bring your cases, your cases will be promptly litigated in the state court system. You'll have impartial judges. Your cases will move swiftly through our system -- as swiftly as litigation goes -- and that safety net is there.

If our budgets continue to get cut and cut and cut, we will have to prioritize. We will have to fulfill, of course, our constitutional and statutory duties first. Among the statutes, business cases are not a priority.

**JACK FRIEDMAN:** Thank you.

Our next speaker will introduce himself and his topic.

**DAVID ROSENBAUM:** Thanks. I am David Rosenbaum of the Osborn Maledon firm.

Welcome all. It's a pleasure to be here and on this panel.

It was five years ago, in 2006, that Directors Roundtable last had a session like this in Phoenix. You've heard that Chief Judge Schroeder was on the panel as were Justices McGregor and Bales.

Justices McGregor and Bales chose to speak at length back then in 2006 about judicial independence and the threats on an independent judiciary that existed nationally in judicial elections and through campaign contributions.

So when Jack asked me to choose a topic that I thought might be of interest to the business community, I was reluctant to choose the same topic. But as I read the transcript of those proceedings and thought about the changes that have occurred and those that haven't occurred since 2006, I realized that the winds are blowing as strongly now as they were back then, if not more in terms of the challenges.

So there was probably no more important topic to the business community. I want to talk about what's happened nationally to some of the national issues and also talk about recent events in Arizona.

We've been blessed in Arizona in terms of our appellate judges in the state court system and our trial court judges in Maricopa and Pima County that we've been spared contested judicial elections.

We've largely been spared in the influence of campaign financing. But I think, nonetheless, the reason to be aware of the threat nationally is because it may be coming someday to Arizona.

In Arizona, as Justice Berch just said, the attacks on the independence of the Arizona legislative judiciary have continued on unabated since the time that Justices McGregor and Bales spoke. The end result a comprehensive compromise that I'll talk about. Some may call it a deal with the devil. Some may say it's an improvement or not, but a referendum will be on the ballot this November.

So what has happened nationally since 2006? Well, I think framing the issues, there are two key U.S. Supreme Court decisions.

There was the Citizens United decision that probably means that there are no limits, even in judicial campaigns, on independent funding by corporations, individuals, public interest groups, in contested elections or retention elections.

The other decision was the Massey Coal decision, where the court struck down 5 to 4 on due process grounds the refusal of a sitting justice at the West Virginia Supreme Court to recuse himself when he was deciding a case involving his major campaign contributor.

But if you read the decision, that narrow majority, 5 to 4 decision, I think, confirms that except in the most extreme cases, there are no due process limits on the ability of a judge to decide a case involving litigants or lawyers who contributed even heavily to that judge's campaign.

Let me talk a little bit about Massey. I think many of you probably are familiar with the facts, because they're really so egregious. The plaintiff had obtained a \$50 million verdict against Massey Coal in the trial courts in West Virginia. While the case was on appeal to the Court of Appeals, and inevitably headed to the West Virginia Supreme Court, Brent Benjamin challenged sitting Justice McGraw in a contested election.

Massey's CEO and president, Don Blankenship, spent \$3 million supporting Benjamin's campaign and opposed the reelection of Justice McGraw, including a \$2-1/2 million contribution to a political action committee that was supporting the candidacy of Benjamin and opposing that of McGraw.

The \$3 million that Blankenship spent was more than the total money raised by all other candidates in West Virginia judicial campaigns in that election cycle. His \$2-1/2 million PAC contribution was two-thirds of the total funding raised by the PAC that was supporting Benjamin.

Benjamin won. The Massey case, as expected, reached the West Virginia Supreme Court. The plaintiff moved for recusal of newly elected Benjamin. He denied the motion. By a 3 to 2 vote, the verdict was reversed.

There were actually two votes. There was a re-consideration. I won't go into the details. But in the end, Benjamin's was a deciding vote in the case. The U.S. Supreme Court accepted review of the case, and as I said by 5 to 4 majority, it held that it was a due process violation for Justice Benjamin not to recuse himself.

The minority opinion written by Chief Justice Roberts, a very entertaining dissent, would have upheld the decision not to recuse, worried that the majority adopted too standardless a test.

According to the dissent, apparently any level of contributions by anybody, litigants, a lawyer would at least not amount to a due process violation.

Whether the judge should or should not have recused is, obviously a state law question and ethics question. But as far as the due process clause was concerned, the dissent would have found no basis to challenge the recusal.

The majority came up with a test that limits the due process issue to cases with a serious risk of actual bias.

They articulated the following elements: Due process is denied where the contributor has a significant personal stake in the case before the court and that case was either pending or imminent at the time of the election and that person had a significant and disproportionate influence on the judge by either raising funds or directing the judge's campaign.

Under that majority test, I think it's fair to say that no recusal is required even if the party made a disproportionate level of campaign contribution to the judge so long as the case wasn't pending or imminent. If the party merely contributed a lot of money to the judge's campaign, but it's not disproportionate to the other money that's been raised, even with a pending case, no recusal is required.

What are businesses to do in states with contested elections? Particularly when you know that the trial lawyers are contributing, the unions are contributing, other influences, other interests are contributing?

I can ask the same; this is the business-related forum. If I was addressing unions, I'd ask the same questions. What are you to do when you know the Chamber of Commerce is contributing?

Well, you'd be foolish not to spend money trying to elect a judge who you think might be more favorably disposed to the kinds of interests that you have. So that's what has happened.

Let me give you some figures. These come from the nonpartisan group, Justice at Stake. According to their figures, campaign funding for judicial elections more than

doubled in the decade of the 1990s and the decade of the 2000s, 2000 to 2009, from \$84.3 million in the '90s to \$206.9 million in the 2000s.

In three of the last state/supreme court election cycles, funding in each of those cycles for Supreme Court elections topped \$45 million.

What was interesting about the Justice at Stake analysis is that it shows more and more money coming from what they call “super spenders.” They studied 29 of the most costly judicial elections, and the top five spenders in each of those 29 elections averaged \$473,000 from a single contributor.

So Blankenship wasn't too far above the mean when it comes to super spenders. The remaining contributors averaged \$850.

Some big money is coming from just a few sources in these elections. Half a million dollars in each of these campaigns is coming from, on average, five contributors.

A lot of that money is being spent on attack ads. \$93.6 million was spent on TV advertising in the decade of the '90s.

So who are these super spenders besides Don Blankenship from Massey Coal? In Ohio in 2000, the Chamber of Commerce spent \$4.4 million on one election. In Illinois in 2004, the Democratic Party spent \$2.8 million in an election.

It seems to be pretty even spending on both sides. In the decade of the 2000s according to Justice at Stake, the combination of Democrats, plaintiffs' lawyers and unions, if you combine those, they donated \$9.4 million directly to candidates, leaving

aside independent spending. The combination of Republicans, business groups, and conservative groups contributed \$9.8 million.

Besides draining corporate coffers and union coffers and creating at least appearances of impropriety, does this money make any difference? Does it in fact affect how judges decide cases? Is there a quid pro quo?

Maybe that happened in the Massey Coal case, maybe not. Who knows?

But there was actually a study that's in the handout materials, done by two political science professors, Chris Bonneau of University of Pittsburgh and Damon Cann of Utah State. They examined the 2005 elections for Supreme Court seats in Nevada which has nonpartisan judicial elections, and in Michigan and in Texas which both have partisan elections. Their study concluded that, yes, in Texas and Michigan where there were contested elections, campaign contributions do appear to affect the outcome of the cases.

I don't know about the methodology, the science. But they've done this study, and it appears to support that conclusion. Not surprising. Judges are human. Even without an intention to be influenced, it's possible that money has some effect in how they are deciding cases.

So it's no surprise that courts are becoming politicized because of this campaign election cycle.

Perhaps, that's best exemplified by Wisconsin where the recent union busting legislation reached the Supreme Court. According to news reports, Justice David Prosser



put Ann Walsh Bradley, Justice Bradley, in a choke hold while they were debating the merits of that appeal.

