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THE PRACTICAL IMPACT OF THE COURT OF APPEALS: A PANEL DISCUSSION

As part of the Twenty-Fifth Anniversary of the Minnesota Court of Appeals Symposium, Marianne Short† moderated a panel of experts in discussing how the Minnesota Court of Appeals has impacted various areas in legal practice. The following is a transcript of their conversation.

MS. SHORT: Thank you very much, David [Herr]. We're happy to be here. So welcome, everyone. Come back with me, if you will, and let's go back in time twenty-five years ago. I agree with our previous two speakers that many of you in the audience don't look like you could come back that far, but think a little bit with me, come back and recall, as we heard from Justice Magnuson, the discussions that went on at the time of the creation of the Minnesota Court of Appeals. As we all know, the naysayers at that time said that appellate decisions would take twice as long and be twice as expensive and that at the end of the day they would still go to the Minnesota Supreme Court, so why incur the cost and the bother and the delay? Now, luckily, in addition to many prominent naysayers, there were a lot of supporters, and the supporters said, if we remember, that the supreme court is not able to stay up with the volume, that it is in opinions, that summary affirmances are the norm, that when you receive one you hardly recognize that it's a decision in your case, and that the years plus of delay is expected.

So we're here today to talk with you about who is correct: the naysayers or the supporters. I'm joined by a panel of experts; let me introduce them before we start our discussion. Brad Colbert is

† Marianne Short has been a managing partner at Dorsey & Whitney, LLP since 2007. She has more than thirty years of courtroom experience. As a trial lawyer, she served as counsel for major companies in several important litigation cases. As a Minnesota appellate judge from 1988 to 2000, she authored more than nine hundred opinions in nearly every area of criminal and civil law. Short is a member of the American Academy of Appellate Lawyers and the American College of Trial Lawyers and is certified by the Minnesota State Bar Association as a Civil Trial Specialist.

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an assistant state public defender and a director of William Mitchell's Legal Assistance to Minnesota Prisoners (LAMP) Clinic. He has argued more than two hundred cases before the Minnesota appellate courts and one case, congratulations, at the U.S. Supreme Court.

John Gallus has his law degree from the University of Pennsylvania Law School. He clerked for a judge on the United States Court of Appeals for the Third Circuit and an associate justice on the Pennsylvania Supreme Court. He was an attorney for the Neighborhood Legal Services Program and worked for about five years at the U.S. Department of Justice criminal and antitrust division. He joined the Minnesota Attorney General's office in November of 1979 and worked there in antitrust, civil litigation, and construction litigation before joining the criminal appeals division thirteen years ago.

Cathy Gorlin is a member of Best & Flanagan's family law practice area. She represents parties in a range of family law matters, including custody matters and marriage dissolution, complex financial estates, and business valuation. She has more than twenty-seven years of experience litigating and negotiating family law disputes, including marriage dissolutions and post-degree, parental, and custody disputes. She is also the editor of the *Minnesota Family Law Practice Manual*.

Larry McDonough has been a legal service attorney in Minnesota for twenty-four years, focusing primarily on housing and consumer law for the last twenty years. He is the co-founder of Minnesota's Annual Housing Law Institute and author of *Residential Unlawful Detainer and Eviction Defense* and most of the forms that anyone would use to fill out for any of the cases involving those matters. He is also a published author, teaches at the University of Minnesota Law Housing Clinic, and is—and this is my favorite—a professional jazz performer. So if we get a little dry up here and you don't have any questions, we're switching over to a musical repertoire.

And finally, but certainly not last, Richard Pemberton is a senior partner at Pemberton, Sorlie, Rufer & Kershner. He has more than thirty years of trying a wide range of jury cases in many courts. He is admitted in Minnesota and North Dakota state and federal courts, in the Eighth Circuit, and the U.S. Supreme Court. He is a fellow of the American College of Trial Lawyers and the American Board of Trial Advocates. He is designated by the

American Research Institute in six categories. He has numerous chambers ratings, and in 2001 he received the award from the Minnesota State Bar Association for professional excellence, so congratulations.

I don't have to do much up here with this panel; I think we're going to look great. So with no further ado, let me change to why we're here. And as I said, we're here to talk about the impact of the court of appeals these last twenty-five years. So before we start to talk about the substantive area in which the experts have so much expertise, let me ask first the question from a procedural standpoint, we'll do substance second. What is the court of appeals' procedural impact on Minnesota law? Let me turn first to Dick for a comment.

MR. PEMBERTON: At the time that the process was getting going, I was on the bottom rung of the apostolic ladder leading to the presidency of the Minnesota State Bar Association, and ahead of me on that ladder were a bunch of very significant people. At the very top of the ladder at that time, Clint Schroeder, lawyer in the Gray Plant law firm still today after all of these years; followed by Ted Collins, Mr. "St. Paul Lawyer" of the time, and for a long time thereafter; Ron Seeger of Rochester, another lawyer such as myself from the boondocks; Dave Doty, now Federal Judge Dave Doty, of the Popham Haik law firm at the time; Len Keyes, another Mr. St. Paul lawyer, and myself. All of us worked on the issue of getting the court of appeals going. Justice Doug Amdahl was passionate. We heard about passion this morning from Judge Toussaint, and Judge Amdahl was passionate about doing (creating the court of appeals) because things weren't working.

