Alternative Methods of Resolving Environmental Disputes

Editors

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SYMPOSIUM: ALTERNATIVE METHODS OF RESOLVING ENVIRONMENTAL DISPUTES*

This symposium provided a lively and interesting format for all of those in attendance. Unlike other symposia, this proceeding was not conducted as a series of paper presentations followed by a short question and answer period. The nature of the topic, alternative dispute resolution, created a situation ripe for interaction between the panelists as well as between the panelists and the audience.

Audience members were provided with a brief statement of each panelist’s thesis prior to the start of the program; therefore, the audience was able to refer to these statements throughout the program. The panelists in turn gave brief presentations highlighting a full range of dispute resolution techniques.

Following the panel presentations, the floor, guided by co-moderators Professors Henry Perritt and John Hyson, was open for discussion. This resulted in an impressive, well-rounded colloquium which explored the various ways in which mediative perspectives may be employed in diverse professional situations.

The Editorial Board has reproduced this edited transcript of the entire program. The Board hopes that this will provide the reader with some insight into the dynamics underlying this particular panel and possibly alternative dispute resolution itself.

ELIZABETH GRIECO:

Thanks for coming out on a snowy Saturday. We appreciate it. I'd like to just take a moment to thank those involved with the organization of today's events. First of all, thank you Professor Henry Perritt and Professor John Hyson, for your help in organizing this symposium. I would also like to thank Professor Doris Brogan and staff members Cynthia Calder, Maureen Luke, Tim Szuhaj, and Ann McGill. We can thank Ann later. She was re-

* Articles authored by each panelist follow this transcript.

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sponsible for the reception. So without further ado, I’d like to present Dean Frankino, Dean of the Law School.

DEAN FRANKINO:

Thank you, Liz. It’s a pleasure to welcome all of you to the inaugural symposium of the *Environmental Law Journal*. When one puts together a law journal or a law review, or indeed, a symposium, there is always an inaugural event, but actually, most of them have a pre-inaugural event. This symposium certainly has a very distinguished pre-inaugural event. Last year a dedicated and very hard-working group of law students, who are now alumni, put together a symposium under the aegis of what is called *VIEW*. *VIEW* is the Villanova Incorporated Environmental Watch. They had a very, very successful symposium last year, which resulted in a publication called the *VIEW Proceedings*. Now, the *VIEW Proceedings* are to the *Environmental Law Journal*, what number 0 is to the *Villanova Law Review*; that is, it’s the inaugural issue. I see a number of people who were very much involved in that, what I think was an historic event in the development of our law school. The Editor-in-Chief of the *VIEW Proceedings*, David Butterworth, is here, who is now an associate with Morgan, Lewis and Bockius. Welcome back, David. And I see Daniel Boehmcke, but I don’t see John LiCari, I think John is supposed to be here. Daniel is with the Environmental Protection Agency [EPA]. I see Tim Campbell who is now with Stradley, Ronen. Robert Toland, who also was one of the managing editors of the *VIEW Proceedings*, is here; he is presently a clerk for the Honorable Herbert J. Hutton of the United States District Court of the Eastern District of Pennsylvania.

I note all of this because without their efforts, today would not happen. Without their efforts, the *Environmental Law Journal* would not have been presented to me, to the faculty, nor would it have been approved. We now carry on the tradition with the inaugural *Environmental Law Journal* symposium and we look forward next month to the first issue of the *Environmental Law Journal*. So, for us at Villanova this is a major event, and we are extremely happy that you’re here. You’re going to be present with a very, very distinguished panel and I hope you’ll enjoy the afternoon.

It’s my pleasure now to ask Professor Henry Perritt, who is going to moderate today’s proceedings, to come forward and take over. Hank.
HENRY PERRITT:

Thank you, Steve. It's worth endorsing what Dean Frankino has to say about the entrepreneurial spirit of the people who organized the Villanova Incorporated Environmental Watch and the proceedings last year that led to the Journal. It's also appropriate to describe the kind of environment Dean Frankino has helped create here in which that kind of entrepreneurial spirit is encouraged. This is a terrific program that has been put together by the editorial board led by Editor-in-Chief Karen Palestini, and organized more directly by Liz Grieco. We want to follow a somewhat unusual format. At these kinds of proceedings, it's typical that you hear fairly lengthy presentations from each of the experts that has joined the panel followed by what is supposed to be an ample question and answer period, but frequently the press of time and people running over their allotted schedules results in a very compressed and limited opportunity for discussion. We thought that the most interesting way to explore the topics and issues involved in alternative dispute resolution (ADR) and the way ADR can be used in connection with site specific environmental disputes, was to have the maximum amount of interaction between the speakers and the speakers and you. So, what we have asked the speakers to do is summarize very briefly their positions and how they came to the area of ADR. Then most of the afternoon will be devoted to a discussion, possibly some argument among the speakers, and discussion and possibly some argument between you and the speakers.

At the end of the afternoon, before the reception, there will be an opportunity for the speakers to make any concluding remarks that they wish. I'd like to introduce the speakers in the order of their presentations. The order of presentation has been determined in rough fashion by the degree of institutional formality [formal systems of organized practices and procedures] that each of them has experienced. Jonathan Brock is going to go first. Jon's experience in helping to resolve environmental disputes involves the least degree of institutional formality.

Jon is currently an associate professor at the Graduate School of Public Affairs at the University of Washington in Seattle. He began his career not too far from here at Franklin and Marshall College. He received an MBA from Harvard Business School. He and I had the opportunity to work together for the United States Government for a period of time on the Wage and Price Control Program and in the United States Department of Labor.
Jon served on the faculty at the Kennedy School of Government at Harvard. He's written some very influential books and articles on dispute resolution in the labor and management context.

Leonard Charla will speak second. Mr. Charla is Senior Vice-President with Clean Sites, an organization that helps people put together dispute resolution techniques for environmental disputes. Mr. Charla began his career under the oversight of Dean Frankino at Catholic University. He was Editor-in-Chief, I believe, of the law review at Catholic University. He has a distinguished and varied career as a lawyer, working for a number of federal government agencies and for General Motors Corporation. He has been quite innovative with Clean Sites in terms of working out dispute resolution techniques suitable for a particular dispute.

Larry Bacow is an associate professor of law and environmental policy at the Massachusetts Institute of Technology. Larry started his career at MIT where he received a bachelor's degree in economics, and then, he moved up the river to Cambridge, and proceeded to get three degrees from Harvard University, including a Master of Public Policy, a Ph.D. and a law degree. Larry and I first met each other when he was working on his Ph.D. dissertation. He wanted to look at some innovative techniques for resolving disputes in connection with occupational safety and health and we were able to scare up a little bit of support for Larry's Ph.D. research, which resulted in an influential book on negotiating occupational safety and health disputes in the workplace. Larry then went on to write a statute in Massachusetts that set up an institutional framework for resolving hazardous waste siting disputes. He has continued to be involved in working out specific disputes in Massachusetts. In terms of institutional formality, Larry comes third after Mr. Charla because his most prominent experience in connection with the Massachusetts statute obviously is associated with a more formal and a more permanent legislative structure.

Jerome Simandle, United States Magistrate, from the United States District Court for the District of New Jersey, comes last in the sense of institutional formality. Judge Simandle works within what is the most formal of the permanent institutional arrangements that we work with: the Federal Rules of Civil Procedure. Judge Simandle, despite the formality of the Federal Rules, has a considerable reputation for being creative and effective in terms of using the formal processes of the federal courts as an effective
mechanism for resolving environmental disputes. Judge Simandle received his J.D. degree from the University of Pennsylvania, where he was Editor-in-Chief of the law review. He served as an Assistant United States Attorney before he joined the bench as a Magistrate in New Jersey. With that, I would like to turn the proceedings over to Jon Brock. Jon.

JONATHAN BROCK:

Thank you very much, Hank. It's a pleasure to be here and it's a pleasure to see some snow. I grew up in the northeast and Seattle gives me too little opportunity to see it unless I charge into the mountains.

Let me say at the outset that I entered into this research that I'm about to describe to you because I'm a believer in alternative dispute resolution procedures as a useful adjunct to the ways in which we resolve conflicts in this society; specifically, those procedures that probably are more familiar to you in terms of a traditional legal education.