In Florida, just like in Arizona, as Justice Berch mentioned, the legislature was seriously proposing a court packing plant. They were going to divide the court into two five-judge high courts, one for civil, one for criminal cases. They would have severely constricted the court's ability to be involved in rule making, and they would have required a 60 percent majority approval in judicial retention elections so you couldn't even be retained in your retention election unless you obtained 60 percent vote.

So let me bring it back to Arizona where merit selection is alive and well. All of our appellate judges are appointed through the merit selection system. In counties with a population in excess of 250,000, Maricopa and Pima, the trial court judges are selected through the merit selection system.

We've had this repeated effort at the legislature to at least put measures on the ballot. It would require a constitutional amendment to modify, restrict, or undo the entire merit selection system.

The result will be on the upcoming ballot, a referendum. You have senate concurrent Resolution 1001 in the handout materials, which was a negotiated compromise.

I wasn't in the room, and I don't know if we will hear some inside stories from Chief Justice Berch or not, but it is a compromise that will make some significant changes to the merit selection system in Arizona if approved by the voters.

As I said some have called it a deal with the devil. There are those who say if this compromise hadn't been reached, we would have seen much worse come out of the legislature. It's not worth risking something much worse on the ballot, that the mood of the electorate, which has always been friendly to merit selection in Arizona, may not be as friendly anymore.

We need only look to Nevada where despite very active support from retired Justice Sandra Day O'Connor, despite very strong support from key legislators, the electorate rejected merit selection. Nobody could be assured what would happen if a more draconian measure reached the ballot than this compromise referendum.

Let me highlight just some of the changes, and you'll see it in your handout materials. Part of this was an attack on the state bar. The five attorney members of merit selection commissions, 5 out of 15 are now nominated by the state bar. They are no longer under the referendum. The governor will select four of those attorneys and the state bar just one.

There will be a much more expanded list of names sent to the governor for openings by the commissions. Currently the commission need send a minimum of three. Under the proposal, the minimum will be eight. That is if there's only one opening; if there are multiple openings at the same time, then they can send six for each opening. But the names for each position have to be different. So if you have five simultaneous openings, as I think just recently happened in Maricopa County, it means the commission needs to send 30 names. Although the commission needs to segregate six per opening, the governor can pick from any of the 30 for those five positions. I think the idea was

there's a greater chance that more names to our liking might reach the governor if the commission is forced to pass on more and more names. On a single opening, the commission can send less than eight names if they turn down all the remaining candidates by a two-thirds vote. It's possible if you're to get 10 candidates and they just can't stand three of them, then they'll only send seven names to the governor.

At the time of the retention elections, all written opinions and orders by any judge of the court of record -- Superior Court is a court of records, as are the Court of Appeals and Supreme Court -- have to be made available on the Supreme Court website unless the order is under seal. Maybe we're heading there anyway. I don't know. But there will be an ability of opponents who wanted to challenge the retention of even a trial court judge to pick through every minute entry order in a case that's unsealed if it's a final ruling in the case.

**JACK FRIEDMAN:** I would like to ask you a quick question. Why does the great predominance of the business community support merit selection consistently? Why wouldn't they want to have a system where their contributions could affect what judges there are?

**DAVID ROSENBAUM:** Well, studies have shown -- and I know the Chamber of Commerce has done this -- that actually the outcomes for businesses are better in jurisdictions that have merit selection.

Now who knows who's going to succeed in buying the judge? Will it be the trial lawyers or will it be the Chamber of Commerce?

I think businesses appreciate the fairness of the system. They don't want a rigid system. The Chamber of Commerce organization that has local affiliates that are forced to spend in contested elections is the same group that is so strongly supporting merit selection. I think that speaks for itself.

**ROSLYN SILVER:** I just want to comment. I had a similar issue in the Clean Elections case in Arizona.

Jack, you talked about this a little earlier. I know you did the other time that we had this program.

As district court judges, maybe because we don't have as much time and maybe it's because we're not as interested. We are more robotic in making our decisions.

Two months before I made my decision the United States Supreme Court held that the Federal Clean Elections Act was unconstitutional on First Amendment issues because the nonparticipating candidate was triggered to spend his or her own funds once there had been funds that were used by the participating candidates. So that created a First Amendment issue. Did it do that in Arizona?

But what I thought was fascinating is in the Davis case, in the Supreme Court of United States, the First Amendment issue was brought by a Democrat, and a very wealthy Democrat.

Okay. So that may have -- you know, that may have been interesting as opposed to in Arizona. It looked as if the Scharf-Norton Center for Constitutional Litigation was on the other side of the issue.

I also noticed that in contrast to that, many portions of the business community did not support the Clean Elections Act.

So I think there's some diversity on that, because it was designed to allow people who didn't have the money, to participate and perhaps not be so pro business.

**DAVID ROSENBAUM:** I think that's right. Of course, spending money on elections for individuals running for elective office is a slightly different issue. So one could be very much in favor of unlimited campaign spending in that context and yet be an advocate of merit selection. We'd rather not have any system of election for judges. When it comes to elected officials, no holds barred let's spend away.

There are just a couple other features of the referendum. At the time of the retention elections, a joint legislative committee of the house and senate judiciary committee may hold hearings on the judges up for reelection.

An earlier version of the bill said "must." What actually passed said "may." So perhaps that's not a change. They always had the right to call any hearings they wanted. But that at least has the prospect of politicizing the process even more and gives a green light to the committees where, perhaps, otherwise, there would be some opposition that the hearings are unseemly or inappropriate.

So what's in the referendum for merit selection? What's good about it? Well, at least two provisions that advocates of merit selection would say are positive steps.

One is the mandatory retirement age is extended from 70 to 75 years. Then terms are extended to eight years for Superior Court judges. It's now four. So they don't have to sit every four years; it's every eight.

To the extent they are worrying consciously or subconsciously about the political impact of rulings they make, they'll have eight years of a cycle to worry about those issues.

I won't express an opinion whether these are good or bad changes, whether even if it's a deal with the devil, you should vote for it, because of what might otherwise happen.

If adopted, will the deal really last more than one or two terms in the legislature or will we be facing the same kinds of attack bills that appeared this year? I don't know.

I heard there was a meeting of former state bar presidents where they were talking about organizing an opposition to the referendum. Even though other groups that have been very active in efforts to support merit selection are on board with the compromise, it will be interesting to see what comes out of this, what groups organize for or against the referendum.

What the Chamber of Commerce will do, I don't know. I don't know if they'll support it, hold their noses, or oppose it as a step backwards.

So when we have time to debate, I'd be eager to hear what the folks in the audience and on the panel think about those issues.

**JACK FRIEDMAN:** Thank you very much.

I'd like to introduce Shane Swindle of Perkins Coie who will be our next Distinguished Speaker.

**SHANE SWINDLE:** Thank you, Jack.

I appreciate the opportunity to participate and your putting this program together.

Chief Justice Silver and Chief Justice Berch, it's really an honor to be on the panel with you.

To pick up where David left off, allow me to describe one of the great pleasures of practicing law in Arizona. When a new client from out of state calls, the first thing they want to know is: Who's the judge and what do I have to worry about? They're always surprised by the answer. Almost, without fail, I am able to tell them: You have a great judge. He or she will listen carefully to the evidence and will move the case forward on merits.

This is true at both the federal and state level, and particularly at the state level.

New clients are shocked by this. They're not used to having judges that are objective. They're used to having to deal with which side of the partisan divide is this judge on, and how are we going to deal with that?

I've never had a client, at the end of one of these conversations say, "Well, that's terrible. I'd like to know that I've got this guy or this woman in my pocket."

I've never had that happen. They're always thrilled to be able to know that they can address the case on the merits and move it expeditiously through the process.

I don't think there's any question that the quality of the state court bench is a function – and the lack of partisanship on the state court bench is a function -- of the merit selection process that we have had so successfully for many years.

It has worked to the great benefit of the business community and of Arizona as a whole. It allows cases to be decided, at least more often than not, on the merits.