One of the people that I contacted, who knew more than I do about this whole subject, is recently retired Minnesota Supreme Court Chief Justice Russ Anderson, who was a rural Minnesota practitioner like myself, served years as a district judge, and ended up as the chief justice of the Minnesota Supreme Court, looking at things from both sides. He talked about a case that he had back in those pre-court of appeals days. He, one morning, got a ruling from the Minnesota Supreme Court two-and-a-half years after the case went down there, and it was a remand to a smart, salty rural Minnesota judge that a few people in this room might know, Jim Preece of Bemidji. And he said, "[W]hen I had to go and tell Judge Preece that he was getting this case back after two-and-a-half

years on a remand," he said, "that was exquisitely painful." And that's the framework in which the discussion of the court of appeals begins.

My comment is that the procedural impact on the state of the court of appeals on all kinds of justice in Minnesota, not just civil justice that I'm supposed to talk about, is the mere fact of its existence. Where would we be without it? We couldn't be without it. Something would have had to happen. The only thing to talk about is whether there is anything better that could have happened, an expanded supreme court or what? And the court of appeals has proved the worth of its existence.

In addition to merely existing and curing that very unsatisfactory state of affairs at the time, it's created what I would call a college of law lawyers, jurists; it created not just the many past and present justices of the court of appeals itself, and certainly half a dozen, at least, Minnesota Supreme Court Justices who graduated from this college, but also all of the clerks. We have a group of appellate law specialists that wouldn't be around; if not for the court of appeals we wouldn't have the specialty of appellate lawyering in Minnesota.

And, finally, [it brought] justice to the boondocks, where people like me who specialize primarily in line-fence disputes and traffic violations and things like that get to see the lawyers and judges in our territory. They don't have to come down here to the big city, where it's kind of frightening for us. We appreciate that very much, and our clients appreciate it because they don't have to pay us to come down here.

MS. SHORT: As Dick is talking here, I'm kind of envisioning Justice Simonett, that kind of country lawyer that you've got to watch out before you're slit as they're doing this. That's so great. Other comments from the panel, Brad?

MR. COLBERT: My experience is that they have really formalized the process. I started practicing twenty-odd years ago, and I'm a criminal defense lawyer who did appellate law. And as one of my first cases, a first degree murder case, I filed the notice of appeal with the court of appeals, which is the wrong court. So I started out wrong completely, and I panicked. I walked into the office of my boss, C. Paul Jones, and I said: "I filed the notice with the wrong court. What am I supposed to do?" He said: "I'll call

[Chief Justice] Doug [Amdahl] and we'll take care of it." So the next day I got an order that said: "[T]his notice was deemed to have been filed with the supreme court," which was perfect; I thought, what a great way to practice law. It's not the way it works anymore. Just lately I had a student who was going to argue in front of the court of appeals, but she graduated and couldn't argue. I had filed a motion and was going to have another student, so I thought, I'll call the court and just have a new student there. And they said: "[Y]ou have to file a motion to change the student," and I thought, a motion? So they formalized the process, I think, for better and for worse. For those of us who make a fair amount of mistakes, it doesn't work that well. I kind of like the old system. But it is nice.

I think the best part of the formalization of it is the ninety-day rule. When you have clients in prison, their appeal is more important than anything in the world. I love being able to tell them after the argument, "I don't know what they're going to decide," although I have a pretty good idea. "I don't know what they're going to decide, but we will know in ninety days." And it is incredibly reassuring to them to know that they are going to get a decision, and it's going to come in that finite amount of time.

I have a case in the federal district court, a habeas case; it's been two years. I call and they say, "[I]t's under advisement, Mr. Colbert." That's it. And it's frustrating for everyone. So I love that piece of it.

MS. SHORT: Cathy, what are your comments?

MS. GORLIN: I think that family lawyers were similarly frustrated before the onset of the court of appeals because not only did the lower courts not give decisions that really explained what they were deciding, but the supreme court wrote opinions in less than 30% of its cases. So with so many summary affirmances, the lawyers, if they appealed the case, just really didn't know why what was decided was decided; it was difficult for them to explain that to their clients. The onset of the court of appeals, and the development of the law that the court of appeals has created, has given lawyers and judges explanations as to why the decision was made or whether it needed fixing. So that explanation has often been very helpful for the lawyers in knowing what possibly to expect for the next case or to be able to explain to a judge how to

decide another case. And so those decisions with explanations, and the detail that the court of appeals has taken, has been extremely helpful for lawyers. Also, in the same vein, the court of appeals has made it clear that specific findings are extremely important for the lower court to write, so it has affected the way we practice family law in that the judges are often asking us to prepare those proposed findings before we come into court for a trial. We often, even if they don't ask us to, spend the time to prepare those proposed findings because we know how important it is.

Also, with regard to trials, we make sure that the evidence that we put in is properly put in. I think that there was a time when we weren't really sure what [to include]: what facts were needed to show a particular thing, whether it would be the right child support amount or the right order with regard to custody or visitation or parenting time. [Now we know] that the pertinent facts are what really need to get into the record. The court of appeals has helped the lawyers do that and has helped judges know what is needed. Therefore, I think it has improved the quality of the decisions that the judges and the referees are making because they also know. Just the other day I had a referee tell me that he knew what he had to do regarding a certain discovery decision because he knew that [otherwise] he would be overturned. So judges and referees are really thinking about what they need to do because they've been told by the court of appeals what is the right way to do it.

MS. SHORT: Thank you, Cathy. John.

MR. GALLUS: Yes. The procedural impact on the Minnesota Court of Appeals has been profound, and the chief justice and chief judge of the Minnesota Supreme Court and the Minnesota Court of Appeals have eloquently summarized those profound effects. And I have really little to add, but I would comment on a couple of things.

