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## Symposium Proceedings

Various Editors

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SYMPOSIUM PROCEEDINGS

PROF. PERRITT: It will take a little while for those of you sitting on this side of the podium to get the momentum to ask questions, so I'll ask one of my own. I would direct this initially to Professor Dunlop. It seemed to me that while Mr. Wahrhaftig was talking about community based dispute resolution, he was concerned with avoiding the risk of the property in a dispute being, in his words, "ripped off by professionals." I heard you, Professor Dunlop, from time to time, characterize the reluctance of labor, particularly labor management professionals in the industrial relations community, in part as a reluctance to have lawyers involved. It seems to me that there was also a fear that the dispute would somehow be ripped off by legal professionals who were not well skilled at helping to resolve the problem. So I would ask for your comments on this apparent fear of lawyers.

PROF. DUNLOP: Well I'm quite sympathetic with the notion that there are some kinds of disputes that can be handled in the community based framework while there are others that cannot. On your general question about the legal profession in the labor management business, I guess I have as general a view about that as I have on anything. I would put it this way: It is in my experience very much a matter of what kind of services the lawyer provides, or what kind of style the professional generally uses. It's not whether a person has a legal education or not; it is the question of whether he is trying to solve the problem rather than litigate it. Some of my best friends in the business are lawyers. One of them was one of the pioneers in this business. Although he was trained as a lawyer, he was clearly one of the country's leading mediators and arbitrators, and he very seldom practiced what he learned at Harvard Law School. So I think the solution might be to try to equip people who have a legal education with the skills and knowledge that will enable them, in a more practical environment, to talk to their clients about whether the clients are interested in problem solving or whether they're interested in litigation or continuing to litigate. I would like to make just one other comment about the labor relations thing in the United States. There was a period from about 1950 until very recently, when most of the labor relations in the major companies was conducted by people who had been trained as lawyers, and I think they tried to keep it that way. I do think in the last five or ten years we've seen a major move

(1477)

away from that, towards people who had some knowledge in what is now called human resource management. On the whole, these are people with some knowledge of, and interest in, productivity and efficiency, who are not lawyers and who are much more attuned to the concerns of top management. One of the things that happened with labor relations lawyers in this country is that they wandered off on their own, forgetting that there are top bosses who are interested in making money. The fact is that the chief executive officers of our companies were not particularly interested in the kind of institutional business of fighting or making peace. It is only recently that a number of those departments have become more sensitive to the central concerns of the company. That's the way I see the evolution overall.

PROF. PERRITT: Mr. Wahrhaftig, do you have a comment on that question?

MR. WAHRHAFTIG: Well, not specifically, but I didn't want to imply that I wanted to set up citizen groups to handle all the disputes in the world, and I think the kinds of activities that the panel has talked about are super. I'm just concerned that we should leave room for nonprofessionals, and we should encourage nonprofessionals to develop their ability to resolve conflicts.

PROF. DUNLOP: May I ask a question? Is your interest in neighborhood dispute resolution just a reflection of your view that that's the best way to solve these kinds of disputes, or is this a part of the larger ideal, what could be called a "neighborhood movement"? For example, we have neighborhood health care in Boston and some say that it's the best way to deliver health care. There are now about thirty-eight health care centers in the metropolitan area. Instead of everybody coming to the emergency room of a major teaching hospital they go to one of those health care centers.

If you're talking about the political life of a community, are you saying that, notwithstanding the "neighborhood movement," these neighborhood city halls are the best way to settle disputes about tenants and street fights? For example, the problems of the cops in how many men should answer a priority three call: you know that is not a neighborhood issue right off, that's a city-wide cop utilization issue. I would like to know whether it is your view that neighborhood-based dispute resolution is the best way to handle problems in the neighborhood, or is it the best way to solve disputes generally, or is it just a part of your view that American metropolitan cities ought to be de-

composed into their smaller “neighborhood” elements? That’s what I’m trying to find out.