Let me turn to a different topic that is not nearly as lofty as an independent judiciary or the democratic principles that an independent judiciary preserves, but I think is critically important to the functioning of an independent judiciary, and that's civil discovery.

The air goes out of the room when you say that. But let me tell you why I think civil discovery is so important. It is important that it functions smoothly. There are a couple of reasons.

The first is that discovery is the foundation of the system. It produces the information that allows clients to carefully and fairly evaluate their own cases and everything that follows from that, including settlement and the approach to litigation.

It also is the best process that we've come up with thus far to get the facts on the table so that cases can be decided fairly and on a level playing field and on the merits.

There's a second reason that discovery is important to the system, and that is that for most of us, for most clients and for most attorneys, this is where we will spend the bulk of our time.



Many, many clients will not see the inside of the courtroom; or if they do, it will be a very brief visit. For attorneys as well, we will spend far more time with discovery outside of the courtroom than we will inside.

So it's important that discovery functions smoothly, and when I say "smoothly," what I think of is, I like to ski, and so I think of a virgin slope of powder with beautiful S turns carved through it with no mistakes. It's a thing of beauty.

Or if you're not a skier, it's like a hot knife through butter. It needs to be smooth and quick with not a lot of rough edges.

There are a number of innovations and procedural changes that have happened over the last decade or two in Arizona and in other courts around the country that have helped smooth out the discovery process.

One of them is pretrial orders like one sees out of Judge Silver's court. For example, you will inevitably, soon after a case is filed, get a standard order that requires you to get in touch with the other side and start putting together a proposed pretrial order. It requires the parties to get together and cooperate. There are disclosure rules at the state and the federal level that requires that level of cooperation.

Cooperation is even more important when you start to consider electronic discovery and the changes that it has wrought in our system. Let me try to introduce that by quoting from a memo that was just put together by a subcommittee for the federal rules advisory committee, considering amendments to Rule 26.

Among the amendments they're considering are specific triggers for when a duty to preserve evidence will arise. So in addition to the receipt of a pleading, a service of a pleading, there are other triggers and also other ways to handle electronic discovery.

It's not clear that they'll make any changes in the rules, but they're considering them. This is the memo's explanation for why:

“In this realm, anxiety bordering on anguish arises from uncertainty as to the beginning scope and duration of the duty to preserve and concomitant risk of sanctions for spoliation.

As a general matter, it seems clear that many are concerned that preservation obligations may often seem far too broad, and that huge expense resulted from that overbreadth, particularly because the standards for severe sanctions are unpredictable and inconsistent across the nation.”

Then it goes on to say: Having said all that, having noted that there is a serious problem, it isn't clear what the answers are from the rule-making perspective.

You can try to have very specific rules or you could try to have more general rules. Both of them have their plusses and minuses, and both options will leave many cases to be decided, as they are now, on their facts.

We can come back and talk about some of those more specifically, if that would be helpful, but let me instead try to wrap it up this way:

With the advent of all of the documents that are now available through electronic discovery, it really is no more difficult to make a decision about whether there is a duty to preserve evidence, but it is much more difficult to implement that decision, and it's much more expensive because of the volume of information that must be preserved.

Take, for example, an employment dispute. Before the advent of e-mail, there was probably a memo in the file in the employment office, and you would preserve that, and you'd be good. Today there's an e-mail, and it may have gone to 100 different places, and you don't know all of those places at the outset.

So it's one thing to say, well, your obligation is to produce to the other side all relevant evidence and all evidence that may lead to the discovery of admissible evidence, but it's not a simple thing to implement that rule in this context.

Cooperation is therefore needed more than ever. If the discovery process functions smoothly, judges will be involved seldom. So cooperation between litigants is all the more important.

Cooperation is needed even as to things like agreeing on the custodians who will be interviewed and whose documents will be collected, agreeing on the search terms that will be used to go through the documents that are collected on an initial basis before there's actual eyes on review by people.

If we don't have that level of agreement, if instead one side is able to say, well, you have your obligation, go fulfill it, and then if you trip up, I'm going to move for sanctions, including and up to dismissal of your case and payment of my fees, and so

forth; then the system breaks down in a hurry. Now, in Arizona we've been very successful with this at both the state and federal level. But if there is some assistance that could be provided by the courts, I think it is probably a little more specificity as it moves through the management process.

For example, in the federal courts, the rule requires parties to discuss electronic discovery. Perhaps, after that first case management conference where you can see whether it's working, there may need to be a subsequent order that spells out the details -- custodians, search terms, whatever that specific case may need.

On the state level, the rule is still electronic discovery should be produced as part of the initial disclosure. But as a practical matter, that's not really possible, and it rarely happens.

It may be time to amend the state rule or to issue some guidelines to the judges. It's in fact better to have communication up front before parties start producing electronic discovery. Otherwise, it's going to be produced in ways that the other side may not be able to see, may not be able to work with; and it will cause more problems down the road.

There are additional levels of specificity that can probably be implemented over time to address the problem. But ultimately our goal should be to make the system run smoothly so that judges don't have to get involved and can spend their time in this era of increasingly scarcer resources on the merits of the cases. That will allow cases to be decided quickly and on the merits. We as litigants and counsel can do a lot to further that process.

I'll leave it there, and we can pick up with questions.

**JACK FRIEDMAN:** Thank you. We will move ahead to a Roundtable discussion with everybody on the panel.

From a judge's point of view, what does this epic issue called E-discovery mean? There are court processes and resources that you're going to need in order to try to be efficient. Also, of course, there is the time element and the cost of going through all the e-mail.

On their side the business community says, "E-discovery, are we really going to have to spend \$1 million?"

**ROSLYN SILVER:** I'll be interested in what Justice Berch has to say. I think we have been ahead in technology for a long time at the federal courts. Particularly in Arizona, we have the most technically proficient court system. We have moved towards the E-discovery rather quickly.

It's still in its embryonic stages. Frankly, it's because a lot of the judges don't understand E-discovery. You get a lot of misunderstanding of the terminology and the application of E-discovery.

The judges, perhaps, don't have enough time or interest in learning all the nuances of E-discovery, so we wait for the lawyers to bring it to our attention.

But I think, Shane, you had a very good point, which is this issue needs to be addressed at the outset. In some cases, you're not going to have as much E-discovery,

but, I'll tell you, the discovery disputes that have come to our attention about it have educated us.

One of the most important problems that I've seen in E-discovery has been inadvertent disclosures. Now, we have a new rule on that in federal courts about how you handle those inadvertent disclosures, and a lot of it has to do with privilege issues, attorney-client privilege issues that are missed.

It's very expensive. I am hopeful that over time it will become less expensive.

I also notice that there are growing pains for the legal community, and they're having a little trouble coming up to it. Those that don't understand it are disadvantaged.

Part of the problem, too, is that we have this massive publication of the methods and means of handling it.

It would probably behoove everybody for us to have more seminars like this so we can get the feedback as judges for the problems that the lawyers are having and maybe we need, and we don't have enough, local rules concerning it.

When I was actually the chief of the local rules committee, the question concerning technology was, more than anything else although we had E-discovery, what kind of equipment could you bring in the courtroom.

So that's not enough. We need to do more. I know that the federal judiciary committee in Washington, D.C. on which one of our judges serves, Judge Campbell, has

been working on this. They work on it every year. Unfortunately, that takes a long time to get new rules.

So that's an area where we need feedback.

**JACK FRIEDMAN:** What if there's inadvertent disclosure? What is in the new federal rule?

**ROSLYN SILVER:** I'm embarrassed to say I don't know exactly what it is, but it has to do with good faith. It has to do with quick disclosure. It has to do with quick response concerning that disclosure.

Then the judge may well have to decide, oftentimes as in anything where you have privileges, whether or not it should be used just like you have, or if it can be used in a limited context.

Then you also have its use in the criminal area, which is that once you make one of these disclosures, you have -- and I've had this issue in front of me -- the fruit of the poisonous tree.