The general formulation one hears is that the Minnesota Court of Appeals was created to be an error-correcting court so that the Minnesota Supreme Court could deal with the important stuff, the difficult stuff, the stuff that involves important issues of public policy. And I'm really looking forward to Justice Hanson's talk later this morning about the differences between an error-

correcting court and a policy-making court.[1] But I think we have to remember that, at least in my practice, I don't think there's that much difference. I practice quite a bit in the Minnesota Court of Appeals and have for more than a decade. I've done so on a regular basis. Even though Minnesota's been a state for more than a century and has millions of citizens, these fact situations could have been expected to occur before and be litigated before, but not infrequently do I have issues of first impression that I have to argue to the Minnesota Court of Appeals. In terms of an issue of first impression, the court is required to do the same sort of careful analysis, the same sort of considering the strength or weakness of case law from other jurisdictions, as the Minnesota Supreme Court would have to do. There are not that many cases that are a foregone conclusion. It's not simply that the Minnesota Court of Appeals is just being asked to review the sufficiency evidence in the criminal case and decide whether, viewing that evidence in the light most favorable to the guilty verdict, the jury's verdict was reasonable. The Minnesota Court of Appeals, in my experience, is frequently deciding important issues of first impression. They're frequently, in my practice, deciding constitutional issues, and not simply Fourth Amendment search and seizure issues or Fifth Amendment self-incrimination issues but also First Amendment issues. So I think in some sense when the court of appeals is described as an error-correcting court—although it does correct error—this description is not quite grasping the full extent of its role.

Now, in terms of the publication of opinions and the speed of decisions, as I said, that's been eloquently covered by people who have spoken here this morning before me, but I just personally think those are just so essential for the integrity of the criminal justice system; I imagine civil litigants would feel the same way. If a person is sitting in the Minnesota Correctional Facility in Stillwater serving a prison term and thinks that he or she did not receive a fair trial, the thought that that person's fate could be finalized through an order opinion without any written rationale, or that that person would have to spend two or three years of a four-year sentence before his conviction was either affirmed or reversed and

[1] *See* Sam Hanson, Jonathan Schmidt & Tara Reese Duginske, *The Minnesota Court of Appeals: Arguing To, And Limitations Of, An Error-Correcting Court*, 35 WM. MITCHELL L. REV. 1261 (2009).

a new trial ordered, would really subvert the criminal justice system, I believe.

In terms of what the Minnesota Court of Appeals has done for the supreme court, I think there is one aspect that has not been mentioned yet this morning, and I think it's important. I think in those cases that the supreme court reviews and considers after the court of appeals has handled the case, the court of appeals performs a very important benefit for the supreme court in refining the issues, in letting the supreme court see how another very competent appellate institution has handled the issues.

Finally, on a personal note, I think it benefits appellate lawyers. Having been through the crucible of many oral arguments in the Minnesota Court of Appeals for a number of years, I think I'm a better advocate—oral advocate—not only in the court of appeals but in the supreme court. And that benefits not only my client, but I think maybe in some small measure it benefits those courts as well. There's a college of legal scholars, but I think there's also been maybe a junior college of appellate advocates whose skills have been honed and can contribute a little bit better to the business of appellate advocacy in Minnesota.

MS. SHORT: Thanks. Larry.

MR. McDONOUGH: Good morning. Like Brad, I was never smart enough to get a second job, and so I've been working at Legal Aid about as long as he's been working at LAMP.

What I wanted to talk about was what the court of appeals has done for, essentially, the education of practitioners. I don't know what the percentages are, but I would say about 90% of the cases never go to trial, never reach a trial court decision; they settle or people get advice and go on their own ways without doing litigation. Probably 90% of the cases that go into litigation end at the trial court level. So what ends up going up to the court of appeals and the supreme court is just a tiny little fraction of what really the practice of law is all about. Unless you're an appellate practitioner specialist, you don't get up there a lot. I'd say I've been up to the court of appeals and the supreme court maybe about fifteen times in twenty-five years. But I've probably done a thousand trials and probably done many thousands of cases in terms of giving advice.

Part of what the court of appeals did by being an error-

correcting court and getting a larger volume of litigation to the court of appeals is to give us as practitioners a better window of what is supposed to happen at the trial court level. For the most part, in most practice areas you can't research very effectively the trial court jurisprudence of subject areas, and there are a few areas where practitioners, like myself, have tried to accumulate those unpublished trial court decisions and use that as a teaching method, but that's kind of random at best. So part of what the court of appeals has done, has by reviewing a lot of trial court decisions on more of an error-correcting basis and having those opinions available for us to see, I think it informs us a lot more of what we're getting into and the way it ought to work when we do trial work, because, again, that's most of what we're going to do as a litigation area. So I think it's been really helpful in that front.

If you go to the pre-court of appeals era, there was a little bit of guidance on that, but I would say very little relative to what we've got. So while some people might say it's kind of too bad that we have more appellate litigation going on, that that's maybe a bad thing for society or a bad thing for the court system, I'd say in terms of showing folks the way the court system operates or is supposed to operate, it's actually a good thing.

MS. GORLIN: Marianne, I would agree. Creating this whole body of family law really helps attorneys and judges alike to be able to research and settle their cases. I don't really appear in front of the court of appeals very much. I, actually, may have one coming up soon, but I don't appear a lot. But I'm able to settle my cases based on the law that the court of appeals has created for the bar and parties and the bench. So as a quick plug to my *Minnesota Family Law Practice Manual*—what I tried to do in editing and writing the *Minnesota Family Law Practice Manual*—we put in there all of the cases in a fashion that is easily accessible to family law attorneys to be able to find the cases that relate to family law, which helps define what's required both procedurally and substantively in family law.