MR. WAHRHAFTIG: I think it’s a little of both. In a lot of disputes, a person’s first line of defense (or offense, depending on which way you look at it) is naturally going to be friends, neighbors, and folks that they know and can talk to. Drawing upon the ability of a close circle of people who feel comfortable solving conflicts is strengthening something that’s very natural, and it’s probably going to work better than taking it downtown. I think it’s also part of the neighborhood revitalization movement. It could also be seen as the sort of internally generated thing that coincides with the overall political and economic conservation which goes on when services and government funding gets cut back. Sort of by default, neighborhood structures are a logical place to build those services where people can help each other help themselves.

PROF. DUNLOP: I just have one interesting footnote on that. In our previous discussion it seemed to me that two things were relevant to this point. First of all, I think that one interesting point was that the lawyers were converted from advocates, who have totally controlled the process over the past ten years, to counselors with the professionals. In one recent case, a health and safety officer in one of these big companies was doing the talking and conducting the discussions. This presented a sort of change of role with respect to professionals, and consequently all hell broke loose because the vice-president for labor relations was infuriated that these health officials were talking to a labor union. For Christ’s sake—you can’t do that. And it took a lot of working to get that settled down. I think it was very clear that the worst performance in the whole thing was when they tried the lawyer in negotiations process. It was a disaster.

PROF. PERRITT: Phil, do you have a comment?

MR. HARTER: Not appropos to this discussion, but I had a question for Judge Lambros.

PROF. PERRITT: By all means, ask it.

MR. HARTER: Judge, if I’m practicing law in the Northern District of Ohio, how do I invoke your program? Do I have it as a matter of right as a practicing lawyer, or is it something I have to get the other side to agree to by some sort of stipulation?

JUDGE LAMBROS: It's compulsory. However my rule doesn't use the word "compulsory." Some of my clerks think it's voluntary because they haven't spent enough time to see the massaging that goes on in advance of the question. During pretrial conference or even in some of the earlier preliminary pretrial conferences, the news is broken to them so that down the road, they won't confront a surprising result. Although I have great confidence that the case will be settled during the pretrial development, if it's not, I want them to familiarize themselves with my summary jury trial process. So at that time I mention S.J.T., or summary jury trial, and the courtroom deputy taking notes immediately gets up and lays in front of each lawyer my summary jury trial handbook. Some of them say, "oh yes, I've heard about this, tell me about it." The fact remains that when we get to that, they pretty well expect it and there's usually no resistance, unless there's really a good reason for not going. I've generally found, however, that the cases where there is resistance are often the best candidates for summary jury trials. So, at least in some sense, it is compulsory.

There is one thing about that question that bothers me at the moment. However, I think I've got time to cut it off at the pass. The judicial conference committee of the United States, the policy making body of the federal courts, is looking into the summary jury trial. All but one member of that committee is persuaded that it is a worthwhile alternative in the federal system. The only thing is that they're inclined to recommend that it be on a voluntary basis. That's bothering me because generally when people agree to an alternative, we never end up needing the alternative. Or in those cases where we do need the alternative, it doesn't make much difference because the case was going to be settled anyway. In those instances where there is no accord, I think it really has to be a compulsory thing. I think that's why the Philadelphia program is so successful. In fact, my procedure is compulsory. It couldn't be otherwise, but there are certain cases that don't automatically go into it. My staff doesn't automatically assign a case to summary jury trial. That determination is made as part of a selection process in the pretrial program, because there are certain cases that just don't lend themselves to the process.

MR. HARTER: So I would only be able to avail myself of the program if I was looking for it or if I had the good fortune to have a case get on your list?

JUDGE LAMBROS: That's correct. One of our pretrial local rules provides for a summary jury trial or any other alternative as the judge

may choose. Even though the rest of my colleagues have gone along and adopted the rule, none of them have adopted the process themselves. I think it's just that they haven't tried it yet. They're not comfortable with it and some of them aren't as alternative oriented as I am. I'm inclined to think, however, that if you went to one of the judges there and requested the process, they would grant your request, because some of the judges have done it in similar circumstances.