The further I got in the research and the more I looked into alternative dispute resolution processes, the more I recognized the limitations and the particular ingredients that had to be there in order for them to be valuable and to produce useful resolution of conflicts. As we looked into the issue of institutionalizing alternative dispute resolution procedures, we found that there were many more problems and many more impediments to using institutionalized procedures than there were for site-specific procedures.

Let me define those terms, at least in some loose way, for the purposes of the discussion today. A "site-specific" dispute primarily involves one site. Maybe it's a waste-siting issue, maybe it's a particular regulation: it is always a particular dispute where the parties come together, sometimes with a third party, and develop a series of procedures in order to negotiate, or possibly arbitrate, the dispute. "Institutionalized mechanism" is a term that I'll use during the course of the day. An institutionalized mechanism is one where a set of rules are put forth to govern the resolution of a series of site-specific disputes that are expected to arise in that subject area or geographic area. The distinction is between one dispute, site-specific, and a system intended to allow resolution of a series of site-specific disputes that might be expected to occur.

The basic premise of my argument is that the ingredients that
make it possible for site-specific resolution to work often either get lost when the system becomes institutionalized, or some important aspects of it are otherwise missed. I put these ingredients into two categories: unrecognized differences between the institutionalized and site-specific resolution, and unrecognized similarities. Just as a matter of categorizing, I'd like to use those two categories.

The premise that underlies these distinctions, these unrecognized differences and similarities, includes three watchwords which make for value and success where alternative dispute resolution procedures have been successful. These three watchwords are the following: flexibility, matching and acceptance. Stated more completely, the flexibility of the process to match the circumstances of the dispute and be accepted by the parties. It is that acceptance, the flexibility of the process to match the circumstances that account in large measure for the success of site-specific and alternative dispute resolution, as a substitute, or as an adjunct, I should say, for more formal procedures that might otherwise have been used.

There are some key ingredients that I'd like to use as touchstones, to look at the unrecognized differences and unrecognized similarities. In the interest of time, I'll name those categories in the course of talking about the differences and similarities, rather than stating them separately.

Contrast what happens in a site-specific dispute to what happens in an institutionalized system. In a site-specific dispute, the parties typically want to negotiate. (We can certainly find exceptions to this and to all the principles that I will name.) It might not be the parties' very favorite idea in the world—to negotiate with those horrible folks on the other side of the table, but, for reasons of risks that they face or reasons of time or frustration, they're involved in the site-specific dispute resolution process because they have decided that they want to or are willing to negotiate.

In contrast, when you institutionalize a system, you're often requiring or insisting that parties come to the table to negotiate who may not wish to do so; they may have better alternatives to negotiation, they might wish to pursue things through the courts, or through some other means, for those of you familiar with Fisher and Ury's work in this field, Getting to Yes,¹ the parties may

have a better BATNA [best alternative to a negotiated agreement] in the institutionalized system. In a situation that may arise under the purview of the system, they might not be interested in negotiating.

In a site-specific dispute the issues are known when we form the process. We know what the issues are, we can attract the necessary parties around those issues and set up a negotiation process that will be able to deal with those issues.

In an institutionalized system where you're setting up rules and regulations governing disputes that have not yet arisen, it's very difficult to know what the issues are going to be. While it may be a siting issue in each case, what are the underlying issues in that dispute? Is it water pollution? Is it air pollution? Is it who owns the property? Is it truck traffic? The issues may be very different than the ostensible subject matter of the dispute and what they will be is hard to predict in an institutionalized system. Similarly, we can select the parties to match those issues in the site-specific dispute. In an institutionalized situation, not knowing the issues means you can't select the parties ahead of time. The selection of the parties is often prescribed in the statute or the regulations so it may not be possible to get the proper parties there. Moreover, it may be necessary to have parties there who shouldn't be there. Even deciding on a mechanism by which you would select the parties may be part of a realistic dispute resolution process. Participation can be problematic and has often proven to be so.

In a site-specific alternative dispute resolution situation, the parties typically have some kind of cohesion, so they can come to the table and be represented in some relatively unified way. They may have come together around a lawsuit, they may have come together around activism of some kind, but the parties are sufficiently cohesive to participate in a negotiation. If I seek to compel parties to negotiate, which is often, but not always, the case in an institutionalized system, they may or may not be sufficiently cohesive to negotiate.

They may or may not have spokespersons available, and to have a negotiation, someone has to be the spokesperson at the table. The labor model, for example, makes that quite evident. Without spokespersons, no one can bind the parties or mediate within a party to bring the party together in order to facilitate agreement. Agreement becomes very difficult. In an institutionalized system, if you don't know what the issues are, who the par-
ties are, or what the dispute is, it’s up for grabs whether or not there will be spokespersons available, or who can perform the necessary functions of a spokesperson in negotiation or in a representative function.

Another important factor is the selection of the third party, which is a common item in specific dispute resolution. In an institutionalized system, it’s not clear whether or not the mediator will be selected by the parties or sometimes provided for in some other manner that may not necessarily fit the situation or be acceptable to the parties. Probably the most important thing in this category is that the process and the ground rules fit the situation in a site-specific mediation. For that specific situation, the process and ground rules for it are worked on by the parties and by the mediator to fit the issues, to fit the parties, and often to fit the politics of the situation.

That’s much more difficult to do in an institutionalized setting, where we don’t know the issues or the parties or the politics that will exist for a particular dispute. More often than not the processes that are established are generic kinds of processes unrelated to the kinds of issues that may arise. These tend to restrict the flexibility of the process to fit the specific circumstances of the dispute. This takes away one of the primary strengths of the site-specific dispute resolution: the flexibility to fit the circumstances.

Finally, in this category, the form of the agreement will fit the circumstances of a site-specific dispute. In an institutionalized setting, the statute or the regulations frequently prescribe what form the agreement which will be a better agreement for a particular dispute.

So the unrecognized differences between successful site-specific resolution and successful institutionalized alternative dispute resolution are important things to recognize so that we can incorporate them and be cautious about them when we seek to design a mechanism.

The other category which I will deal with involves the unrecognized similarities between site-specific alternative dispute resolution and institutionalized dispute resolution. Primarily, this category centers on one particular aspect of the process: how the system itself is developed. I’d like to put forth the notion that the development of the institutionalized system itself, in a site-specific dispute, and the ingredients that go into a successful site-specific
dispute resolution must also go into the development of the system.

Let me name a few of the elements as examples so we can talk about more of them later on. In a site-specific dispute, as I said earlier, you have to have spokespersons and representatives of the parties. Typically, when we put together an institutionalized system, rather than spokespersons for the parties, we have different people. The people that play a large role in putting it together might be legislative staff or it might be attorneys (God forbid) or might be professors (double God forbid) who play a large role in describing what the structure of the system should be. Settlements of these kinds of disputes need to represent the reality of the situation and the interest of the parties. Only principals of the parties can properly represent those interests and realities. It doesn't seem to work nearly as well when they are not part of it. Having the right people there is paramount. Dispute resolution also requires a strong "neutral." Typically, we don't have a neutral to help shape the institutionalization process and because institutionalized dispute resolution systems are often the product of a legislative process or a regulatory process, the process itself may not fit the circumstances and the politics of the situation and the needs of the parties. We may organize a legislative committee to explore institutionalization, which may exclude key parties who may be using the system later down the road. It may exclude important factors that might not occur to legislators, legislative committees, or people who are working with them, so we end up with an unreasonably unrealistic process.

In summary, it seems to me that there is value in using alternative dispute resolution procedures on a site-specific basis. It is much more dangerous to try to impose ADR procedures on an institutionalized basis because we lose many of the important flexibilities. We lose the acceptance of the parties. We lose the capacity to match the dispute resolution procedures to the specific process because we become compelled to institute generic procedures that may not fit. Finally, it is that much more difficult to institutionalize these processes in a way that works because rather than being concerned with the direct parties to the dispute, people who are really interested and have problems with the issue and need to be part of the outcome, we end up with several indirect parties involved in the institutionalization, people who have political interests, interests in due process and appearances. These indirect parties insist on features of the mechanism that are
unrelated to its capacity to actually resolve disputes. That tends to pollute the structure of the system and make it somewhat unworkable.