MS. GORLIN: Go ahead, John.

MR. GALLUS: I would like to echo sort of the same sentiment with respect to my professional cousins who actually do criminal law at the trial level. One state supreme court justice has remarked,

and I think correctly, that guilty pleas are a good thing because without the settlement of a high percentage of criminal proceedings, the system would just simply break down. And I think the extent and just the sheer volume of criminal law and case law that the court of appeals has rendered in the last twenty-five years has greatly enhanced the ability of defense lawyers at trial and trial prosecutors to assess the merits and litigation risks of a particular case and promote a settlement, which is essential to the functioning of the criminal justice system.

MS. SHORT: In school we're taught that there are trial lawyers and there are appellate lawyers and that they are separated areas, but quite the opposite is true when you think about the work of an intermediate court. In particular, we're talking about the Minnesota Court of Appeals, which is to say that, yes, there is a whole developed body of appellate work and appellate law. [The court of appeals has had] a strong influence because it talks about what the trial court is doing in terms of reviewing standards. It talks about procedure, and evidence rulings in a way that, as you've heard from the panel members, gives all of us that are out practicing in the trial courts a guide to what is the right way to do it and what will be the effective way. So that's something I think we don't really think about when we think about the whole body of appellate work and what its influence is.

But let's shift, then, from talking about the procedural impact of the court of appeals to talking about its impact in substantive areas. And as you know from the background of all the speakers here, we have the expertise right here on the stage. So let's start with the criminal law area, if we can, and talk about the impact of these twenty-five years of the Minnesota Court of Appeals on criminal law.

MR. GALLUS: Well, if you go on the Minnesota Supreme Court website, you'll see annual reports for a number of years, and the most recent report is 2007. It shows that the supreme court had 126 direct appeals, 41 of which involved first degree murder. The court of appeals had 2,333 filings; that group involved 796 criminal matters. So when you start at the bottom with more than 60,000 major criminal filings at the trial court level and then assess relatively what the supreme court and the court of appeals, in terms of volume, dispose of, it's clear that the Minnesota Court of

Appeals is a full partner. I'm certainly not diminishing in any sense what the Minnesota Supreme Court accomplishes. But I think the court of appeals, even though it's an error-correcting court, has been a full partner of the supreme court in adjudicating criminal appeals and making case law for the past twenty-five years.

The court of appeals publishes its significant decisions. Now, if you look at those significant decisions from September of 2003 to August of 2007, all of these are published; you'll find 149 significant decisions. It's more toes and fingers than I have, but when I was trying to count this up, I counted forty-two reviews granted, fifty reviews denied, and fifty-two reviews not even sought. There were a few that when these reports were published the petition had been filed, so how the petition had been disposed of was not apparent from the reports. These significant decisions, again, involve many constitutional law topics. Being a criminal lawyer, I have basically a code practice, the criminal code of the State of Minnesota, and you will see numerous significant decisions involving matters of statutory interpretation.

And the final area I'd like to note is the Minnesota Sentencing Guidelines. For those of you who aren't criminal lawyers, roughly about the same time—not quite—as the Minnesota Court of Appeals have been in existence, the State of Minnesota switched to a presumptive sentence system where the Minnesota Sentencing Guidelines Commission would establish a presumptive sentence for virtually all crimes, except for first degree murder. There are some exceptions that are not relevant for purposes of the point I want to try to make. But first degree murder, the only category of criminal case for which the Minnesota Supreme Court does have original appellate jurisdiction, all other cases in the first instance involving questions under these new Minnesota Sentencing Guidelines have fallen upon the court of appeals to figure out and whether there was a particular aggravating factor that supported the trial court's decision to depart upward from the sentence, from the presumptive sentence, or, conversely, whether there were sufficient mitigating factors to depart down.

So in all three of these areas you can see the stamp of the Minnesota Court of Appeals all over the relevant case law that's been developed, notwithstanding that it's just an error-correcting court. And, finally, the other thing I'd like to mention in this regard is that there have been—well, you can choose your metaphor. I'll say tsunami. There have been two tsunamis in the

substantive criminal law in the past five or six years: *Crawford*[2] and *Blakely*[3].

Crawford turned upside down what had been, I think, decades of subtle law under the Confrontation Clause. Previously the test had been reliability, basically. If it was a reliable out-of-court statement, it could be admitted in evidence and not offend the Confrontation Clause, even if the declarant did not appear as a witness and was not subject to cross-examination. It was replaced by what the supreme court said was "testimonial hearsay." Testimonial hearsay, the admission of it, violates the Confrontation Clause. When *Crawford* came out, very prominently the majority opinion writer said that the Court was not going to tell you what testimonial means. That case involved a custodial interrogation. They said, "Well, that's testimonial, but we'll leave it for another day and another case to figure out what testimonial means." And that meant the Minnesota Supreme Court, the Minnesota Court of Appeals, like its counterparts all over the United States, had to figure out in many, many different fact situations what was testimonial hearsay. If it didn't involve a first degree murder case that went directly to the Minnesota Supreme Court, the court of appeals was in the line of fire. The court of appeals had to figure this out, and they, I think, did a very good job. They had to perform original analysis. They had to consider cases from other jurisdictions.