**PROF. PERRITT:** In regard to the question on mandatory versus voluntary systems, the District of Columbia Bar considered a recommendation from Judge Mountry, who is now Chief Judge, that the District of Columbia Court of Appeals adopt a system modelled on the Philadelphia program. Because of the various concerns within the bar they elected not to do that, but rather to adopt a voluntary program. After about three years of operation, Mr. Nejelski, there have been, what, six cases of voluntary arbitration?

**MR. NEJELSKI:** About six cases. You're aware of the fact that in our federal court in the Eastern District of Pennsylvania, we have a system which is somewhat like Judge Doty's system. Instead of an arbitration center, however, we sit in a courtroom with three lawyers, and the jurisdictional amount is \$50,000. I sit down there with some regularity and we get some healthy cases. I believe that system was approved by the judiciary council for the Eastern District at least on a pilot basis.

**PROF. PERRITT:** Maybe it would be useful to pursue that point a bit because Paul Nejelski authored a law review article on the subject. Even quite apart from the article, he was very much a part of those pilot programs. One particular issue I would like Mr. Nejelski to comment on is the appeal rate in the three federal pilot programs. The rate in the Connecticut program, which has since been abandoned, was really quite a lot higher than the rate in the Philadelphia program and that of some of the other state court programs. Would you tell us something about the pretrial programs?

**MR. NEJELSKI:** There were three districts that started this program about five years ago. The one in Connecticut has since stopped for reasons which I think are peculiar to Connecticut. But there has also been this very successful program here in the Eastern District of Pennsylvania, and a program in the Northern District of California. In San Francisco, they have a \$100,000 jurisdiction limit. They've

taken some sizable cases and the appeal rate is fairly high, a little higher than you see in the Philadelphia county court, but you see some of the same phenomena that Judge Doty mentioned. A lot of people will take an appeal to protect their rights, and then not actually go to trial. Although I haven't looked at the figures for a little while I think the rates are comparable to those in the Philadelphia program, certainly not more than ten percent. It's interesting to note that there are about five or six districts that have voluntary arbitration programs and the experience is the same as I noted in the D.C. Superior Court—almost no cases at all. Part of what I was trying to talk about in my initial remark is that unless you have some compulsion in many of these programs, they are not going to be successful. Either the people don't know about them or they're too reluctant to get involved.

PROF. PERRITT: Any other comments? Does anyone in the audience have a question for the panel?

AUDIENCE: I have a question. I belong to a family mediation association which has more mental health professionals than lawyers, and I'd say eighty percent are women. I was just wondering if the American Association of Family Conciliation Courts have met with truly multidisciplinary groups. I also have friends in the human resource area that are hiring consultants in corporations so that they can resolve conflicts there, and I know that they want to avoid lawyers as much as possible as well. I wonder what observations members of the panel had with reference to the challenge to the legal profession posed by those consultants in negotiations and mediators that are nonlawyers?

PROF. PERRITT: Anyone want to take the first shot at that?

MR. KRAUT: I have not seen any effect, nor do I expect to see one. I was at that conference in Williamsburg, if that's the one you're talking about. The problem has been, is, and will continue to be that as soon as litigants go to an attorney, the case goes out of the nonadversarial field. I'm noticing the phenomenon in which I am getting cases that attorneys refer to me not as a mediator, but as an arbitrator. In this way, the attorneys and the litigants can present their case privately, very quickly and resolve the dispute. That's taking place more and more. Where there are attorneys that want to move their cases along, and they realize there's a backlog in the courts, they will get their clients to agree to binding arbitration.

I was thinking about this during the discussion of the use of non-professionals in neighborhood dispute resolution centers. I think it's important to note that there are certain areas where nonattorneys cannot function in mediation. For example, in divorce mediation, I think that equitable distribution in property settlements is one area where nonlawyers will be unable to function. These are very sophisticated areas, areas that I think are going to be ripe for malpractice. I think that mediators and dispute resolution people are going to have to be very leery of these potential malpractice areas.