**JACK FRIEDMAN:** What came from it?

**ROSLYN SILVER:** Yes. What came from it? How much more disclosure? I mean, was this really a hot button for opposing counsel when they saw it? Whether or not it was close to a privilege issue or not a privilege issue what else are they entitled to? So it is a numbingly complex question.

**REBECCA BERCH:** We, like all of you, are learning about E-discovery. In my judging career, I've always been an appellate judge. We see only the extreme problems, and we see them at the far end of the litigation process.

We've seen only two cases dealing with E-discovery, one dealing with whether e-mails are public or private and the second dealing with the duty to preserve and disclose metadata.

You know, we use electronics now the way we used to use the telephone. You pick up the phone you used to order flowers, you order lunch. Nowadays you go online and you find a source, and you procure these things.

Because we used to use the telephone, all the messages were gone. The information was ephemeral. Nowadays it's all preserved, the metadata is still there.

So a lot of the issues that we're starting to see involve where the line is between what business information is required to be preserved, and what must be disclosed in the course of a business dispute.

Where my court is most effective is in our rule-making capacity. Like the federal courts, we have discovery rules. Our rules, though, are a little more flexible and can be changed more easily.

We have an electronic rules forum. Any person, anybody, lawyer, or non-lawyer, can suggest rules to us. So if you see a need to update our rules or change our rules or make them more specific, again, Google 'Arizona Supreme Court.'



On our cover page we have drop-down tabs. One of them is our electronic rules forum. You can propose a rule or you can propose a change, or you can see if somebody else has.

We run it as a blog. So if you see a proposed change on our electronic rules forum, you can comment on it: "Well, this wouldn't work because," or "In my experience it doesn't work that way." Then the original proposer can go on, take a look at that and say, "I think you're wrong and here's why."

We actually get a pretty good discussion. We review these proposals and comments shortly before we're ready to meet on our annual rules agenda.

There are a lot of unintended consequences to rules. You want them specifically detailed so that people receive guidance from them. But you don't want them so detailed that they cause an issue of fights or they limit or they constrain in ways you hadn't intended, or they open doors that you hadn't intended.

So in E-discovery we're fighting the same battles that you're fighting. That is, to provide the necessary guidance so that lawyers know what they're required to maintain and disclose while also preserving information that for your business may be private business information that is not necessary to a lawsuit, and you don't want to have disclosed.

We're not even talking about the really extreme cases of trade secrets. We're talking about regular business practices, clients' identities, supply lists, and so forth.

There are many areas in which we need your guidance on this to tell us how things actually work in the real world.

We need to find a way to place the kinds of limits that Shane talked about on E-discovery so that what's being disclosed is limited. We use to bury people in warehouses of documents. We do the same thing now, but we do it so much more efficiently with the touch of a button on E-discovery and we need to get a handle on that.

**ROSLYN SILVER:** I would like to say something here. I was on a committee on the federal civil rules about a month ago in California. I was assigned a hypothetical on E-discovery. I realized that this is not a topic for me, but I spent a lot of time with the other members of the panel. All I can say is that I think that lawyers should be terrified. Because if you look at the federal rule now, it says that under E-discovery anything that's tangible needs to be disclosed and, of course, in the broad spectrum of what under Rule 26 constitutes disclosable information.

I was shocked to find out that everything is tangible, that the text messages are tangible, that Twitter is tangible. All of these things that I thought would disappear when you press the delete button.

There are very expensive experts who shockingly can retrieve this. That's the kind of problem that attorneys have today. If the business doesn't have somebody who they can hire to ensure that it's un-retrievable or, if it's before a trial that you do something to make sure that this is the end of it. Or once their case has been filed, that you have your expert to say, "We can get that material." You certainly better turn it over.

The word is "tangible;" that's what's in the civil rules. It is certainly broader than I ever anticipated.

**DAVID ROSENBAUM:** Jack, if I may just pick up on that point and tie it back to something that Shane said earlier. Reaching early agreement among counsel after the case is started usually works with good lawyers at good firms on each side of the case. You'll probably reach agreement on 90 percent of what needs to be maintained, how you're going to search it, how you're going to produce it. That works pretty well.

It's more difficult where you have an individual plaintiff or defendants who can say, "I'll agree to search all of my computers. You do the same, General Motors, General Electric."

But normally there's mutual interest. You can work out a reasonable deal. The problem is, and what's really scary, is what do you do before you have that meeting?

Shane made the point of the issue of mandatory disclosures, particularly in state court. You have an obligation to produce everything before you've had that conversation. You have this overarching obligation to preserve. The lawyer has the obligation to make sure the client is doing that. At the end of the day, there's going to be some sliding scale reasonableness test. If it's a \$50,000 case, no, you don't have to preserve cell phone data. You don't have to retrieve Blackberries, take them away from the employees.

It was okay that the employees were still using their computers. You hadn't yet imaged them, and they might be inadvertently overwriting important deleted data.

The problem is, at the outset you don't know what ultimately the other side's going to insist you should have done or what the judge will say you should have done, because the standard is so subjective and vague.

I'm not optimistic that anything can come out of these discussions at the rules committee. Because if you make it concrete, you're either going to impose standards that for the really big case, important case, perhaps is too low or that for the smaller case is way too high.

You shouldn't be forced to spend \$100,000 up front on an outside E-discovery vendor to image computers in a \$50,000 case. Yet, the same material is probably as relevant in the \$50,000 case as in the \$50 million case. How do you write a rule that's geared to the dollars at stake or even the likelihood that it's going to be resolved by settlement?

In some cases, even big cases, both sides know, ultimately they'll agree, let's not spend all that money now, because we're probably going to resolve this. Until you have those discussions, you're in no man's land.

**JACK FRIEDMAN:** I'd like to give some business feedback here.

At a large global conference I was asked to chair a session on the relationship between the Board of Directors and a technology crisis in a regulatory environment.

Naively, I said, "Well, if I was on the Board, I would call in the Chief Information Officer and tell him or her to collect all the data. The lawyers would tell this person to collect all the e-mail."

The technology people in attendance said the following was a major problem:

Corporations decentralize their databases, so you may have operating units with their own software which may be incompatible with other unit's software.

They all know their own databases. The central chief information officer doesn't even know all the databases that the corporation has in a large corporation. So this person may not even know exactly to whom he or she should go. Suddenly the collection process and the compatibility issue, getting it into a uniform format to submit it, is daunting. I don't mean just daunting for the dollars and cents, but also to try to figure out whether we have forgotten anything?

Secondly, on the deletion issue, again, I may be somewhat wrong here, but my understanding is there's nothing on the computer that is ever deleted, ever, when you press the delete button.

So the only policy -- and this actually happened in a reported case, in order to make sure something was deleted, someone ordered that all the hardware should be smashed by hammer.

**ROSLYN SILVER:** That's right.

**JACK FRIEDMAN:** If you go to court and they say, "Well, what is your policy? The company may say that it can't be delivered, because it is deleted every 30 days."

They say, "Well, okay. Go get all your deletions."

So are you supposed to go in and say, "Our policy is to smash our hardware"? Not even because we have litigation coming up, but we just want to make sure there's no record of anything that shouldn't be out there, so we smash our hard drive every 30 days. Well, that sounds to a judge or a jury like a very strange retention policy.

Then you have the problem of the volume. The volume problem is that it's physically impossible to go through all the e-mails in a large company. You just can't do it. Even if part-time people are hired to go through everything for General Motors or Exxon, you really effectively can't do it, no matter what your resources are. Litigation consultants are developing the software procedures and packages where you look for certain key phrases.

A big issue the courts will have to face is whether a good faith effort with this software that recognizes phrases is enough when combined with an expert witness saying, "This software is accurate enough and here's our methodology." A judge may say, "I think you've done enough in searching for the key phrases and submitting all the results." Then the other side will say, "Well, how about this phrase, this phrase, this phrase, and this phrase?" So suddenly the judges are going to be ruling on whether a software search protocol is 80 percent accurate, 90 percent, or some legal threshold.

The bottom line is that business leadership and the technical community believes that outside lawyers, inside lawyers, Boards of Directors, judges, the whole legal system, do not understand how impossible it is to just say, "Give us everything you have, no matter the cost." So the whole legal profession will have to be educated in the hard reality of technology.