Now, the supreme court did, through its discretionary jurisdiction, grant a lot of petitions for review and the supreme court did have the final say on a lot of these *Crawford* issues. But, again, I think the court of appeals was essential just in terms of this *Crawford* revolution not to have the criminal justice system overwhelmed just with the sheer number of cases that *Crawford* involved. The other single-name case is *Blakely*, which, again, involved our guideline system. And I'm oversimplifying, but the United States Supreme Court said, "well, if a state has a presumptive system, such as in Minnesota—although it wasn't clear at the very beginning whether Minnesota's was sufficiently close to

2. Crawford v. Washington, 541 U.S. 36 (2004) (examining the admissibility of hearsay statements in criminal cases under the Confrontation Clause).

3. Blakely v. Washington, 542 U.S. 296 (2004) (examining the extent to which judges may enhance criminal sentences based on facts other than those decided by the jury or admitted by the defendant in the context of state sentencing guidelines and the Sixth Amendment right to jury trial).

the one at issue in *Blakely*—if the state wants to impose a greater sentence than the presumptive sentence, it has to prove to a jury beyond a reasonable doubt that those aggravating factors occurred." Again, this was a revolution in the law in Minnesota and elsewhere. Because the guidelines cases basically involved the cases for which the court of appeals had the original appellate jurisdiction, the court of appeals again had to stand in the line of fire and figure this all out. The Minnesota Supreme Court did grant review and took a second cut at a lot of these so-called *Blakely* issues. But, again, I think the Minnesota Court of Appeals as an institution was essential in not having the criminal justice system overwhelmed in that regard as well.

MR. COLBERT: Both *Blakely* and *Crawford* were from the United States Supreme Court, and, somewhat shockingly to us public defenders, they came down in our favor. It doesn't seem to happen very often from up there. And I agree with John, it really did test all of us.

The perception we have as public defenders is we don't win too many cases at the court of appeals, and in every case we win, the supreme court seems to take review. Or they look more closely at the ones we win, we'll say that. So our view of that is we almost have to win twice as this goes on, or we have to win clearly. And that presents an interesting dilemma for all of us because we have to show that they're so wrong. The court of appeals recognizes [the process that we do] well. The assumption is there's going to be an affirmance, and so we have to convince them that the law is, like I said, really wrong. And the areas that John was talking about, exactly like the *Blakely* and the *Crawford* decisions, it took a long time for the supreme court to finalize what those cases actually meant in Minnesota. You could see the court of appeals dealing with that issue; it was kind of a fun time to practice because it was an open question and no one knew which way the supreme court was going to go. At that time it was one of a few areas where you were able to see different panels of the court of appeals doing different things. And that process, I think, was good for the practitioners, as well as for the court. This was a chance to see the court of appeals actually be more than an error-correcting court. It seems to me that the court of appeals is reluctant to step into those areas generally.

Because of the current makeup at the United States Supreme

Court, we rely a fair amount on the Minnesota Constitution. We say: "Well, that's what the United States Supreme Court says about the federal constitution; we think the Minnesota Constitution should be read differently." The court of appeals reluctantly, at best, will read the Minnesota Constitution differently than the Federal Constitution. To get there, we have to get to the Minnesota Supreme Court. Even if it's a new issue, the court of appeals seems reluctant to go because I think they see their role as an error-correcting court. We seem to get a lot of "that's the Minnesota Supreme Court's job. That's what they have to do." And so we, as a result, end up having to, in a lot of the cases, save that argument for the Minnesota Supreme Court.

MS. SHORT: I'm looking out at the audience and I see a lot of civil practitioners, so I want to be sure that everyone knows that the court of appeals doesn't only look at criminal cases, and let's shift over to the civil side. Dick, what about the civil area? Do all the civil cases go right to the supreme court and there's no jurisdiction here?

MR. PEMBERTON: Let's make kind of a gradual shift because no one has talked about *Linehan*[4] yet. That's a criminal case that deals with when you can lock somebody up and throw the key away. I happen to be representing a doctor on the civil side in fourteen different malpractice cases when he was being prosecuted criminally at the same time, so I kind of got into this issue of when you can throw the key away. In his case, it's still thrown away after about twenty years. So I think *Linehan* is a case worth mentioning by name.

Transitioning into the civil side, there's so much you could talk about. You could talk about, Marianne, your case, *Cohen*,[5] that went to the Supreme Court on First Amendment issues; you can talk about *Pine River*,[6] the case that talked about an implied contract of employment through the handbook; there are the unrequested leave cases; there's the tobacco case, the *Forster*[7] case,

4. State v. Linehan, 311 N.W.2d 507 (Minn. 1981).

5. Marianne Short authored the Minnesota Court of Appeals' opinion in Cohen v. Cowles Media Co., 445 N.W.2d 248 (Minn. Ct. App. 1989) that the United States Supreme Court later decided in 1991 at 501 U.S. 663.

6. Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983).

7. Forster v. R.J. Reynolds Tobacco, Co., 423 N.W.2d 691 (Minn. Ct. App. 1988).

which held that the federal cigarette law did not impliedly preempt an injured citizen's right to bring a case in state court. And we all know the significance of that.

But the one civil case that I would mention by name would be *Pedro II*,[8] the 1992 decision of the court of appeals because it's been cited fifty times, more or less, around the country, and the supreme court has never written over it. It hasn't cited it, so it stands there as a court of appeals' decision recognizing a fiduciary duty of majority shareholders of a closely held corporation toward a minority shareholder, [noting] that there's some obligation to treat that shareholder openly, honestly, and fairly rather than screwing him, as has been the practice so many other times over the years in the case of a minority shareholder. Recognizing a concept that reasonable expectations in the case of the minority shareholder, such as a reasonable expectation for lifetime employment, and all kinds of pronouncements on damages and how you can double them up and triple them up. This court said no, it's not; and talking about joint and several liability and a whole flock of issues. It sort of makes you wonder if the court of appeals is solely an error-correcting court or if it maybe gets some law out there of its own that survives the passage of time.