So I would like to urge caution in institutionalizing dispute resolution procedures that have proven useful in site-specific circumstances. Institutionalization is far more difficult.

For those of you who came to the conference expecting to hear all about how valuable institutionalizing dispute resolution is, you may find that this is very much like the anniversary card that I got from my wife last year. She always sends me imaginative cards. On the front it says, “You’re the answer to my prayers.” (Maybe some of you have gotten the same card.) When you open it up it says, “You’re not what I prayed for, but you’re the answer that I got.”

That’s what happens sometimes when we try to institutionalize dispute resolution processes.

HENRY PERRITT:

Thank you, Jon. Leonard Charla.

LEONARD CHARLA:

Thank you, Hank.

Professor Perritt promoted me to Editor-in-Chief of the Catholic University Law Review. I wish he had been around twenty-four years ago, but it’s too late. I was active in the review, but not as Editor-in-Chief.

It is a privilege to be here today. The issue of environmental dispute resolution is going to be around a long, long, time. When you open today’s New York Times, and on the front page is news of a major revelation of radioactive materials stored all over the St. Louis metropolitan area, you see not only that the problem is going to be with us for a long time, but it’s much bigger than anybody thinks. In the next eighteen months or so, keep your eyes open for news about the Bureau of Public Lands. That’s all I can tell you now, but the word on the street is they have a large number of sites, too.

The first thing I’d like to mention is that ADR does have some limitations. I frequently run into people who indicate that it is going to be a cure-all. It is not. It is a good, solid set of techniques that can minimize difficulties as applied to Superfund [Comprehensive Environmental Response, Compensation and Li-
ability Act or CERCLA] sites, and can really help move things along and save money if all the parties have an agenda to do that. Often you’ll find groups of people who have hidden agenda, one of which is to delay the process. Because by delaying the process, “judgement day,” the day in which they start paying to clean up the site, is itself delayed. If that incentive to delay is present, ADR is going to be less successful because these people come with trunks full of monkey wrenches which they start flinging at every opportunity. One of the things one has to look for in judging whether or not these techniques can be reasonably applied, is whether the parties are willing to receive them. The next thing (and Professor Brock touched upon it very briefly), is a notion that causes a great deal of resistance to ADR: the notion that the entire Superfund process provides a form of ADR, so you don’t need to superimpose any other structure. The Superfund process is that the parties will negotiate and will eventually schmooze themselves into a nice deal. However, this works very well at some sites, while at other sites they’re going to be in court for years. The public welfare is really the victim because the site doesn’t get cleaned up as expeditiously as it could be. Better techniques could be used, and I think that the parties who resist them dogmatically cause some unfortunate outcomes.

The second view is that every site needs to receive ADR, and let’s put a structure on top of the site process. That has similar results at the other end of the continuum—the process is unsuccessful.

I like a more pragmatic approach which involves flexibility in looking at the environment of the site itself, and attempting to bring in those techniques which are going to be most successful in achieving the end that the process seeks. This end is remediation: as speedily as possible, as completely as possible, as protectively as possible, and consistent with national goals and objectives.

Another question you might want to think about—this is a digression, but it has been raised and is going to be very important in our lifetimes—is whether the amount of money allocated to remediating Superfund sites is being used wisely. Think about whether Superfund money would be better allocated on clean air or clean water or public housing. This is a public policy issue that I think is going to be an increasing source of debate in the future. The ADR processes that have been developed almost in response to some of the statutory provisions are preauthorization-mixed
funding. That was new with SARA [Superfund Amendments and Reauthorization Act] in 1986. The government agrees to reimburse potentially responsible parties (PRP) who do all the work. Then the government will proceed against other parties who have “hidden in the weeds” during the Superfund process. That’s been used fairly successfully within EPA Region Three, headquartered here in Philadelphia. Region Three has two or three of the mixed funding sites; however, there might be about six of them now. At one of those mixed funding sites, a single PRP agreed to front most of the money. By using mixed funding and negotiating for over a year with the region officials, with EPA headquarters, and with the Department of Justice, about three and one-half million dollars was saved on the cost of remediating the site. So it was a case where the site got cleaned up quickly and where the company got a good benefit in terms of having its cost reduced. I think that’s an example of an ADR technique working very well.

A second example is in the midwest, in EPA Region Five. There, a surrogate for preauthorization-mixed funding avoids long negotiation time, elaborate preparation, and intensive review in Washington, D.C. by EPA headquarters and Justice. Some regions, rather than use the formal preauthorization process, have used what they call “surrogates for mixed funding” in which they will agree to forgive a portion of the past response costs that are imposed on the site in exchange for services or acts to be done or foreborn by the potentially responsible party. At one site in Region Five, the PRPs were able to save half a million dollars in past response costs simply by agreeing to go forward with some activities which the Region wanted but was loathe to do itself. In the section 106 area, if the PRPs can successfully negotiate an administrative order by consent, they often will have a smoother procedure, and a more effective and quicker clean-up, than if they follow unilateral procedures.

These three areas are more or less SARA-specific and have evolved since the passage of SARA. At the more conventional sites, where parties utilize ADR, there have also been some significant successes. In the far west, in Region Nine, there is a vast site that has thousands of PRPs. There the steering committee used a system of subcommittees to handle a number of functions. These functions included direct negotiations with Region Nine, negotiations among themselves, and community relations. There was a legal committee, and there was a full-time manager. All of these teams or committees resulted in a consent decree being achieved.
for the first operating unit at this site, more than a year ahead of what might have happened had they simply permitted that region to follow its nose in reaching settlement at that site. There are other examples, as well, where third parties have been brought in as formal "neutrals" to do allocation among the parties. People were permitted to provide information, and comments on that neutral's decision. That's much more like the classic ADR that people talk about.

Of course, my company has done this at sites as well—with some modicum of success.

These are ways in which ADR can be applied at sites. It isn't a panacea. There is resistance to ADR because some groups like to do it in a very expensive way. I think you need to take those impediments out of the way, such as high costs, and look at what's really happening. You need to specify the goals and objectives of the steering committee and the government, and then, draw from the vat of ADR techniques those techniques which are most likely to be of assistance at the particular site. Thanks very much.

HENRY PERRITT:

Thank you, Mr. Charla. Lawrence Bacow.

LAWRENCE BACOW:

It's a pleasure to be here. I'd also like to thank the Dean and Liz and the others who have arranged this good day for us, and thank them for their hospitality in helping some of us get here under difficult circumstances. It was, I must confess, pleasant, and also humbling, to listen to Jon Brock's comments on the difficulties of institutionalizing alternative dispute resolutions. What Jon didn't tell you is that one of the cases which he looked at quite closely in arriving at his conclusions is the statute which I helped draft in Massachusetts to institutionalize such procedures. I must confess that the statute has not worked well. It has not worked well for all the reasons that Jon has already told us. All I can say is, "Jon, where were you ten years ago when we could have used your good advice?"

I still think, as do all my colleagues on this panel, that alternative dispute resolution is a good thing. We've all talked about it, but we haven't really spent much time describing it in our own words. So let me first define it, and then explain why I think it's a good thing, and why I think we ought to be nurturing it.
First, in my view alternative dispute resolution represents face-to-face negotiation by the parties, by the principals involved, the affected interests, in the attempt to come to grips with their conflict. Sometimes they negotiate with the assistance of a "neutral," but without resort to the courts, although, obviously, that's always lurking in the background.

Why do I think that's a good thing? Well, let me come at it by telling you why I think litigation is a bad means of resolving some of these disputes. The disputes that I've been involved with are largely disputes where people want to build things, things that often have the general property that society needs them, but nobody wants to live next to them: like hazardous waste facilities. You have a proponent of a facility coming forward and saying, "We're going to do something; we're going to do it right here. We'd like your permission, government, to do it right here." And you have a bunch of people who have the misfortune of living next to it who say, "No, don't put it there."