There are certain areas, I think, in the domestic relations field, where nonattorneys can be quite helpful. In the mental health area, especially in cases dealing with custody, I think that some people need a finale; they need someone to sit there up on a bench and tell them this is how it's going to be. Certain people need that. Others need therapy and they need time to be stroked and to go through the process. I think nonattorneys can be very helpful in that area because they've been trained in how to deal with these problems. If you take cases of spouse abuse, Pennsylvania has the Protection from Spouse Abuse Act. The main use for the Act is to remove the party from the domicile. A lot of times these cases are resolved before going to trial, and it's because attorneys have been forced to sit there and discuss the issues. But many times, nonattorneys in the mental health fields can be very helpful in dealing with the problems that cause spouse abuse. In areas such as support, I see much more emotion than I do in custody. I think it is because people are more pressed to give up dollars that they can see than they are when they're dealing with their children. I'm not sure that nonattorneys are going to be helpful here. They could be if they can break through and deal with the emotional part of it. They can be helpful because most people are unable to deal with the emotional part. There are pros and cons to both ways. My own personal belief is that attorneys are necessary when dealing with lots of areas, but there are areas where nonattorneys can be helpful.

MR. WAHRHAFTIG: I'd like to respond to that, too.

PROF. PERRITT: I thought you might.

MR. WAHRHAFTIG: My other hat is a family mediator. In some ways, it's one of the prime illustrations of the professionalization of the field. Family mediators and divorce mediators were some of the first places that nonlawyers were used as mediators. That practice has gone through a number of attacks by the legal profession. How-



ever, that's cooled down pretty well as it's become established. Nevertheless, the fact that this is an area where big dollars are involved makes it a natural area for attack for some lawyers. This area's much more attractive than public housing problems dealing with trash cans.

One of the responses by the family mediator associations is to look at themselves in an attempt to ask: "How can we become professionals really fast?" I know our local counsel has been trying to set up standards and we're seeing that, maybe, to be a family mediator you ought to have a law degree or a B.A. in behavioral sciences to start with and then build on top of that. When I hear that, I sit and scratch my head. It seems to me there are three major subject areas that you have to have to be able to understand in order to be a divorce mediator. You have to know how to mediate, that's fundamental; you have to have some knowledge of the law; and you have to have some knowledge of the emotional aspects of these sort of problems. You don't have to be a lawyer, because you end up using lawyers as referral people, and because experts in the legalities do the final critiquing of the property settlements. You don't have to be a therapist because you can refer them out to therapists if problems get out of control; but you have to have a smattering of all three of those things. I wonder to myself why an LL.B. or a J.D. or an M.A. in psychology is more important than a degree in mixology or cosmetology, and those are probably the two degrees that I would look at to find a natural mediator. In conclusion, it really bothers me that there's this need to become professional very fast and to close that area in.

PROF. PERRITT: Paul, if I can, when you were talking about sending it out to professionals, to attorneys, once there's been a resolution, has it been your experience that once the matter has gone through a mediation and then been sent out to a professional, the final product either ends up being litigated or ends up not in the same vein? And, if so, is it because the attorneys that have been involved at some point must justify their skills by acting in some role other than being that of a scribe?

MR. WAHRHAFTIG: Our practice in the area south of Pittsburgh is so small and new that those sort of things haven't been much of a problem. The national literature doesn't seem to indicate that many agreements break down. Generally, folks know what they're after, and they use the lawyer to fine tune and raise issues we haven't thought of. I haven't seen it fall apart yet, maybe you have.

PROF. PERRITT: Let me ask you one other quick question. In most cases, do the litigants have the resources to refer out to the psychologist, to the attorney, and to other professionals?

MR. WAHRHAFTIG: Yes, the statistical profile of people who go into divorce mediation at the moment is disproportionately affluent.

PROF. PERRITT: Judge Lambros, did you have a comment?