MS. SHORT: Great. Cathy, what about family law?

MS. GORLIN: Well, I think the court of appeals' development of substantive law has really helped the area of family law. It's really helped the reputations of family law attorneys because we have cases that we can use to help to get our cases settled and to argue to the judges as to how the cases should be decided. There used to be this perception before the court of appeals about how there was so much subjectivity to how family law cases got decided and that there were "good 'ol boys" that sort of decided cases by intuition. So then the legislature and the people said "okay, we need statutes," and the legislature just has continued to make statutes, which is sort of the basis of family law.

But the court of appeals has really helped interpret all the statutes that are the basis of our family laws. So we really have now many opinions that are the guidance for family lawyers; [this] elevates the trust and the process because we have [these] cases

8. Pedro v. Pedro, 489 N.W.2d 798 (Minn. Ct. App. 1992).

that we can rely on. And, of course, the cases are continually being distinguished, so it has allowed the practice of family law to become a very sophisticated practice because there are so many nuances in all of the different areas of family law.

MS. SHORT: Okay. Larry, what about the poverty law?

MR. McDONOUGH: In poverty law what's really been good, I think, substantively, is a lot of areas of poverty law, at lower administrative and trial court levels, move through processes very quickly, [but] a lot of times through processes that aren't as legalistic as I would like them to be. And so part of what happens when you get to the court of appeals is that these processes, [which are] fast processes as far as appellate jurisprudence goes, but it's a slow process compared to a lot of times how poverty law travels at the lower level. I do a lot of eviction defense. I might get a case into my office today that's going to go to trial tomorrow, and, I don't get too weirded out by it because that's just what I do. But there's a limit to how much analysis, both from the bench and from the practitioners, can happen in that process. And when you get up to the appellate bodies, that slows down and you get a little more scowly, analytical treatment of it. So I think that's been very helpful to areas like eviction defense, application of consumer law, [and] procedures for administrative hearings, which determine whether someone will receive or continue to receive government benefits. I think of the *Carter*[9] decision that kind of laid out some of those parameters; *Love v. Amsler*[10] said the consumer fraud law applies to landlord/tenant issues. *Schuett v. Anderson*[11] talked about how these small accommodations of disabilities under federal law apply in landlord/tenant relationships, all in a way that was analytical enough to say this is not only the decision, but this is why it makes sense. So I think it's been really helpful in that area.

MS. SHORT: Before we move to our next topic, I want to just put one more pitch in on the civil side, which is to say, I've watched, having sat on the court for nearly twelve years with my colleagues, how fast the judges are able to move. You heard the

9. Carter v. Olmstead County Hous. & Redevelopment Auth., 574 N.W.2d 725 (Minn. Ct. App. 1998).

10. 441 N.W.2d 555 (Minn. Ct. App. 1989).

11. Schuett Inv. Co. v. Anderson, 386 N.W.2d 249 (Minn. Ct. App. 1986).

chief justice talk about the number of cases that are before the judges on a particular day, six, seven cases at a time. To be able to take those multi-box cases and hear a fifteen-minute argument from each side and then render the depth of analysis that comes out of the opinions, you have to just applaud them.

But I think one side of that that you don't see is the discipline that it puts into the civil practicing bar. In other words, to take some of those cases that have been two- and three-month trials below, with multiple opinions and multiple decisions on motions, and reduce it down into a fashion that can get the appropriate treatment—I commend the court for their discipline they instill in all of us to be able to marshal that. I think that's improved, again, the appellate and the civil appellate opinions greatly because of our discipline [in] putting them together in a smaller fashion and trying to reduce down what we might have argued to a jury, hundreds of issues, and reduce them down to three and below. So that's helped, at least, our focus on it.

So now let's move [onto]—we've already heard the kind of shadowing of this as our whining—our whining section. But, I do my best, Chief Justice Toussaint. I know you've inspired us with your quotes early on and tried to make us happy and positive, and I tried to take that into consideration when I was meeting with our panel, but frankly, we just didn't want to come across at this twenty-fifth anniversary party as just kind of Pollyanna. We wanted to kind of take a little bit of a tough look as well. So this next section that we're talking about, after having talked about the procedural impact of the court and the substantive impact of the court, is [whether], from our perspective, there a dark side to the court of appeals' operation. So forgive me, Chief, but here we go. So off we go to the races.

There are a few topics in particular that I know all of our panel want to talk about, and, Larry, I'm turning right back to you because I know this is one of your favorites. Take it away.

MR. McDONOUGH: One of the things I noticed in the area of poverty law—and, again, a lot of cases that I do travel very quickly at the lower levels—[is that] if you're going to make a decision on whether to appeal or not, like in the eviction area, you've got ten days from entry of judgment to assess the case. A lot of times these are cases that we haven't even done ourselves. We're just picking up and trying to figure out whether we want to appeal them or not.

One of the things I noticed in researching appellate practice when I started practicing before the court of appeals is that how the supreme court had been a little bit soft on how cases got there, and I think in a good way.