Sometimes I get judges who say to us, "Can you put together some educational programs for judges, because we know you're completely neutral?"

Our problem as a volunteer organization is which issues should be put at the front of our priority lists. This whole technology issue in the courts has to move ahead in what we're doing.

**SHANE SWINDLE:** Let me just make two really quick points. One is, proportionality really is critical and, fortunately, in case law you see that taking hold more. Judges are looking at what's proportional given what is at stake and what can be done at what cost.

The second is, for all of the reasons that everyone was just talking about, that's why it's so important that there is cooperation and transparency between counsel.

If one side is uncooperative, as David says, they say, "Well, I'll give you everything on my home computer. You give me your network."

Nevertheless, the big company needs to remain transparent and tell them, "This is where I'm looking; this is what I'm looking for," so that there is a record. When and if it does get to the judge, there's a record to say, "Look, we approached this in a reasonable way. We told them what we were doing. We told them why we were doing it. We tried to be proportional in the way we approached it." So that there's some sort of record. Transparency becomes all the more important.

**JACK FRIEDMAN:** Would the other side have the opportunity to say, "Well, if you're going to do these 87 search terms, okay, could we have you add these 7?"

**SHANE SWINDLE:** Absolutely.

**DAVID ROSENBAUM:** Yes.

**JACK FRIEDMAN:** They're doing that and they're negotiating the search terms?

**SHANE SWINDLE:** Yes.

**JACK FRIEDMAN:** Then you present it to the judge, who says, "Look, you agreed to 87 plus 7 is 94. If after the fact you decided you missed the 3, both of you, I'm not going to go back and start going through them."

**ROSLYN SILVER:** It's hard to go back. It's hard to probably even remember the olden days when you had nothing but paper, and there was a broad request. It was always a question, "Is this over-burdensome in terms of pulling all these papers up to the archives and going to the bowels of the corporate center to find these papers?"

But the lawyers couldn't say necessarily that there may not be something relevant there. Then the courts can say, okay, it seems to me there's relevance. There's a balancing, exquisite balancing, as to who pays for it. In technology, you're going to have the same thing. What we as judges have to do is listen very carefully. We're trying to learn.

We're trying to listen to sometimes experts, oftentimes experts who will say on one side, you know, "That's going to be impossible. It's going to cost a fortune. We're going to pay \$300 an hour in order to take a look at your hardware and everything else to try to get this information."



Then the client who's saying, "Okay, we can do it, but it's going to cost us. You know, we have one for \$400 an hour in order to get this information."

Then we get into the question of how? How relevant is it going to be?

We have, at least in our federal court, a whole group of tech geniuses on the third floor that we can refer to and say what is this terminology?

So it's still taking a long time, and you've got to educate your judge. You have to have an expert who's going to come forward and say: These are the things we're looking for. These are the things we wanted. These are why we think it might be available, based upon the system that the company has.

Then you're going to have a countervailing, no, not necessarily that they may not be there. You've said, Jack, that somebody said that delete doesn't mean delete. Well, it can mean delete. There's a reason why we have classified documents. Some of that technique of completely destroying information, although expensive, is now available in the private sector.

**JACK FRIEDMAN:** You're saying there is software that truly absolutely deletes?

**ROSLYN SILVER:** Absolutely. Then you call it trash. Or you can just get rid of your hardware. But there are methods and means for the documentation to completely disappear. Of course, you can't do that in anticipation of litigation. You can't do it, but you can have a policy to do it.

Now, you take the risk that we may need this information, so that's got to be the decision of the company to do so.

But I can tell you, having worked on classified document cases, that there are experts who will come in and say, "We can't get that information anymore." So that's all within the realm of many things that I don't know and on which I need to be educated.

**JACK FRIEDMAN:** You have to be sure to have on your staff people who are no older than 15, high school age. They just think computers and electronic devices are the most natural thing in the world. They just push a button and they're only in the tenth grade. Make sure that you're compliant with child labor laws.

What I would like to do at this point is to open it up to the audience. We have a tradition that we view the audience as really the core of why we exist. We want to invite you to ask any questions, make a comment, or share some wisdom; just keep it brief if you would. Does anybody have a question or comment?

**AUDIENCE MEMBER:** Yes, I have two comments. I'm certainly no technical expert, but I'm wondering if the increasing prevalence of Cloud computing will simplify at least the gathering of information on the E-discovery basis.

It won't simplify the amount of information that's available, but it may simplify the gathering of information. Because the devices are safe, and they all go to one place. That's a question, because I'm not sure if that's true or not.

Then my second question has to do with the retention elections.

**ROSLYN SILVER:** I couldn't hear you on the second question.

**AUDIENCE MEMBER:** The second question is regarding the comments from Justice Berch and David, which I thought were very insightful about merit selection.

I'm wondering if you have a view on the effect of retention elections on the whole process. How widely are those looked at by the public? Do they have a true effect on the outcome? Are there any improvements that we can make there that will perhaps enhance the merit selection process?

**JACK FRIEDMAN:** Can I supplement the first part of his comment about Cloud computing? There's the issue of how discoverable the server is. If everything is wireless it is not just sitting in a company. The company has to have an external server of some sort to get the communication to the other side.

It's the issue that as a society everything you send out is discoverable because you have to go through the third party server. Is that the type of society we want to have, where everything literally can be subpoenaed from a third party? Just give us everything this corporation or this individual ever sent out through you.

**ROSLYN SILVER:** Well, I can't answer your specific question on Cloud computing. But I can say that in criminal prosecutions, particularly in child porn cases, the servers are always seized, and there is enormous expertise in determining what's on that server.

Without a doubt, maybe it's because people aren't as careful, I have never had one of those cases where the agents haven't come in and said, "We have all the information. We can pull it off." So I can't answer that. The other question is for Justice Berch and David.

**REBECCA BERCH:** As to retention elections, let me start there, because that's the one I know a little bit more about. On the first, I suspect that you're right, but I don't know.

On the second issue dealing with retention election, all appellate judges stand for retention election at the first general election following their appointment and then every six years thereafter.

Superior Court judges stand for retention election every four years. Judges take this very seriously. We worry about it. We don't campaign. In light of the Iowa experience, maybe we ought to.

If you're not aware of it, the Iowa Supreme Court decided a same sex marriage case. The decision was 7 - 0 and was based entirely on state constitutional law grounds. There was a campaign to unseat the three justices: Marsha Ternus, the Chief Justice, and two others were voted out of office. There was a move to impeach the other four members of the court.

So should we take retention election seriously? Yes. Have we in Arizona? Not yet, but our eyes are opening. In the last election cycle there was a campaign by a group that ran a campaign called NoBadJudges.com, and they targeted four Superior Court judges. The vote percentages for those four judges were about four points below the average, so we don't know whether this campaign had any effect.

On the other hand, it was a campaign run with almost no money and it was a very last minute campaign. So the fact that they could perhaps swing 4 percent with basically an Internet campaign right at the last minute is a little concerning.

All four judges were targeted, as I recall, based on specific decisions the judges had made. An ideological group disagreed with their decisions. It wasn't based on whether their decisions followed the law. It dealt with the fact that these people didn't like the decisions.

I always hear people say, "All these list of judges, I don't know who any of these people are."

I always have to bite my tongue to keep from saying, "Well, shame on you."

We deliver the information on these judges to your home. It's in the voter pamphlet. You have all the information you could possibly want and probably more. You have information on: Is this a good judge? Does this judge seem competent? Does this judge follow the law?

Does this judge rule timely? Is this judge fair based on this whole list of categories? The questionnaire covers all the questions that one should want to know about the judges.

Contrast that with a typical election sign. If I were to run, I'd put up a big sign with a lot of red, white and blue on it, and it would say "Reelect Judge Berch." I might even put a picture of an attractive family there, my kids or somebody else's.