JUDGE LAMBROS: Yes, I just don't think we should engage in a discussion of this in the sense of professional/nonprofessional or lawyer/nonlawyer. I don't think it's as simple as saying, well yes, we can train nonlawyers with respect to solving a domestic relation problem. A lot of lawyers are not good at that. They're good at resolving legal problems, but a lawyer may or may not be good at getting to the heart of the problem of a reconciliation viewpoint. It seems to be that we've got to start thinking about mediation and problem solving, and not just about whether one is or is not qualified.

I think we've got to start viewing this in terms of an institutionalized type of structure. First, whenever we deal with a dispute, we've got to have trained people who are able to identify a particular problem and we've got to be ready then to assign the people to deal with the specific aspects of it. I don't think one can oversimplify it by saying, "Let's now license a bunch of mediators." We can't assume that once we've licensed and trained them in the skills of negotiation, that they'll be competent to go out there and start mediating problems. I think it's too complicated for that and it's going to take a lot of study of the type that Professor Perritt and his colleagues are pursuing.

AUDIENCE: I have a question directed towards Mr. Harter and tangentially to Professor Dunlop, who may also want to comment. Mr. Harter, you spoke about certain negotiations in which the parties came from about fifteen miles apart down to four inches. It sounds as though the endplay that Professor Dunlop was talking about is exactly where the negotiations broke down. Based on the breakdown during the endplay, first, would you say the use of regulatory negotiations was successful, despite the fact the forms didn't work? And second, you said the use of regulatory negotiations is cost-efficient, but since the issue is now going to go back to OSHA and they're going to have to come up with a regulation in just the same way they would have had to before, is the use of such negotiations truly cost-efficient? Any comments in light of executive orders concerning cost efficiency would be appreciated.

MR. HARTER: Actually, I'm not sure things didn't fall apart precisely because of the executive order you referred to. I don't think, as I told the *Business Week* reporters yesterday, that the talks are quite dead yet. I don't think the phoenix is dead, it's only on a respirator. I think, given the ambiguity of whatever these positions are, health standards which are *uncomfortably* expensive can take a lot of the pressure off in an election year. That deadline isn't here yet, the parties didn't have to work all night, and we still only met during office hours. We'll see what happens when some of those people who are staring at the regulation see what it's going to look like in the *Federal Register*. In this case, simply publishing the notice in the *Federal Register* will drastically change the relationship of the parties, so what I think would be interesting is to see what happens on the eve of that publication.

As to cost-effectiveness, I'll admit that to the extent that it would break down and everyone would walk away, it's not cost-effective because if you spent more than one cent you would have no benefit out of it. There's no question that it's a very expensive process; a lot of people spend a lot of time and really work hard on it. Certainly when everybody is in unanimous agreement at the end, the process had been enormously productive. I want to mention that for the first time in this case everyone had roomed in the same hotel. Thus, when several of them on both sides moved within hearing distance, they realized that they had taken a certain position for years but never understood why. Now, I don't know whether that's going to be a good thing or not. In the abstract it sounds like a good thing, but on the other hand, that might be ammunition for the war that could come later if they don't make the resolution. So, I'll come back next year and tell you.

AUDIENCE: For the panel generally, and specifically, Professor Dunlop, you mentioned the need for a mediator with the ability to deal with situation by touch, and Mr. Wahrhaftig talked about a conflict resolver like the motherly figure in Chester, while Judge Lambros mentioned training people to deal with these problems. Do you think that people who are good mediators have some kind of inherent personality traits, or is it something that we, as students, can learn to do?

PROF. DUNLOP: Well, that's a subject I'll try to answer first. I think the answer to your question, carefully put, is related to three propositions. First, there is something about negotiation and mediation that every person who is a professional, such as a person in a business enterprise, a labor leader, or a lawyer, ought to know. I can send you

my book on the subject and there are some intellectual cognitive aspects of it that can be taught and can be learned.