A really dominant case in the landlord/tenant area is *Fritz v. Warthen*,[12] which was the first supreme court case to interpret how the covenants of habitability of good repair apply in landlord/tenant settings and [whether it] could be raised defensively in an eviction case for nonpayment of rent. Nobody knew. And how the case got there, I believe the appellant—you're supposed to appeal from entry of judgment—I think they appealed from one of the orders of the case but not entry of judgment. What the supreme court said is that you appealed from the wrong thing, but this is a really important thing; we're going to decide it. They just went ahead and decided it. I saw a number of decisions in that framework. What I saw with the court of appeals, and maybe it was because of volume, or maybe it was just kind of what the style of the court was going to be, is that if you didn't have it perfect, it's gone—we're not going to look at it. I think that there's good and bad to that. The good is that it sharpens everyone's practice to do it the right way. On the bad side, one could say, you know, whether you're appealing from this order or this entry of judgment is kind of minor with respect to you [whether you] did get a final decision, and you are appealing up within a time frame; it's an important issue, so why not deal with it? So I found that kind of frustrating in looking at the jurisprudence, that there have been a lot of appeals that have been dismissed on grounds like that where there were some issues [on which] I think judicial economy would have said let's go ahead and deal with this and get it figured out. [These are] the same kind of judicial economy issues you have with the *Crawford* case, where you have the supreme court saying, "here's the new rule, so you guys go figure it out over the next twenty years and then we'll tell you if you got it right or not," which I don't think has a lot of economy to it.

So, obviously, there are other things I could whine about, but I don't want to block anybody else. And then if there are some areas that you guys didn't whine about that I think we ought to whine about, then maybe I'll pop back in.

12. 213 N.W.2d 339 (Minn. 1973).

MS. SHORT: Okay. Well, let me focus the whining a little bit on one question that I think is sort of the mystery around published versus nonpublished. We've seen the history of the court on published and ordered and nonpublished, and everything is on LEXIS, everything's available on the court website. Isn't that a form of publication? What about published and nonpublished? What are the reactions from the panel?

MS. GORLIN: Well, I think in family law we cite all the published and nonpublished cases. So we try to use those unpublished cases to support our case to a judge. But I think the hope with the court is that there's going to be fewer and fewer family court cases. So from our standpoint, we would really like to see more published cases so that they really do have some help and guidance for the family court practitioner.

One area that I just wanted to mention, though, and we can come back and other people can talk about the published and nonpublished, is the cost because [as] I see it with regard to family law there's sort of a dark side with regard to this concept of mediation that can be done; there's one more shot after the judge has made his decision. So these days we can really barely do an appeal to the court of appeals for less than ten thousand dollars, so it really gets to be expensive for parties after they've tried to be reasonable throughout the whole thing. [Then] they finally go to trial because the other side, at least, they perceive as being unreasonable. They finally get a decision in their favor and then the other side is appealing it. Then often you think, "oh, what could they possibly be appealing it on; it's so clear by now." The court has now made a decision with lots of findings, and yet they're appealing it, and so it's like one more step of "here we go again." And with there being this new mediation process, that's also one more shot.

MR. COLBERT: That's something I can't speak to since I've never represented a paying client in my life, so—it is interesting, because our clients, have a right to appeal and that's—it's great, right? Let's appeal. Why not?

The mystery of the published and unpublished is interesting. I think we have two students here, and you can ask them if they've ever been to the library. They just don't go. It doesn't happen. They don't; they couldn't find the Northwest Reporter if their lives

depended on it. And the idea of looking in a Decennial Digest, remember those? They may well toss those out for this generation; they're gone. People get everything off the computer. So the reason to have published and unpublished I don't think stands anymore. People use unpublished as if they were published. I just got a brief from the state where they literally attached five unpublished decisions. So people treat it as though they were published; that's how they're perceived. And if they're perceived [as precedent], if we do that at the court of appeals, I promise you at the trial court they're used even more [as] precedent. What you have is there is no distinction as to how they're used, but they're called two different things, so I'm not sure if it makes sense to have that distinction anymore.

MR. McDONOUGH: The other thing I'd add to that is that the court of appeals has actually told us as practitioners that they're not supposed to be relied on kind of blindly, and there was one—I can't remember if it was a dynamic error or something, there was a decision, basically, telling the trial court that you shouldn't just rely on these unpublished decisions. So it creates this kind of paradox. Whereas, a trial court judge [will] probably always want to know what the next step up has to say about what [is] in front of him or her; [still], I'm really not supposed to probably cite that decision. Maybe I can cite it for persuasive effect, but I have to kind of explain why it's a really good idea. So I think it makes it just kind of complicated or mysterious [as to] how we're supposed to use them, because they definitely are a source of authority, but we're getting kind of signals as to how we should or shouldn't use them.

Another area that I wanted to mention is just the area of having the various different panels decide decisions in the court of appeals. Now and then you can actually see within a certain subject area different threads of jurisprudence on a particular subject area by different panels. One time I had an issue, and I can't remember exactly what it was, but it kind of got to two different panels at the same time. I wasn't litigating it, but I was following the development of these cases, and they came out differently but didn't cite each other. And I think they were both unpublished. But it kind of led to this situation where it's like, okay, I could cite this three-judge panel and the other side can cite the other three-judge panel, and they're both unpublished, so they really shouldn't be binding. It was like, what's the trial court judge supposed to do

with that? So I think that's created a little bit of mystery for us as well.