How do you know more about me by seeing a sign on every street corner that says "Reelect Judge Berch" than you can find out by looking at a book? And with merit retention elections, you can vote at your dining room table. Take the pamphlet, sit at

your dining room table and look at whether the results on the judges reflect that this is the kind of person that you would want to hold judicial office.

You can find the responses. You can drill down into it. You can go online. You can go to our website, be directed to it. You can go to the JPR website, which is [AZjudges.info](http://AZjudges.info).

All of our opinions are posted online. All the cases for the Court of Appeals are posted online. Most the orders for the Superior Court are online if you really want to look. So when people say, "I don't know anything about these people," while I understand that there are several judges on the list, but the answer is: If you're going to vote just as you do when you're going to vote on who the president should be or a congressman or somebody else. If you're going to vote, do your research. Look it up. Be informed.

I do think that, even though all the voter information is delivered to people's homes and is available online, somehow or another we must do a better job of getting the word out. David probably has retention election comments as well.

**DAVID ROSENBAUM:** Well, I have some statistics. This is from a law review article that my partner Mark Harrison published a few years back.

But according to statistics he got back a few years ago, the retention rate for Arizona judges was 97 percent. And from '74 to '98, only two Arizona judges were defeated in a retention election.

But there's nothing to prevent a Blankenship from spending \$3 million on an independent advertising campaign against a sitting judge.

**REBECCA BERCH:** The Iowa experience shows that.

**DAVID ROSENBAUM:** Exactly and targeting a judge for a ruling in a specific case. My guess is that could be quite effective despite some very good judicial performance reviews, statistics where all the lawyers and litigants, peer reviews for the judge said that the judge was unbiased, fair and intelligent, and all the things that are measured in those studies.

The JPR process is really phenomenal. I have been on interviewing panels a number of years. The judges take it very seriously. The data is statistically valid. So the answers are there, as Justice Berch said, for voters who care about that. I don't think they do. The retention percentage votes tend to be in a narrow range, between 78 and 92 percent. I'm making those up. But it's very hard to get voters to distinguish one judge from another.

But with enough money, it would happen. Will there be dollars that could be raised in opposition to that kind of targeted campaign? In theory it could be, but the judge would not be involved in that effort.

So it's a risk. It's a risk that exists so long as we have retention of judges. I imagine there will never be a merit selection system in Arizona that includes life tenure. In my view that would be ideal.

Let me give you my views on Cloud computing. I don't know much about Cloud computing except I use it. I use Dropbox.

My experience is it just creates additional locations for the very same documents that will make E-discovery much more complicated.

The document that's in my office computer that I move to the Cloud now exists on my iPad, on my iPhone, on my home computer, on my Mac Book Air that I carry with me, because they all are connected to Dropbox.

So I think it will be a real problem to deal with. What we're talking about with the Cloud is that a business no longer uses its own servers and instead places everything to a third party.

So one question is: Are they obligated to get those documents from the third party? Do they have custody, control of those documents or not? Do you have to use a third-party subpoena to get them?

**JACK FRIEDMAN:** Remember, by the way, Facebook's legal position is that everything you put on Facebook is their legal property. Even if you close your account, they have legal rights to everything you ever put on Facebook. If you don't like it, go use someone else.

**DAVID ROSENBAUM:** If any of you have dealt with Google or Yahoo, trying to get e-mails or other records, they have departments of lawyers and paralegals that probably number in the hundreds of thousands. That's all they do.

Their job is to make it very difficult to get the documents, because they have a business model. So if you have to go through that step with the third-party Cloud provider in order to get key documents, not just e-mails, which is typically where the



Google or Yahoo are involved but also the other corporate documents, it's going to be a struggle for the litigants and for the courts to deal with.

**ROSLYN SILVER:** Jack, let me just mention real quickly something that follows up with what David said about the difference between merit selection and lifetime tenure.

In my experience, early on I held unconstitutional the Bible Week case where the proclamation from both the governor and the mayor of Gilbert, I found unconstitutional and seemed to me unconstitutional. It was upheld by the Ninth Circuit.

But there was a full-page spread in Sunday newspaper doing a survey of the population as to whether or not my decision was right, and 60 percent said it was wrong. Gulp.

Then I remembered -- that was about two years into my term of lifetime tenure. I thought, thank God. Thank God I have lifetime tenure.

**DAVID ROSENBAUM:** That's ironic you'd be thanking God when you struck down Bible Week.

**ROSLYN SILVER:** That's true. I also held constitutional that -- and this is another one where I got beaten up a lot in the press -- that satanism was a belief system, and I suppose that's a God. Once again, there was 70 percent of the people who disagreed with me.

But as I said, I admire substantially the courage of the state court judges who have to deal with those decisions and don't have the protection that I have.

**JACK FRIEDMAN:** I'd like to just close with a true story about Sandra Day O'Connor. She told the story, as you may recall, that when she graduated Stanford third in her class, Mr. Rehnquist was first in the class. The major law firms wouldn't give her a job as an associate. She was given a job as a paralegal for awhile and then became an associate.

This happened in California. The law firm had its hundredth anniversary, and there were 1200 people at the anniversary dinner where she was the keynote speaker and told this story.

After starting out as a paralegal, her career continued back in Arizona later. The managing partner of that law firm was appointed by President Reagan to be his first Attorney General, she knew him from her days at the firm.

She got a call from him and he said he was calling as the Attorney General and would like her to come to Washington to interview to be a secretary."

She said she was taken aback but responded politely, "Well, thank you very much, but I do want you to know that my career has advanced, and I don't need a job as a secretary."

He said, "No, I'm sorry. I didn't mean that type of secretary. I mean a secretary like the head of HUD or HEW." Soon after that she got on to the Supreme Court.

She said that she had seen in recent years that the law firm had more women associates hired than men and that she felt that the trend was in the right direction and all is forgiven.

I'm from California, and I want to thank Arizona for Sandra Day O'Connor. I think it's obvious to the country that she was always known as someone who was a middle ground person who got along and softened the edges of conflicts. Given what's going on more recently in all of Washington someone like her, and specifically, she is sorely missed. Her retirement is a great loss to the country, and I hope she's very happy in the other things that she's doing.

**ROSLYN SILVER:** Jack, I want to share something kind of cute about her, is that right after she was appointed, there was an alumni meeting of the Stanford class, and Justice Rehnquist and she were both there. Everyone else who was there had a little sign saying, "I was second in the class."

**JACK FRIEDMAN:** I want to thank all of our distinguished speakers and the audience. The purpose of the program is to try to expand national awareness of the type of issues that were raised here today.



## **Chief Justice Rebecca White Berch**

### **EDUCATION:**

M.A., Arizona State University, 1990

J.D., Arizona State University College of Law, 1979

B.S., Arizona State University, 1976

### **PROFESSIONAL EXPERIENCE:**

Chief Justice, Arizona Supreme Court, July 2009 - Present

Vice Chief Justice, Arizona Supreme Court, June 2005 - June 2009

Justice, Arizona Supreme Court, March 2002 - June 2005

Judge, Arizona Court of Appeals, Division One,  
April 1998 - March 2002

First Assistant Arizona Attorney General, 1996 - 1998

Special Counsel to the Arizona Attorney General, 1995 - 1996

Solicitor General for the State of Arizona, 1991 - 1994

Director, Legal Writing Program, Arizona State University College of Law,  
1986 - 1991, 1994 - 1995

Associate and Partner, McGroder, Tryon, Heller, Rayes & Berch, 1979 - 1985

### **SELECTED PUBLIC SERVICE:**

Board of Directors, U.S. Conference of Chief Justices, 2009 - Present

Co-Vice Chair, Education Committee, U.S. Conference of Chief Justices, 2010 - Present

Co-Vice Chair, Meeting Planning Committee, U.S. Conference of Chief Justices, 2010 - Present