Item two, if you're seriously interested in learning how to become a mediator, I would suggest an apprenticeship. I mean to say that there are certain kinds of skills for which an apprenticeship is the best way of learning. By the way, I come from the generation in the labor field of arbitrators and mediators who were all created by World War II. Since that time, we've all gotten older, and there's been enormous debate in the labor arbitration field about how to train arbitrators. Every professional meeting has stacks of pages about that subject, and I read that literature and I view the experiences of my colleagues as showing that the best way of learning is an apprenticeship. If you look at the younger people, arbitrators coming up in the labor field, they're all the people who came up as apprentices, those who worked or clerked with fellows or ladies in the business. And, by the way, there are a number of women arbitrators arising in that process. It's the hands-on experience, but my point is that the only way you can learn some of these things is by the hands-on process.

Finally, I think you can specify certain individual traits that make a difference. But I'm not sure that anyone could come up with an objective job description that would pass the Supreme Court's test as to whether a particular person had the qualities that would make a good mediator. Some qualities are obvious. I am only trying to say that there are different kinds of mediators that I've worked with. I have a friend named Bill Estes, whom I've known since I met him as a machinist representing the machinists' union down in Cape Canaveral, when I was mediating at the missile sites. Bill, I think, has an ability to articulate things that I don't. Maybe that's just one of the failings of being a professor. Bill's worked with me, and he has this uncanny feel about a situation and a sense of timing that is absolutely superb, the same way that comics have a sense of timing. Those kinds of qualities I know you can identify, but I don't think you can take tests on them. But the first point: you can learn if you're serious about it; you have to do it by an apprenticeship.

AUDIENCE: I had a question for Professor Dunlop and also Judge Lambros. It seemed that one of Professor Dunlop's themes was that very often when the parties come to the negotiating table, they're really not seriously prepared to negotiate because they haven't figured out exactly what they want and what they're going to settle for. They can't reach an agreement until they themselves know what they want. I know that in litigation, very often lawyers don't come into a settle-

ment conference really having thought out their cases that thoroughly. They often aren't really prepared to negotiate seriously, nor do they know what they want. Consequently, the case doesn't settle in conference and you have a furious expenditure of energy preparing the case for trial. Nevertheless, the case finally settles on the courthouse steps, because the parties mainly fear what's going to happen in the courtroom. My question is: Is there anything that can be done to get people better prepared to negotiate sooner, so that a lot of energy is not wasted?

**JUDGE LAMBROS:** I think we did a pretty good job outlining four principles. There are some lawyers who are instinctively good in evaluating cases. These lawyers are always prepared to engage in a very intimate dialogue and they're able to analyze a settlement position. In many instances, lawyers who are totally unprepared simply respond impulsively, that they want it all or nothing.

I don't think lawyers are necessarily good negotiators; we've not trained them to negotiate. They've entered law school, at least in my era, and it was always going for the jugular. We answered the questions as to who should prevail, the plaintiff or the defendant. The same is true on bar questions. We taught the case method, *Jones v. Smith*, we taught them cross examination, how to fight in the courtroom. We have not taught them now to resolve conflicts. I think lawyers are poor negotiators on the whole. We've reached the point where negotiation techniques must be taught, and that's why Professor Perritt has introduced this subject, and why it's becoming so prevalent today. I think we're making big strides right now. We have to start teaching negotiation skills and we've got to establish a new model for lawyering, we really do. I'm hopeful for the day when the letterheads of these lawyers engaged in the practice of litigation will not just say specialized in civil litigation, but will say specialized in civil litigation and conciliation. We've got to start teaching that.

**PROF. PERRITT:** I think it's also important to note that mediators can often help with these problems and some of them do it. The American Arbitration Association and the Department of Public Advocacy in New Jersey will deal with a community that's upset by the proposed expansion of a hospital or something like that. They concentrated a lot on meeting with the groups on their own before getting them together, and they have some training devices that attempt to train the leadership in how to organize their own bargaining unit. They develop a position before they ever get the parties together. That's something that we need to concentrate on as well.