When that issue is litigated, in the courts, the issue that you get before the courts is typically a procedural issue as to whether or not the administrative bodies took the appropriate steps and actions, held the right hearings, whatever, in rendering their decision. Or, it's the adequacy of the environmental impact report that was filed prior to the hearing. Usually neither of those issues are of any real concern to the parties. The developer wants to know . . . is that a good site? The people who live next to it, who are usually going to be unambiguously worse off if it's built there, notwithstanding the fact that it may be good for everybody else, say, "No, it's a bad site and we don't want it there." They don't really care about the adequacy of the impact statement; if you could deliver the perfect impact statement, there are people who would still oppose the facility.

So we have this strange set of circumstances: the issues that the court really cares about tend to be of little real concern to the parties, and the issue that the parties really care about, "Is that a good site, should it go there, or someplace else?", is one with which the court doesn't want to deal. This seems like we've got a situation where ships are passing in the night and decisions are being made in a context where the true underlying issues aren't addressed. The parties can address the real issues themselves. There is at least a chance that that can happen in a productive way. Having acknowledged the difficulties which Jon has already talked about, the real question becomes this: if we think that
ADR is a good thing, but we also recognize the difficulties of institutionalizing it, how do we nurture it or alternatively, how do we at least look at our administrative and procedural processes so that we don’t place obstacles in its way. We should not handcuff the parties in their attempts to try and fashion solutions to their own problems.

All that is in the way of introductory remarks. What I really had intended to talk about is this problem of parties. One of the nice things about litigation is that there is a beginning, a middle, and an end. The problem with negotiation is that it really is a classic seamless web. Negotiation and bargaining begin before the parties sit down at the table. Unfortunately, it also continues after there is an agreement. It’s not a linear process: it’s ongoing; it continues. If we want to encourage people to negotiate, if we want to play some role, as lawyers—as litigators, or mediators or just officious intermeddlers, we need to recognize that characteristic of negotiation.

We need to think ahead and look at the process by which the parties might bind themselves to an agreement. If those compliance issues are not anticipated in advance, then negotiation becomes a useless exercise. You will not get the parties to the table. The parties will not invest their time, effort, and resources if they think that, for whatever reason, the agreement they strike will not be binding.

Environmental problems cause particularly vexing compliance issues. Not all deals are difficult to enforce in our lives, however. When I go to the flea market and pick out something and haggle over the price and then buy it, there’s not a compliance problem and the reason is that the deal is closed on-the-spot. Performance occurs mutually and simultaneously. In an environmental dispute that’s never the case. Performance typically occurs, especially in the kind of site-specific disputes that we’ve been talking about, over many, many years. I say, “Put it there, it’ll be alright, don’t worry, we won’t have these big problems down the road, there won’t be groundwater contamination problems, there won’t be air pollution problems, there won’t be noise problems, there won’t be congestion problems”—and I’ll make certain types of assurances. People don’t believe me when I say that because performance occurs over long periods of time. Nonperformance is not always obvious: it requires careful monitoring. The capacity of the institution that’s making the promises is often in question because one never knows whether it will be a
viable enterprise five, ten years down the road. Moreover, a perception often exists that the kind of damages that will occur if there is noncompliance will be in some sense fundamentally irreversible.

The environmental site-specific disputes pose particularly vexing compliance problems which need to be anticipated by the parties in the negotiation process if they are to be successful. Now there is a range of techniques that are available. There are alternative approaches to resolving environmental disputes, alternatives to litigation that we can discuss. Let me stop there in the interests of time.

HENRY PERRITT:

Thank you, Larry. Judge Simandle.

JUDGE SIMANDLE:

Thank you and good afternoon. I'm glad that so many of you could make it on this day of inclement weather. I'd like to draw your focus now to what's been called the most institutionalized process of all. That, of course, is the federal court. I'd like to speak with particular reference to litigation in federal court involving Superfund sites. Typically, the plaintiffs are the EPA or the state. Sometimes it's private parties seeking contribution, where the private party has come forward with a remedial plan and is seeking contribution from other parties who may be potentially responsible. The object of the litigation is to recover the response costs under CERCLA. Sometimes the object is to abate a release of hazardous substances into the environment. But basically the object is to have money flow from one side of the table to the other in order to redress harm that has been done and to prevent future harm.

Typically—and I think this is an important point—settlement efforts have failed at the administrative level or they've never been tried before the matter has come to court. There is, of course, under Superfund, an entire administrative settlement mechanism that takes place before the EPA. Demand letters go out and the parties have an opportunity to negotiate and settle. What I've seen from my vantage point in federal court, or what I hear is that on increasingly numerous occasions the parties are self-organizing at that early stage. If the settlement efforts before the EPA are unsuccessful, they are not necessarily wasted. Those efforts are sometimes picked up again in federal court. Some-
times there is already an organizational structure of counsel in place, parties have had an opportunity to identify themselves as belonging to certain groups: generators, handlers, and owners and operators; each of which with interests that diverge from that of the government certainly, but also interests which may diverge from each other.

It's my thesis that litigation can be managed in a way that promotes settlement by achieving flexibility, fitness, and recognizing an amenability of the litigants to settle the case. Judicial roles in the settlement process span a wide spectrum. These roles range from a pure adjudicator, a judge who has no role to play and stands aside; up through a neutral manager who has no special settlement agenda, but if settlement is about to happen, then the neutral manager will help it to happen; to settlement process manager which means the negotiations can be managed in a way that helps to promote the opportunities for settlement without in any way specifying what that settlement ought to be; through a mediator, a person who functions with some degree of compulsion to bring the parties together, provide a forum and perform a mediative role; and all the way up to the level of being an arbitrator who is more directed toward the results and the goals of the process.

To say that a judge is helping to promote settlement doesn't necessarily answer the question of which of these roles is the judge playing. In my experience with federal court where magistrates do perform case management functions, I've played each of these roles—at different times, in different Superfund cases. It's often a question of timing.

Attorneys, similarly, are called upon to play a number of roles. Sometimes they play the role of pure attorney, pure litigator, pressing hard to trial, always trying to gain the advantage, doing more, faster, bigger, better, and pressing the adversary into a corner. Often times they play the role of team litigator. That is in multi-party cases with 50 to 500 parties in them, coalescing, at least, for litigation purposes, in teams. One step further is the hybrid litigator, someone who's litigating as part of a team, but, also, is settling or trying to settle, trying to negotiate as part of a team. The attorney as team player really comes into the fore in this sort of a Superfund site litigation.

I think the purest settlement form involves someone I would call the settlement counsel. This is an attorney who has been brought in and retained by a group of parties for purposes of
helping them to achieve settlement. Sometimes settlement interests are being represented at the same time that litigation interests are going forward. When I talk about a settlement process in federal court, it's often within the context of simultaneous litigation. Both things can be done at once, but I'm also eager to put the brakes on the litigation process, to put the gas on the settlement end of the process in order to achieve the sort of timing that promotes settlement.

Who decides whether there ought to be a settlement process? In my view the decision has to come from the players; it's nothing that a judge can impose upon the process. In each case where this has happened in my court, the first question to the parties has been, "Is there a willingness among the parties to engage in good faith in a settlement process?" If there is a critical mass willing to take that risk, whatever the risk may be of saying, "Yes, I'm willing to engage in a settlement process," and as long as the mass includes the plaintiff, the governmental authority, or the party who brought the matter to court, then I'm willing to ask a few more questions.

"What form should the process take?" There is no magic formula to be imposed in each Superfund case. I've seen half a dozen and each one has separate characteristics that would make the process used in that case inappropriate for at least some of the others. This type of dialogue, up front, helps to define what the process ought to be. Let's consider advantages of court supervised settlement processes, as opposed to out of court processes. Once you're in court there are not many choices. One advantage is being able to select the remedy for the site, as part of the negotiation. You can negotiate money, you can negotiate timing, you can negotiate the remedy. If the remedy is one that's consistent with the governmental studies, the plans, the policies, the statute, then you may have a hand in selecting the remedy. I've seen dramatic instances of lower costs because of the opportunity for the negotiating and settling parties to select the remedy and to convince the governmental authorities why their remedy would work.

I won't mention the case, but you can believe me when I say that I saw in one case, a 50% savings in a proposed remedy, and perhaps even an improvement in the remedy that was selected. The remedy that was selected was a privately-executed remedy. This is well underway already.