Board of Trustees, National Conference of Bar Examiners, 2009 - Present

Chair, Education Committee, National Conference of Bar Examiners, 2010 - Present

Council, Section of Legal Education and Admissions to the Bar, American Bar Association,  
 2010 - Present  
 Council - Executive Committee, Section of Legal Education and Admissions to the Bar, American Bar Association, 2010 - Present  
 Chair, Arizona Commission on Appellate Court Appointments, 2009 - Present  
 Board of Advisors, The Green Bag Almanac and Reader, 2006 - Present  
 Chair, Bar Admissions Committee, Section of Legal Education and Admissions to the Bar,  
 American Bar Association, 2007 - 2010  
 Chair, Probate Rules Committee, 2006 - 2007  
 Chair, Commission on Technology, 2005 - 2009  
 Chair, Maricopa County Trial Court Appointments, 2002 - 2005  
 Judicial College of Arizona, 1999 - 2004 (Dean, 2002 - 2004)  
 Liaison, Arizona State Bar Board of Governors, 2002 - 2003  
 Commission on Judicial Conduct, 2001 - 2002  
 Judicial Ethics Advisory Committee, 2000 - 2001  
 Board of Certified Court Reporters, 1999 - 2002  
 Committee on Examinations, 1996 - 2002  
 Board of Editors, The Journal of the Legal Writing Institute, 1990 - 2002  
 Board of Directors, Homeless Legal Assistance Project, 1990 - 1999  
 State Bar Civil Practice (RAJI) Committee, 1992 - 1995  
 Civil Justice Reform Act Advisory Committee, 1992 - 1994  
 Judge Pro Tempore, Arizona Court of Appeals  
 Judge Pro Tempore and Court-Appointed Arbitrator, Superior Court in Maricopa County, 1984 - 1998  
 Board of Directors, Arizona State University College of Law Alumni Association, 1982 - 1985  
 Law Society, Arizona State University College of Law, 1987 - present  
 Various Appellate Practice Institutes (Chair, Judge, and Speaker)  
 Committee on Judicial Education and Training, 2002 - 2004  
 Valley Leadership Class XIX  
 We the People – Volunteer Judge and Trainer (Local and National)  
 Arizona Mock Trial – Judge for High School Competitions

#### **HONORS AND AWARDS:**

Graduation Speaker, Arizona State University College of Law, 2008, 2010  
 Graduation Speaker, Phoenix College, 2009  
 Rebecca White Berch Pro Bono Suite, Arizona State University College of Law, dedicated 2003

Distinguished Achievement Award, Arizona State University College of Law, 2002  
Outstanding Alumnus, Arizona State University College of Liberal Arts and Sciences, 2002  
Professional Achievement and Contributions Award, Arizona Women Lawyers' Association, 2002  
Outstanding Alumnus of the Year Award, Arizona State University College of Law, 1999 - 2000  
Outstanding Alumnus Award, Arizona State University College of Law, 1999  
Appreciation Award, National Association of Attorneys General, 1998  
Outstanding Service Award, Arizona Attorney General's Office, 1998  
Recognition for Contributions to Arizona State University College of Law, 1994  
Distinguished Service Award, Arizona State University College of Law, 1994  
Outstanding Attorney of the Year, Arizona Attorney General's Office, 1992  
Outstanding Service Award, Arizona Attorney General's Office, 1992  
Outstanding Service Award, Phoenix College, 1974  
Award for Leadership and Service to Arizona State University, 1973

#### **PUBLICATIONS:**

Co-Author, Introduction to Legal Method and Process, West Publishing Co., 1985, 5th edition, 2010  
Co-Author, Teacher's Manual for Introduction to Legal Method and Process, West Publishing Co., 1985, 5th edition, 2010  
Author, eleven law review articles, chapters in two books, book reviews and numerous articles

#### **TEACHING:**

Director, Legal Research and Writing Program, Arizona State University College of Law, 1986 - 1995 (leave 1991 - 1994)  
Adjunct Professor, Arizona State University College of Law, 1984 - 1986  
Adjunct Professor, Center for Women's Studies, Arizona State University, 1985 - 1986  
Adjunct Professor, Center for the Study of Justice, Arizona State University, 1980 - 1982  
Northern Arizona University, Flagstaff, Arizona, summers 1986 - 1987  
Mount St. Mary's College, Los Angeles, California, 08-1986  
Regular Speaker for Continuing Legal Education Programs and Civic Groups

Roslyn O. Silver (born 1946) is a United States federal judge who has served on the United States District Court for the District of Arizona since 1994. Silver became Chief Judge for the district in 2011.  
Early life and education

She was born Roslyn O. Moore in Phoenix, Arizona in 1946. She received a B.A. from the University of California at Santa Barbara in 1968 and a J.D. from Arizona State University College of Law in 1971.[1]  
Legal career

She was a law clerk for Justice Lorna Lockwood of the Supreme Court of Arizona from 1971 to 1972. She was in private practice in Phoenix, Arizona from 1972 to 1974. Silver then served as an adviser and litigator for the Education Division of the Navajo Nation's Native American Rights Fund from 1974 to 76. She was an in house labor counsel for the Greyhound Corporation from 1976 to 1978. Silver returned to private practice in Phoenix, Arizona in 1978 before becoming a trial attorney for the Equal Opportunity Commission in 1979. She was an assistant U.S. Attorney for the District of Arizona from 1980 to 1984. Silver became an assistant Arizona attorney general in 1984 and served until she returned to the U.S. Attorney's office in 1986. In 1989, she was promoted to Chief of the criminal division.[1]

Silver was nominated by President Bill Clinton on September 14, 1994, to a seat on the U.S. District Court for Arizona vacated by Earl H. Carroll. She was confirmed by the United States Senate on October 7, 1994, and received her commission on October 11, 1994.[1] Silver became Chief Judge in January 2011 after the shooting death of previous Chief Judge John Roll during the 2011 assassination attempt of Congresswoman Gabrielle Giffords.[2]



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## David B. Rosenbaum

David's practice focuses on complex commercial litigation in the state and federal courts. David has represented public companies and their officers and directors in numerous securities fraud class actions, represented Fortune 50 companies in a wide range of complex commercial litigation matters, including matters involving intellectual property disputes, represented a major telecommunications company in an array of commercial litigation matters, represented companies in sales and use tax disputes, and represented national and local companies in employment controversies, including class-action discrimination lawsuits. As past President of the Federal Bar Association and Lawyer Representative to the Ninth Circuit Judicial Conference, David has developed knowledge and experience in the finer points of prosecuting complex litigation in the federal courts.

### Education

- J.D., *magna cum laude*, Georgetown University, 1983; *Georgetown Law Review*, Associate Editor, 1982-1983
- B.A., *cum laude*, History and Environmental Studies, University of Pennsylvania, 1979

### Clerkships

- U.S. District Court, District of Delaware, Judge Murray M. Schwartz, 1983-1984

### Professional Recognitions and Awards

- *BTI Client Service All-Star Team*, 2011
- Chambers USA, *America's Leading Lawyers for Business*, Litigation: General Commercial, 2005-2011
- *Best Lawyers* Bet-the-Company Litigation Lawyer of the Year, Phoenix, 2011
- Arizona "Local Litigation Star," *Benchmark Litigation*, 2010-2011
- *Southwest Super Lawyers*, Top 50 Arizona Attorneys, 2010
- *The Best Lawyers in America*®, Bet-the-Company Litigation, Commercial Litigation, editions 2005-2011



## David B. Rosenbaum (cont'd)

- *Southwest Super Lawyers*, Business Litigation, Securities Litigation, 2007-2011
- Arizona Chief Justice Distinguished Service Award, 2011
- *Arizona's Finest Lawyers*
- Lawdragon's "100 Lawyers You Need to Know in Securities Litigation," 2008
- Judge Learned Hand Award for Community Service, Arizona Chapter of American Jewish Committee, March, 2006
- President's Award, State Bar of Arizona, June 2006
- Top 50 Pro Bono Attorneys, 2001

### Practice Areas

- Administrative and Regulatory Law
- Alternative Dispute Resolution
- Employment
- Professional Liability/Licensure/Ethics and Counseling
- Securities Litigation
- Technology and Intellectual Property