AUDIENCE: May I ask Judge Lambros a question? When you said that some people can settle and some can't, I see lawyers these days in labor cases, and I'm not sure whether the inability to settle is reflection of the lawyer's own capacity or whether it's a reflection of the lawyer's failure to establish a relationship with the client. Is the failure to settle the fault of the lawyer, the client, or is it just part of the fact that, at that stage, they have not had enough communication so that they both know what the other fellow thinks? Is it the lawyer, the client, or is it the lack of interaction?

JUDGE LAMBROS: I think the cause of the breakdown in settlement is the lack of lawyer-client communication. Unfortunately, I think that is the lawyer's fault, because the lawyer has chosen not to keep the client informed. If I had to attribute one reason for the success of the summary jury trial in resolution, it would be that this is the first time the client has had effective, active, involved participation. On that day, when we all get together, that client has as much of a role as anyone else, and he has as much access to me as the lawyers. We can do business, and I think that the failure of lawyers to get their clients involved before some process forces them to do so is one of the major breakdowns.

PROF. PERRITT: In that regard, it seems to me worth pointing out that a number of you mentioned the role of setting deadlines as part of the negotiations process. In fact, Paul Nejelski can correct me if I mischaracterize it, but the judicial center evolution of the three district experiments in mandatory arbitration suggested that maybe its greatest benefit, at least the only one that can be established statistically, was that the deadline imposed by the arbitration hearing forced something to happen. This forced the people to get into their cases and they were therefore more prepared to negotiate. Maybe all that we need to do to greatly simplify the intellectual dialogue here is to just figure out how to establish deadlines. I would note that the revised federal rule 16 contemplates the issuance of scheduling orders.

MR. NEJELSKI: In studying various settlement programs either in or out of court, I've sort of developed the notion that you need a doomsday machine. This device of summary jury trial is one. Similarly, one of the state courts has developed a prerecorded videotaped trial which forces both parties to focus on the case simultaneously.

I would close with a quote from Samuel Johnson, the 18th century essayist: "Nothing more concentrates a man's mind than the thought of being hung in the morning." We need more of that for the

lawyers and the litigants. I have seen pretrials as a lawyer where neither the judge nor the opposing side was prepared. There are no deadlines, and that makes it a meaningless exercise, and an expensive one.

PROF. PERRITT: Judge Doty, would you care to comment on the skepticism Mr. Harter expressed, and on the way in which bar acceptance of mandatory arbitration developed in Philadelphia?

JUDGE DOTY: First of all, it was absolutely necessary that there be acceptance by the bar. So, therefore, we got some of the leaders of the defense bar and some of the leaders of the plaintiffs bar together. With the help of the bar association committee, they decided that they were going to push it. The defense bar held a meeting with some of the insurance companies they represented and they sold them the bill of goods.

Now whether it will work in other jurisdictions really depends upon the acceptance of the program there. All I know is what happened in Philadelphia: it's accepted and it works.

MR. NEJELSKI: I would say part of that acceptance may be economic considerations. The plaintiff's bar, working on a contingency fee, is going to get paid sooner under arbitration. They'd rather have their money in eight months than in eight years. A lot depends on how you structure the compensation of defense counsel and how much they will be paid for going to arbitration hearings. Part of the issue is this: are the clients going to put a premium on getting this case over with, or are they going to compensate counsel to delay it?

JUDGE DOTY: I would like to add to that by noting that insurance companies don't have to pay as large a fee to their counsel in an arbitration case as they do in a jury trial.

PROF. PERRITT: Because the defense counsel compensates on an hourly basis, and you're talking about two hours as opposed to three days.

AUDIENCE: In listening to Judge Lambros, and from my own experience in Judge Doty's program, there's another issue here. It's the inimitable way a trial judge can get a message to the parties without in any way compromising his position. He hasn't heard the case, but he can give you the feeling that you're going to "get hung in the morning." Besides, it makes good sense to settle at this point because

you've received some indication of what the judge sees with respect to certain things, such as what he thinks he's going to rule on as a matter of law, when he thinks it ought not go to a jury. I find in my own experience as a chairman of an arbitration panel that when you go and talk to lawyers and say "Now I haven't decided this case yet, but there are certain things I see here, and now that you've heard them, you two should go out, and spend five minutes chatting about a settlement," it is possible to give them the message without registering your position or compromising your role as a fair arbitrator so that they go out and settle it.