Decreasing risk is another advantage. There's no risk of out-
come when you settle. There's a long term risk in any Superfund case, however, and I don't know that any process can do away with that. Part of the risk is statutory. There are certain reopeners that have to be contained in any Superfund site settlement. Years down the road maybe some of these settlements that I've been so pleased with may come back, but there are mechanisms for dealing with them if they come back.

Another obvious advantage is a lower transaction cost. Litigation with 50 or 100 or 200 attorneys is extremely expensive. When I have a group of attorneys like that in a room, I hesitate to stutter because I know that my stuttering like I just did is going to cost some party somewhere substantial amounts of money. I'd rather save the nuts and bolts of how it's done for later discussion because my time is up.

One of the lessons that has to be learned is that the process must fit the problem you're addressing. You don't want a situation where you have a settlement process that itself is micromanaged, where there seems to be judicial involvement in every nook and cranny of the settlement issue. You need things to flow; you need flexibility; you need deadlines that are enforceable; you need good faith, compelled by court orders if it's not forthcoming in terms of the giving of data. You need a confident data base. Courts are good at making parties march to the beat of the same drummer and removing the incentives for staying outside of the process.

In terms of avoiding overkill you want to avoid the situation that one of my attorneys mentioned. He said, "Judge, you know what a good alternative dispute resolution process for this landfill would be?" I said, "No." He said, "Well, it's what we have here, you can have 300 attorneys and one guy with a backhoe."

HENRY PERRITT:

Thank you, Judge Simandle. To begin the interactive part of our program, I want to introduce my colleague, John Hyson, who is sitting at your far right. John began his professional career at Boston College, continued it at the University of North Carolina, and he went back up to the Boston area and he received his law degree from Harvard. John has been on the Villanova faculty since 1971. He's been very innovative and creative, not only in terms of exploring new teaching techniques, but also in terms of getting environmental law usefully into the Villanova Law School curriculum. In fact, much of the original credit for the level of
activity that many of you as students or alumni have shown in the environmental area goes to John Hyson for his willingness to stimulate all of us to think about these things. John, because he knows much more about environmental law than I do, agreed to react to what the speakers have said and to begin our discussion. John.

JOHN HYSON:

Thank you, Hank. Since we’re in the discussion phase, it would seem overly formal for me to get up there and begin to pontificate, especially since I am reacting. I don’t intend to try to add to what has been said. Quite frankly, the people who are up here and who have already spoken know much more about the realities of this process than I do. As we were setting up this particular panel, we were trying to think of exactly what my role would be, and I’ve been hard-pressed to think of it myself. Thankfully, earlier on, one of the speakers, Larry Bacow, described my role and that, of course, is, “officious intermeddler.”

In that role, I’d like to make an initial observation. We were having fun with the characterization of the different speakers about the extent to which they have been institutionalized. I am amused because my reaction after listening to all the speakers, is that the person who was identified initially as the most institutionalized seemed to be in no way bound by any formalities of the institution in which he operates. I make that observation because one of the questions that I had intended to ask Judge Simandle was the extent to which he felt bound by the constraints of the formalized institution within which he operates. I would like to suggest what I think is the answer, and I would invite others to comment upon it. It seems to me that the answer that I will now put in Judge Simandle’s mouth, is that he doesn’t feel bound at all by any constraints. When he’s faced with a difficult multi-party Superfund site, the fact that he is operating as a United States Magistrate doesn’t seem to impose any kind of constraints in Judge Simandle’s mind upon how he can deal with this difficult situation. Do you want to just say, “Yes, I’m correct”, or—

JUDGE SIMANDLE:

I learned a long time ago that my law school professors were always correct. There are certain constraints within the process. There’s always the constraint of due process. There’s always the constraint of treating people fairly, and there’s a constraint of not
depriving any party of its day in court. There are plenty of litigants in Superfund cases, like any other case, who don’t want any part of a settlement process; they want their day in court. They want the case managed, understandably so, so that one day they can have a trial, or have a summary judgement that would establish that they should not be in the case. That insistence may also come from the Government. The Government may feel in certain cases and with certain litigants that it has a slam-dunk, and doesn’t want to be detoured to a settlement process.

So the very first constraint that I experience is whether a settlement agenda is on a collision course with the way that the litigation ought to be handled. Some cases, just plain flat out ought to be litigated. I’m not saying every case ought to be managed for settlement. I think that does a disservice to some parties. That’s why the first point that I mentioned was the need for consensus among the litigants that there ought to be a settlement process.

I wouldn’t seek to impose that, but the lack of constraint is a good point. In a settlement process I’m free to expose myself to the merits because I’m not a judge who is going to try the case. The district judge wouldn’t normally be informed of any of the settlement discussions. I can engage in ex-parte conversations with the litigants in a settlement process. That’s one of the rules that’s put into place at the outset, while in normal litigation, of course, I would never do that. The Federal Rules were amended in 1983 to build in this kind of flexibility, to call time-out in the rest of the case to explore settlement. I think Rule 16 and Rule 26(F) are powerful amendments to the rules that give a judge who wants to take control over either case management or settlement the tools that he or she needs to do so.

JOHN HYSON:

I don’t want to monopolize the questioning here, but I just wanted to follow up what Judge Simandle has said. What are the advantages that a United States Magistrate can bring to a situation where informal efforts of negotiation have already failed? What have you brought to this situation that wasn’t there before, that didn’t allow a successful negotiation to be reached before formal involvement of the federal Court?

JUDGE SIMANDLE:

Well, I wouldn’t want to take credit for the settlements that
are achieved in the federal courts. I think that the lawyers and the parties they represent deserve that credit.

It’s often a question of timing. In the pre-litigation phase, there’s often not an opportunity for everyone to be in the same place at the same time. That opportunity comes in the courthouse. You can exchange any number of ugly letters with an adversary, pre-litigation, but once you have to sit down across the table from that adversary in the courthouse, there can be a certain chemistry, a magic almost. It can happen if there’s an environment of trust. I know that that sounds corny, but you can’t achieve a settlement without some degree of trust or somehow mediating mistrust. The magistrate, as a judicial officer, once the parties have decided upon the mechanism for settlement, has advantages that an arbitrator might not have. If the magistrate has some sort of technical training or technical background, that’s a plus. A number of our judges and magistrates have engineering degrees. I do too. That can be helpful.

A couple litigants have said that there’s a mystique to the courthouse. Sometimes people have come into the courthouse with the idea that a settlement will be achieved, and that’s something that doesn’t happen outside. But you cannot simply assume that all of these things are going to happen. You cannot assume that without some sort of direction that a settlement’s going to occur. That hasn’t been my experience either.

Being a listener, you take your direction from the litigants and build consensus.

There’s plenty of attorneys now, and I see some of them in this room, who achieve more and have more experience in these sorts of cases. They know how to do it. It’s what makes this process very exciting. Frankly, I’m flattered that you would give up a Saturday afternoon to be here . . .

HENRY PERRITT:

I wonder if I could jump in at this point, and ask the other panelists to comment on an observation that might be inferred from some of what Judge Simandle said in his prepared comments, and also from Jon Brock’s initial criteria. One of the difficulties in talking about ADR is that there’s lurking in the background the possibility that ADR works only in the universe of disputes that were going to settle anyway. So maybe the successes of ADR, are only the easier portions of the dispute. Those that aren’t so easy end up with Judge Simandle and maybe they
don’t even get settled by him through negotiation, but they’re the cases that go to trial.

JONATHAN BROCK:

Perhaps I can start on that, Hank. I wouldn’t characterize it as the easy ones, or otherwise, people like me, who think they are good at resolving disputes would be out of business. It depends on the goodness of the fit within the dispute. There are some disputes that are amenable to mediation because of the kind of dispute that they are, because of the parties, because of the kind of trust that exists, because of how much failure there’s been before, a whole range of factors is involved.