### Bar Admissions

- Arizona, 1984
- District of Columbia, 1985

### Court Admissions

- United States Supreme Court
- United States Tax Court
- United States Court of Appeals for the Ninth Circuit
- United States District Court, District of Arizona
- Arizona Supreme Court
- District of Columbia Court of Appeals

### Professional Activities

- Judicial College of Arizona, Member, 2010-
- Ninth Circuit Judicial Conference, Lawyer Representative, 2002-2004



## David B. Rosenbaum (cont'd)

- Federal Bar Association, Phoenix Chapter, President, 2000-2001
- William E. Morris Institute for Justice, President, 2001-2003
- American Judicature Society, Member, 1992-present
- American Bar Foundation, Fellow
- Foundation of the Federal Bar Association, Past-President and Charter Fellow
- Chair, Fellows of the Foundation of the Federal Bar Association, 2009-2011
- Community Legal Services, President, Board of Directors, 1994-1995
- Arizona Supreme Court Task Force for Development of Arizona Law Course, Chair, 2009
- Committee on Civil Rules of Procedure for Limited Jurisdiction Courts, Member, 2011
- Arizona State Bar Legal Services Committee, Chair, 2002-2003
- Arizona State Bar Landlord Tenant Task Force, Co-Chair, 2006-2009
- Arizona State Bar Task Force on Multijurisdictional Practice, Member, 2003
- Arizona State Bar Task Force on Access to Justice, Member, 2003-2005
- Arizona State Bar Fee Arbitration Committee, Member, 2002-present
- Maricopa County Bar Association
- Volunteer Lawyers Program, Advisory Panel, 1990-1994
- Arizona Civil Liberties Union, Legal Panel, 1988-present

### Community Activities

- President, Beth-El Congregation, 2004-2006

### Publications and Presentations

- Author: *The Constitutional Rights of Excluded Aliens*, 70 Geo. L.J. 1303 (1982)





**Shane R. Swindle | Partner**

Shane Swindle, a partner in the firm's Litigation practice, focuses on commercial litigation, particularly environmental, contract and insurance coverage disputes. Most of Mr. Swindle's time is devoted to his active litigation practice, but he also regularly advises clients on environmental, contract, and insurance coverage issues for business planning purposes.

REPRESENTATIVE EXPERIENCE

***Litigation***

**Baker, et al. v. Motorola, Inc., et al.**

Superior Court of Arizona, Maricopa County  
Represented Corning Inc. and its subsidiary in multi-party class action arising out of groundwater contamination in Phoenix and Scottsdale, Ariz. Favorable settlement reached after successful *Daubert/Frye* hearing.

**Burlington Northern v. United States, 129 S.Ct. 1870 (2009)**

Authored amicus curiae brief on scope of joint and several liability under CERCLA.

**Dawn Mining**

Representing Dawn Mining in boundary dispute with BLM.

**Microprocessor Enhancement Corp. v. Intel Corp.**

U.S. District Court for the Central District of California, Federal Circuit Court of Appeals  
Defended Intel Corp. in patent action alleging infringement by IA-64 microprocessors. Patent relates to conditional execution of machine instructions in a pipelined processor. Summary judgment of noninfringement, which the Federal Circuit affirmed. 520 F.3d 1367 (Fed. Cir. 2008).

**Pinal Creek Group, et al. v. Newmont Mining Corp., et al.**

U.S. District Court for the District of Arizona, U.S. Court of Appeals for the Ninth Circuit

Represented Newmont Mining Corp. in multi-party CERCLA cost-recovery action. Argued successful interlocutory appeal establishing that liable private parties are limited to contribution claims. Confidential settlement. 118 F.3d 1298 (9th Cir. 1997)

**Roosevelt Irrigation District v. SRP, et. al.**

U.S. District Court for the District of Arizona  
Representing Corning, Inc. in multi-party private CERCLA cost recovery action.

**San Diego Gas & Electric Co. v. Arizona Public Service Co.**

Represented SDG&E in contract arbitration regarding the Southwest Power Link. Confidential settlement.

**Smith, et al. v. Tucson Airport Authority and City of Tucson**

Superior Court of Arizona, Pima County  
Represented the City of Tucson in multi-party declaratory judgment actions brought by

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EDUCATION

- Brigham Young University,  
J. Reuben Clark Law  
School, J.D., magna cum  
laude, Order of the Coif,  
1986  
Editor-in-Chief, *Brigham  
Young University Law  
Review*
- Brigham Young University,  
B.A., History, magna cum  
laude, 1983

BAR ADMISSIONS

- Arizona

COURT ADMISSIONS

- U.S. Supreme Court
- U.S. Court of Appeals for  
the Ninth Circuit
- U.S. District Court for the  
District of Arizona

insurance carriers for the Airport Authority and the City disputing coverage for environmental cleanup and personal injury claims arising out of groundwater contamination at the Tucson International Airport. Confidential settlement reached following favorable summary judgment rulings.

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**State of Arizona v. Honeywell International**

Superior Court of Arizona, Maricopa County

Represented Honeywell in suit alleging numerous environmental claims and claim of breach of an administrative order on consent. Honeywell's motions to dismiss the principal claims were granted. Confidential settlement reached after matter was fully briefed on appeal but before oral argument.

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**State of Arizona v. United Industrial, Inc., et al.**

U.S. District Court for the District of Arizona

Represented Corning Inc. and its subsidiary in multi-party CERCLA action brought by the State of Arizona to address groundwater contamination. Successfully obtained summary judgment on most claims. Confidential settlement.

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**Universal Underwriters Insurance Co. v. ABC Nissan, et al.**

Superior Court of Arizona, Maricopa County

Represented insurer in declaratory judgment action regarding duty to cooperate and right to control defense. Universal's motions for partial summary judgment were granted. Confidential settlement.

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**United States v. Best Foods, 524 U.S. 51 (1998)**

Authored amicus curiae brief on scope of "owner" and "operator" liability under CERCLA.

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**United States v. Dawn Mining and Newmont USA**

U.S. District Court for the Eastern District of Washington

Representing Newmont and Dawn in negotiation of RDRA consent decree and contemporaneous settlement negotiations with federal PRPs.

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**PROFESSIONAL RECOGNITION**

- Listed in *The Best Lawyers in America*
  - Commercial Litigation, 2003 - 2010
  - Environmental Law, 2008 - 2010
- Peer Review Rated AV in *Martindale-Hubbell*  
(AV®, BV® and CV® are registered certification marks of Reed Elsevier Properties Inc., used in accordance with the Martindale-Hubbell certification procedures, standards and policies.)

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**PROFESSIONAL LEADERSHIP**

- American Bar Association
- State Bar of Arizona
- Maricopa County Bar Association

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**COMMUNITY INVOLVEMENT**

- Varsity Coach and Scout Master, Troop 781, 1999 - 2005

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**RELATED EMPLOYMENT**

- Dalton Gotto Samson & Kilgard, P.L.C., Phoenix, AZ, Partner, 1995 - 2000

- Meyer Hendricks Victor Osborn & Maledon, P.A., Phoenix, AZ, Associate and Partner, 1987 - 1995

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#### CLERKSHIPS

- Hon. Stanley G. Feldman, Arizona Supreme Court, 1986 - 1987

#### SELECTED PUBLICATIONS

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1999	<b>"Closing the Book on CERCLA Section 107 Claims by Liable Parties"</b> Co-author, Article 18 University of Virginia Environmental Law Journal 160
1995 and 1999	<b>Environmental Litigation Section</b> Author and Section Editor Arizona Environmental Law Manual
March 1995	<b>"Toxic Tort, Superfund, and Environmental Insurance Coverage Litigation: Staying on Top of the Changing Wave"</b> Co-author, Article Arizona Attorney
1995 and 1999	<b>Chapter on Insurance Coverage for Environmental Claims</b> Co-author Arizona Environmental Law Manual

#### PAST EVENTS

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- |               |  |
|---------------|--|
| 2002 and 2003 | <b>Evidence at Trial</b><br>Speaking Engagement<br>Lormar Education Services |
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**Jack Friedman**  
**President**  
**Directors Roundtable Institute**

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