PROF. DUNLOP: Can I ask all of the lawyers a question? I'm amazed, but my sense and experience in dispute resolution tell me the courthouse is the ideal place for a mediated settlement. When you assign a case to a judge, he hears a little bit of it and says, "You know, I don't know very much about it, but I think there are certain weaknesses in the situation. You ought to go step outside now with a mediator, to work this over for the next couple of days and then come back and tell me what this is all about."

Let me give you another case: I've run wage and price controls in the United States for eleven years and we also have dispute settling responsibilities. I've had authority under my command to set a wage or price by virtue of wage and price control legislation. When we were faced with a dispute, it wasn't all that hard to settle. I would say, "Why don't you go out and settle it. I'll send my associate out, he'll make certain suggestions to you about this matter and then I may approve it. If you don't follow him, you're not going to get it approved." So it seems to me that the courthouse is a natural set-up for a mediated settlement.

PROF. PERRITT: There is substantial opinion in the literature, regarding the appropriate role of the judge in settling civil disputes, that suggests that it's inappropriate for the judge to get very much involved.

MR. HARTER: For that reason it's important that he said "Go out with my associate, and talk it over." The judge was never personally involved.

PROF. PERRITT: Do you have a comment, Judge Lambros?

JUDGE LAMBROS: I agree that is an effective way; that's what we do in settling some cases. Some judges handle it more effectively and



more subtly than others. One thing the parties ought not to have any dispute about is what the law is, what has to be proved to win, and under what circumstances you lose. So even though they know it, it's good for lawyers to hear from me that I know the law of the case. Therefore, I like to engage them in discussion. I say, "Listen, I'm going to put this in the simplest terms possible. If I understand this particular case, you've got to prove that such is such. Now, it would seem to me that if you're going to win this thing you've got to have a real good witness take that stand that's going to say this, this, this and this. I don't know who you've got as a witness, but you're going to need somebody to corroborate this, this, this and this. Now, if you've got those people, you've got no particular problem, and boy I wouldn't settle, I'd hang right in there." And then of course I'd go to the other side and I'd point out where their weaknesses and strengths are. You know, it's amazing, when the judge starts defining these things, the lawyers start thinking. A lot of these people haven't thought about what their courtroom problems are going to be. It's sometimes amazing how well it works. Sometimes you have young lawyers who need guidance and who really don't know what juries will do or what those cases are worth. So with those lawyers you go into a little discussion of history.

There are a lot of techniques, and of course the deadline is a good technique, but I have a little debate with my colleagues on the use of deadlines. When you come to our court, you'll find ten separate pretrial rules. At the moment your case is filed, you're handed virtually a book of timetables and guidelines. The only way that you're going to handle that pretrial order with those strict guidelines and the timetables of the particular judge is by stopping work on every other case. If it's a firm, you're going to have to put five partners on the particular case. No matter what, that judge will stick to his timetable and drag you to a settlement. I'm wondering if that is good case management—do you have enough time to prepare? I really do think that if we're going to set timetables, they have to be meaningful timetables. In setting the timetables, the lawyer ought to be rather comfortable settling that case because he's going to have sufficient options to explore. Under the rules we could talk about setting a timetable or setting a deadline, but I'd rather talk in terms of establishing timetables.

PROF. PERRITT: Since I've been trained to establish meaningful deadlines, let me thank all of our panelists for being here and for just making a really super set of presentations and for relating with one

another. I would also like to thank all the rest of you for coming. One of the neatest things about this subject is that many of you may have an opportunity to begin on Monday in applying some of this stuff. Most of the rest of you will have an opportunity no later than a year or two from now to begin to innovate and be creative on the individual cases and individual counseling that you do with your client. Particularly, I would also like to thank Gordon Cooney and Jeff Markowitz for putting together a very good program and for making it run so smoothly.