Others just won’t resolve. The most common kind of issue, at least in the labor relations business, is a personality issue. It’s rarely the money that won’t let you settle it, it’s more likely that somebody has hated somebody for years. Going to an arbitrator doesn’t settle the feud, but mediating it and dealing with what may be underlying that personality dispute, that historical dispute, may be the more likely way to do it. It doesn’t mean it was easier, but it means that the tool fit the problem. Discriminating among cases, as Judge Simandle described, is one of the most important functions in deciding whether or not alternative dispute resolution is a proper process.

Another thing that I would underline is one that I mentioned, and that the Judge’s comments reminded me about once again. This is the necessity for those who are interested in alternative dispute resolution processes not to think that it’s a substitute for litigation or a substitute for civil procedures, or any other more formal mechanisms that people are used to confronting. There’s a security in those mechanisms, and there is a specification of rights. Whether you think the other party has too many rights or not depends on what side you’re on. Those things are very important to individuals. It’s important to the society, and ADR needs to be one of the tools in the arsenal. It has been my judgement in the past in the observations that I’ve made that ADR works best when it is one of the tools at the disposal of both the parties and persons who are assisting the parties. This is still a reasonably new field, but I’m sure this is to be true for all time. Dispute resolution professionals, eight or ten years ago, thought that ADR was going to be a substitute for litigation and that everybody should use it. I think it’s terribly important for a group like this interested in these issues to begin to think about the fact
that it's much better not as its own system, but as a set of tools available along with systems that provide security and rights. Whether ADR gets used more than the others is a different matter, but to separate it from the existing procedures, at least in a sudden way, is very dangerous and probably doesn't serve the interests of the parties or people who think this is a good process to use. Larry said he wishes I were around. He wasn't happy when I was examining him on his dissertation at some seminar, I remember, but we've gotten over that and we've been friends ever since.

LAWRENCE BACOW:

Hank, I would just like to ask a rhetorical question. What should be a supplement to what? Is ADR a supplement to litigation or vice-versa? Let the group think about, to try and envision, a world that looks a little bit different than the one that we have here now. There are other societies who manage to address the same sorts of issues without the same degree of intense involvement of the courts. In those other societies, which are democratic societies, people feel like their rights are not being trampled daily. Though the expectation is that disputes of this sort will be settled in one form or another by negotiation among parties, that does not mean to suggest that litigation isn't available or that some cases don't go to litigation. But the mix is very different from the way we have it here. I only offer that as a point to ponder, at least. Is the tail wagging the dog or vice-versa?

JUDGE SIMANDLE:

Can I just follow-up on that? What Larry just said reminded me of something that Jonathan Brock said in his comments. Jonathan, at the end of your comments you referred to the development of an institutionalized system of dispute resolution as itself being a kind of site-specific dispute. You talked about the different participants in developing an institutionalized system of dispute resolution. In setting up any kind of institutionalized system of dispute resolution, one can expect that among the participants in setting up that system will be people who have been trained as lawyers. At one point you referred to notions of due process. Someone says due process and the people in this room, or many of the people in this room, think very positive thoughts. After all, that's embodied in the Fourteenth Amendment. I think when you refer to due process, you're referring to it in a kind of negative way. You're suggesting that perhaps lawyers' notions of
due process causes them to think about a dispute resolution process in a way that is counter-productive.

Now, did I put a whole lot of words into your mouth or did I misunderstand you completely? Do lawyers and basic notions that lawyers have about dispute resolution mess up effective ways of resolving multi-party disputes?

JONATHAN BROCK:

As one of the probably five non-lawyers in this room, I'm looking carefully for the back door before I answer this question because I want to answer it frankly. The answer in simple terms is, "Yes." You can tell me more about the type of training and experience that lawyers have. Other people are products of their own experience as well. In the cases that I study, I feel like I'm on reasonably safe ground. If I don't tell you what the cases were, then I can claim full knowledge and a monopoly on the knowledge. In the cases that I looked at, when it came down to trying to develop the institutionalized system, the folks who really impeded the deal were people whose rhetoric, at least said, we are worried about due process. We are worried about the public having its opportunity to be involved properly in the process. We would insist upon representation, would insist upon restrictions in the process. They insisted upon requirements in the process, that reminded me of litigation. Since I'm not an attorney, maybe litigation doesn't have any of these things in it, but it sure looked like it, and reminded me of administrative procedures that were familiar to me when I worked in the federal government.

The way I use the term due process was meant to indicate that the due process considerations weren't necessarily protection of peoples' rights, although I'm sure they would have had that function, but they were protecting a set of traditions that were familiar and comfortable to individuals whose job it was to use those traditions. In looking at ADR and hearing Judge Simandle's remarks today, which I've been impressed with and have enjoyed, there seems to me to be other ways to protect appropriate due process rights. Larry's rhetorical question (as a professor, I'm probably allowed to answer rhetorical questions) suggested that we might be better off if we looked like some other society, or it might be better if we looked like something else. Probably that's true, although that would change the wage rates in your business a bit. In the meantime, because people are used to certain kinds of due process protection to get them involved in ADR
while throwing the life preserver to the other side of the ship, is going to be difficult. They won’t have anything really to cling to. We say due process protection often when we mean well. ADR, in the particular examples the Judge gave, suggest very strongly that the parties will release themselves from those processes temporarily or for a time under a protective umbrella. They can often give better results when they eliminate the things that really aren’t protecting due process rights in a strong sense; they are only protecting traditions or habits that die hard. I’m not against them dying hard. However, until we’re convinced that what we have to substitute for them, ADR will be just something professors thought up and wrote some articles about. We should get some experience with these things before we start to move out of the way the things that have served us reasonably well, even if they’re anachronisms which many of them are.

LEONARD CHARLA:

One of the things we’re discussing that interests students is a diversion in the activities of some lawyers from the objectives and goals of their clients. If you take the Superfund process, which is the process with which I am most familiar, you can see this on the part of every single party including the federal government, the states, the owners, the past owners, the operators—the PRPs. It is everywhere. It is a good thing at the beginning of any proceeding in which one is going to represent a client to think about what the client’s interests really are in terms of the environmental dispute that one is handling. You might get a different result if you say to oneself, “How am I going to take care of that turkey on the other side, whom I’ve disliked for a long time? I’ll stick it to them.” Very often this doesn’t result in the outcome your client really wants, at least not as fast or as inexpensively as they might want it.

HENRY PERRITT:

In that regard I’d like to ask Larry Bacow to share with you an example of an ad hoc site-specific solution to a compliance dilemma that he was involved in designing. There is a common theme here. It has to do with creativity in terms of perceiving what the client’s interest really is and creativity in finding a way to supplement the procedures people are more comfortable with. Larry certainly has a concrete example that doesn’t require us to look at another society. It happened in this society.
LAWRENCE BACOW:

We are trained as lawyers. Think about our first-year curricu-

lum. We take contracts, we take procedure, we think about how

one enforces contracts. There tends to be a certain knee-jerk re-

action as to how we enforce agreements. Part of that comes be-

cause it's comfortable. We know what the rules are: they're well-

defined, and it's also easy. If you cut a deal with somebody and

something goes wrong, who's going to enforce it?

But I think that if we think hard and scratch our heads hard,

often we can craft the agreement itself in such a way, so that it

stands a chance of being self-executing. I think this is the case

that Hank asked me to talk about.

The case involved the expansion of a municipal landfill in

southeastern Massachusetts. There were a whole bunch of issues.
The developer-owner of the landfill wanted to expand it on land

that was owned by the town. The land was not really being used

for anything else and couldn't be used for anything else, but there

were several people who lived around the landfill who didn't want

to see the landfill get any larger. They were concerned about a

host of issues that went way back in terms of the relationships

between the parties. The last issue that had to be dealt with was a

problem of litter. Anytime you dump garbage on a site, it's sup-

posed to be covered with fill on a daily basis. That prevents birds

from getting at it and also prevents the wind from blowing the

litter around. This was a problem, and the question was how to

ensure that the operator of the landfill complied with the require-

ment that the site be adequately covered every night. Of course,

coverage is expensive for the landfill operator. He's got to buy

fill, there are labor costs involved in moving the stuff around, he's

got to stop his work each day and leave enough time in order to

be able to cover it, so there's a big incentive for him not to do

that. He can save money on the deal, if he can.