MR. GALLUS: I would join in many of these observations about unpublished opinions. But I was reviewing Judge Popovich's book reflecting on the first five years of the court of appeals,[13] and I trust the accuracy of this statement. He said that the unpublished—the phenomenon of unpublished cases was the result of a 1987 amendment to the statute that was for the purpose of reducing the workload of the court. And that kind of struck me because it seems like I'm forever encountering an unpublished case relevant to an appeal I'm working on that is very deeply analyzed, that sets forth all of the material facts, that considers, fairness, common sense, *et cetera*, and I just wonder why the production of that unpublished decision really saved the court any work. I think some of you court of appeals judges are probably being too modest; I think a lot more of your work product is deserving of publication and can serve as a precedent.

Now the other thing that I've observed about unpublished opinions, and I'm not going to identify the case because it's pending, so you can discount this just like you'd discount an unsourced report from a journalist you don't know anything about, but . . . the devil is in the details. There will be a situation where the court of appeals or the supreme court adopts a new principle of law or recognizes a new principle of law, and that's well and that's good and that's necessary, but then the applications of that principle then fall under the radar in the land of unpublished opinions. And the devil is in the details just because the court of appeals or the supreme court—and I mentioned this in the context of *Crawford* as a very extreme example, announc[es] a new rule of law is not enough. The public, the bar, and the trial bench have to know how this should be applied to various fact situations. So in my particular case, I have a series of three unpublished opinions, all purporting to apply a principle that previously came out in a published case; the implication of these unpublished opinions is that one of the CRIMJIGS is wrong and does not adequately protect a constitutional right of a criminal defendant. It seems to me that the trial judges who rely on the CRIMJIGS, that the trial lawyers,

13. PETER S. POPOVICH, BEGINNING A JUDICIAL TRADITION: FORMATIVE YEARS OF THE MINNESOTA COURT OF APPEALS, 1983–1987 (State Court Administrator's Office 1987).

defense lawyers, and prosecutors who rely heavily on the CRIMJIGS, really ought to know this. It turns out that this particular unpublished phenomenon favors the state. But to take the high ground, I'll say even if it benefits criminal defendants, I certainly think it should be published, and I just for the life of me can't figure out why it's not, so that's my whining.

MR. PEMBERTON: My investigative reporting failed to disclose anybody who liked or defended unpublished opinions, period.

MS. SHORT: Well, there you go. Well, I started off by asking Dick a question and having him answer first, so I'm going to conclude with that before I put a conclusion on the end. But I know in our conversations in preparation for this, you had a discussion with Judge Jack Davies from the court of appeals, so I want you to relay that in a minute. But we've heard the chief justice talk about the positives of the court, and there are many as you've heard this panel talk about it, and mention by way of a negative the explosion of cases, and that you could find a case on any argument. So maybe the question to ask is [whether] the readability—being able to take an appeal so quickly and so inexpensively—has that hurt the development of law and [what] our former colleague, Jack Davies have to say about that.

MR. PEMBERTON: He was one of my first targets in the investigative reporting. I might say I had one prior target, and that was my long-time friend Judge Jim Randall, whom I contacted, and he didn't have too much to say to me. But the next target was Judge Jack Davies, whom I've known for a long time. And I said, "What's the impact of the court of appeals?" He said, "That's easy. Too many appeals." And he had some other more profound comments than that, but that was his immediate reaction. I went back to my office, talked to one of my very active civil trial partners, Steve Rufer, [and] said I talked with Judge Davies, and he said that's the impact of the court of appeals—too many of them, too many appeals. And Steve said, "I couldn't agree more. I'm defending three of them right now that are all bogus, and it's just making a lot more work, and I'm afraid of not appealing because in the areas of legal malpractice for negligent failure to persuade, I am maybe negligent in not appealing." So do we have a plethora

of appeals that is bogging down the system? It's worth talking about.

MS. SHORT: And I would suggest that whether you have a bogus appeal or not depends on the chair you're sitting in, so I think we'll leave that issue for later.

Let me conclude by saying that some would say that the test of the significance of an institution is whether you can actually picture your life without it. I think it's the consensus of this panel that I'm privileged to serve with today that we can't think of the state of Minnesota law without the court of appeals. So to all the long, hard-working, and dedicated judges who have served on the court of appeals and to the dedicated staff that support them in their efforts, we congratulate you on your birthday, wish you many more.

And we'll take questions if there are any in our remaining, I hope, three minutes. Any questions from anyone for our distinguished panel?

MS. GORLIN: Well, since there aren't any questions right now, I just want to talk a little bit more about a new mediation project in family law, because I was sort of talking a little negatively before, but I really want to say that there's this new pilot project. I really think it's going to help in most cases because family court cases go on and on and on, and they don't stop after the court of appeals has issued its decision, or even after the supreme court has issued its decision, which is rare. But they often go on and on and on. So the fact that there's an opportunity for family lawyers and their parties to get together—and there have to be a number of cases where the parties, haven't gone to mediation before this opportunity; [for them] it really is a good opportunity. The pilot project just started August 29th, 2008, and I just had my first appellate mediation and; it was done by a quality mediator, and so I really have a lot of hope for that project. So I think that the hope is that it's going to cut down family court cases, the number of cases that actually get decided by the court of appeals. But that means that it is very important for the court of appeals to make those decisions in the court in those cases that they have because those of us who practice family law really are guided by those decisions. Therefore, they're very helpful for us to get our cases settled and hopefully not have to go through the litigation process. So keep on making those decisions, we need those decisions, and we will do

our part by trying to help get all the cases that we can settled before we get there.

MS. SHORT: Hearing no further questions, we'll give any of the judges of the court of appeals a very brief rebuttal. Hearing none, thank you all very much.