What we crafted, in that particular case, was a procedure in

which the landfill operator paid money each year into a fund.

This fund was placed under the control of the public works de-

partment of the town. The purpose of the fund was to front

clean-up expenditures of wind-blown litter on the site, if there

was a litter problem. The money was there so that the town could

go clean the litter up at the expense of the landfill operator. So

far it's relatively straight forward. Then we stipulated that any

money that was left in that account at the end of the year would

be split between the town and the landfill operator. If the town
didn't spend it all, it got to keep some for itself, but it had to share in those savings with the landfill operator.

Mechanically, if there was a litter problem the town was supposed to notify the operator there was a problem and that they were going to make use of the funds in order to clean up the problem. Think about it. First of all it gave the town the capacity to do something about the problem as opposed to just complaining to somebody else, going to a judge and saying, "They are not doing what they said they were going to do; judge, please help us out." Second, it created an incentive for the landfill operator actually to do what they were supposed to do under the agreement: cover the site every night. To the extent they did that then money was available at the end of the year and they were going to see some of it back.

It also created an incentive for the town not to engage in nuisance actions with respect to the landfill operator, to complain constantly, or to tap these funds constantly. What they didn’t use for clean-up, they got to keep half for themselves, at the end of the year.

That's an example of how, if the parties really scratch their heads hard and be creative and inventive, they can imagine ways in which not only can people be brought together, but they can be brought together in a way which won't necessarily push them toward the courthouse door in the future. I think that as lawyers, we do our clients a disservice if we do not think about how the deal which we have cut under the mat will be implemented in the future. I think we have an obligation to do that.

HENRY PERRITT:

As we move along let me encourage any member of the audience to raise their hand and jump in with questions or comments.

LEONARD CHARLA:

Sometimes one finds diversity of interests within groups themselves. For example, ideally the state or the federal government at sites should have the same goals, but frequently they do not. Sometimes the citizens fight among themselves about whether they want a quick remedy or a very thorough remedy. It's not unknown for PRPs to fight vehemently; not only over shares, but also over methods of procedure and timing. I do believe that you can get sites to settle and parties to come together
even when they are at each other’s throats if the right things are added.

There was a suit in Michigan in which the government really wasn’t being very effective in proceeding with the remediation and the parties were fighting like cats and dogs. Common counsel was brought in who had real skills as a peacemaker. By appealing to the mutual best interests of the PRPs he was able to forge unity there. He then took that unity and used it to add value to the process by taking it to the federal government and offering to expedite the design problems at the site. That, in turn, galvanized the federal government to go forward. The state was still out there, fighting for reasons entirely its own, opposing just about everything. Both the federal government and the PRPs got together with the state and with common counsel and were able to persuade people within the state government to join in a good settlement that was adequately protective to the site.

Popularly, people see this as a battle where the PRPs are always looking for low cost quick and dirty clean-ups, but very often that isn’t the case. Very often it’s a question of how much time it’s going to take or what sorts of contaminants are going to be cleaned up and when. There is a body of PRPs out there who still don’t want to pay nickel one. There are other people around who are interested only in making names for themselves. So you do get base motives, but I think most of the time you can use these ADR techniques to appeal to people’s best interests, and to forge resolution of some of the problems. It will never solve everything, but I think we’re here today because collectively as a society we’re on to something good with these ADR techniques.

JOHN HYSON:

I just wanted to comment on the suggestions of a sharp distinction between cases which involve integrative bargaining, or integrative bargaining opportunities, and those that don’t. In reality, the world is not so neat. Even in cases where there is an opportunity for integrative bargaining, once you’ve created the joint gains, they still have to be divided up between the parties, which leaves you with a distributive problem at that point. There may be some cases that are purely zero sum, but even in those cases that aren’t, you still have to settle the zero sum component after you’ve created integrative opportunities. You’re always dealing with that problem, even in cases that look as if they are
easy. Ultimately you still have to get down to the question of how you’re going to distribute these joint cases.

JONATHAN BROCK:

In some ways the more complex the dispute, the more that ADR offers you because it’s shaped to fit the situation; so you can get tools that fit. The more complicated and difficult it is, the more we should look to ADR either in judicial or non-judicial contexts.

One of the difficulties in lots of disputes is the people who are disputing are the people who have the problem. Sometimes the people who have some access to the solution are parties who aren’t there. One issue that I’m close to, but not personally involved in at the moment, is one of airport noise at the Seattle-Tacoma airport. For a long time they had a group of citizens who moved near the airport who were getting together under the auspices of the airport manager to talk about what should be done about the airport noise. They came up with this marvelous list of solutions that the airlines should do this; the FAA should do that; flights should fly over those other communities over there. Of course, everything they came up with went over like a lead balloon in the Seattle-Tacoma metropolitan area and nothing happened. It was terribly frustrating for everybody involved. Then a new ADR initiative was put together, and people who are organizing it went to the airlines, went to the FAA, went to a number of other parties, business groups and so on, who rely on the airport for commerce and transportation needs. They involved a bunch of parties, particularly the airlines and the FAA who are the only parties really who can do something about it, and they appealed to their community interests and to their economic interests. They brought in people who were potentially part of the solution.

I think it’s important to think about if you want to resolve it. You have to get the parties who have some access to the elements of solution. As one of my colleagues, Jerry Cormick, whose activities are reported in some of Professor Perritt’s research on rule-making says, “sometimes you have to make the problem bigger in order to find the solution to it.” ADR gives you that opportunity more than more traditional procedures. We need to think of ADR as a way to make the problem bigger, so that there’s more stuff to divide up and more stuff to trade. Of course, often what’s initially on the table, does present us with a very difficult problem of dispute resolution. Trying to make it bigger may not seem like
such a good idea, but we often get much closer to a solution if we do make it bigger.

MEMBER OF AUDIENCE:

I'd like to present what might be as big an environmental problem as anybody can come up with. We can still not agree on a site for the disposal of nuclear waste. In the process thus far a government agency identifies what it thinks is a potentially best site. As soon as the news passes down, an enormous barnstorm of opposition starts in the local community. "No way are you going to put it here." The opposition in many cases has nothing to do with the geological merits or the technological merits of whether it's safe. If there is any risk whatsoever—and naturally there is going to be some risk with any activity—you're not going to put it close to us, even though it might be more dangerous if you put it close to somebody else. I'm wondering if it wouldn't be more intelligent if the federal government would identify ten or twelve of those geological sites. Then simply call everybody in to say, "Look, we know that nobody here wants to be near the site selected. In all probability, one of you is going to be the site selected. Let's see if you can work out some arrangement on what the proper criteria are and proper safeguards are. Let's see if we can come to some sort of conclusion on a basis that's fair to everybody." Now, maybe something like that would be totally unwieldy but I've just put forth one of the biggest problems I can imagine, and I'd like to get a response to it.

HENRY PERRITT:

Well, the question has certainly taken Jon Brock up on his invitation to consider expanding the dispute, because generally that expands it as broadly as possible. But I think that's an important thread through some of the recent questions and comments, I'd like to try to make it more explicit.

The tendency is to talk about ADR as though it were an alternative to litigation. I would submit that that's not really what we've been saying here. What we've been saying is that we need a set of alternative tools that are alternatives to the traditional model of a lawsuit which has two parties—parties that are individuals. In fact, the range of tools that are interesting are those that permit us to deal with disputes that are in some sense political. That is to say that they are disputes involving parties that themselves are not individuals but are made up of multiple interests.
Within each party you have an enormous number of disputes which are not even visible within the constituency. What we really have when we're talking about alternative dispute resolution is a search for the most appropriate kinds of tools, to deal with political disputes which somehow are not resolvable through the traditional legislative and administrative rule-making mechanisms.

JONATHAN BROCK:

Well, shall we fix the nuclear waste dispute thing as long as we're here?

LAWRENCE BACOW:

The problem that you described is a problem that exists for all types of siting problems. It happens to be larger in scale, but it's not different in kind from the problem of finding a site in Massachusetts for a hazardous waste recycling facility. One of the things that the disputes have in common is that as much as you may want to argue that a particular site may be a poor one for a nuclear waste repository, it's tough for anybody to argue that we shouldn't have a nuclear waste repository. No matter what your attitudes are with respect to nuclear power, we've got the waste, we've got to put it someplace, we've got to do something with it. What we did in Massachusetts in the statute which I was involved with, and it hasn't worked well . . .

JONATHAN BROCK:

. . . and I'll tell you why when he's done . . .

LAWRENCE BACOW:

We can talk about why it hasn't worked. It's very much along the lines of your suggestion. The statute provides for identification of multiple sites, not a single site, but multiple sites. Moreover, the statute is designed to keep as many sites alive as long as possible. The statute then contemplates a process by which the communities organize themselves and participate in the negotiation process structured by the statute. It makes resources available to communities so that they have access to technical assistance because these are highly technical conversations, and it is fundamentally unfair to expect a community to come in and then negotiate about all sorts of stuff dealing with geology and hydrology and whatever if they don't have access to some of their
own technical expertise. It also provides—and this was really the key piece of the statute—for a process by which the communities would be compensated for their willingness to accept a site. What was envisioned at the time of the drafting of the statute was that some clever developer would come along and in effect conduct an auction among the communities. The expectation was that they would be able to get the communities, at least one community, to articulate the set of benefits that they would need in order to compensate them for the social costs that come from living next to one of these things. As you correctly observe, with everything comes some risk. If all you’re getting are risks and costs and nothing else, then clearly you’re worse off if it goes next to you, so you might as well have it go someplace else and so you’ll fight. So the statute provided for multiple sites under consideration simultaneously, technical assistance to the community, a process for nomination of a compensation and a process for negotiation of a compensation agreement between the developer and the community.

Now why has that not worked? There are a variety of reasons one of which has to do with the economics of the business whereby no single developer of one of these facilities could afford to compensate a community. Then the question is, should the state have become involved as well? Some of us argued that yes that was an appropriate role for the state because public goods were being provided by one of these facilities. Such a facility would diminish the amount of illegal dumping and temporary storage of this stuff in a number of diffuse locations. But that has never happened for a whole variety of political reasons. There were other problems that became evident in the statute itself. Ultimately, I think if we are going to site one of these facilities, the only way it will be sited is if there is compensation that is paid to the community. Then the question really is what form does that compensation take, and who’s going to bear the cost of it.

JONATHAN BROCK:

I feel compelled to say something after Larry described that awful statute. We’re avoiding your question, I think, fairly artfully like academics and panelists who have learned to do it well. If this were a problem that our collective knowledge could resolve, we’d be somewhere getting paid $400 an hour today solving it rather than being here.

Larry’s willingness to look at the Massachusetts statute objec-
tively and to understand its weaknesses says a lot about Larry's capacity for inquiry.

In my judgement the reason why it didn't work had to do with the principle that I articulated at the end of my remarks. Leaders of the constituencies likely to be involved in those disputes were not properly involved at the beginning in the way in which the mechanism was developed. My memory is a little bit fuzzy on this, but as I recall, the legislature that passed the law said, "We're going to organize a committee that's going to come up with a mechanism." What they did is what happens very often in public policy when we're trying to solve an important public policy problem. We round up the usual suspects. We got a citizen, somebody who is sort of active in a citizen's group like the League of Women Voters or in a government association or something. We got an environmentalist, and we got a business person. We didn't necessarily get people who could speak for those constituencies on this set of issues.

Two things happened. One is that the mechanism that developed did not reflect either the political, the technical or business economic reality of siting the facility. The mechanism, even though the compensation aspect of it was interesting, and there were a number of interesting aspects to it, wasn't the stuff that came from the parties. Germane to Judge Simandle's remarks, it was the stuff that came from legislative staff and professors. I think it's useful to have legislative staff and professors involved in discussions because we can tell you what happened someplace else and what worked and what failed, but the mechanism has to be a product of the parties. The parties that could do that weren't necessarily there. Some were and some weren't.

The second result was that when the mechanism was ready to be used to site hazardous waste facilities, we did not have leaders go out to their constituencies, for example, a mayor who was well-regarded among other mayors, to say, "Look, we really have to accept this. This is the best mechanism you can come up with and we really need to settle these disputes." There was nobody to go out and demonstrate leadership in the relevant communities, no one to gain acceptance for what was inevitably going to be a controversial mechanism to use on a controversial set of issues. A primary weakness of a lot of these attempts at institutionalization was true in Massachusetts.

Of course, it's easy to look back at it. It's not easy to invent these things so they work.
The other thing is, I take issue with a comment that Larry made. Even though it might be evident to those of us who follow public policy issues, that yes, there needs to be a place to dump this stuff, it is not evident to everybody in every community next to whose home it may be located. In my state (Washington), if you don’t use nuclear power, you don’t give a damn where they put the stuff. It doesn’t matter to you, you use hydroelectric power, you use coal-fired plants or whatever you use, or you don’t care. I don’t think that in Massachusetts, except among people who were environmentally conscious or involved in public policy in one way or another, that there was a widespread recognition of the problem. I think that that’s probably true with respect to nuclear waste. It hasn’t leaked into my water supply, we haven’t had a crisis or a tension-producing event—a reason to coalesce people around necessity. It’s the coal mining theory of regulation. We got a lot of coal mine regulation only after there were a bunch of mine disasters. Unless there’s a recognition of the problem and tension that drives the parties together to find some better solution, it’s hard to create a mechanism that will work. If you don’t consider carefully how you bring the parties together to discuss it, and there’s not an imperative that will bring the right parties there to discuss it in the right way, then you’re not going to solve these kinds of problems. I don’t care what ADR theory you use or what litigation you use. We can delay anything through litigation if we feel strongly enough about it for quite a long time, and certainly you can stall it through ADR.

Without the right people there and without a sense that the issue does have to be solved, it’s very easy not to solve it. My view is that the nuclear waste issue suffers from both of these deficiencies.

LEONARD CHARLA:

One of the difficulties of saying, well, you’ve got to have the right people there, is that it’s not obvious at the time, who the right people are.

JONATHAN BROCK:

Exactly.

LAWRENCE BACOW:

I think it’s worth taking two minutes just to relate how this
statute got passed because it’s a wonderful story, even though it has nothing to do with what we’re talking about. Massachusetts has been trying to site a hazardous waste facility for years. The way they decided to go about doing it in 1978 was to hire a consulting firm, Arthur B. Little, to survey the state and find the geologically best site. It wasn’t just based upon geology and hydrology, but also on access and a number of criterion. It was your typical consultant’s task: take a set of criteria, go out and survey all 351 towns and cities in Massachusetts. There’s no unincorporated land in Massachusetts, so every piece of dirt in Massachusetts is in a city or town. The consulting firm rank ordered all 351 in order of this multi-attribute utility function to determine where the best site was. They drafted their report, and somebody leaked the results of the report. By the way, there was a bill that was proceeding through legislature at the time. The function of the bill was to override local autonomy, to override the local legislative power to prohibit the state from constructing one of these facilities in a local community. That was the history of our efforts in the state; each time the state wanted to put it someplace, local regulations and zoning stopped it. Anytime a private developer wanted to do it, the locality would use its private police powers to prohibit it. So the purpose of the study was to find the best site and the legislature was going to pass the local override bill.

The top five sites get leaked to the press prior to the publication of the study. And what happens? The state representatives from those five communities introduce an amendment to the override bill, to statutorily exempt those communities from consideration as sites—making it illegal to site one there. Guess what happened? The amendment passed.

It was then that people woke up and said, “There’s no way that we’re going to site these kinds of facilities in Massachusetts with state override because even if you succeed in passing an override bill, individual localities, once it is clear that it is their ox that is going to be gored, will marshall the political resources necessary to amend the override. So then people said, “Well, what do we do now?”

At this point, there were several professors who had been working on the problem, and we said, “Well, we have another idea. The last one didn’t work, why don’t we try this? Okay?” There was a special legislative commission. You know, the legislature tends to use the Noah’s Ark approach to these sorts of
things: two of this, two of that, two of that, and so it casts the net quite broadly. They scratched their heads and said, “Who ought to be involved?” So, you’ve got the Associated Industries of Massachusetts, you’ve got the Massachusetts Municipal Association. Everybody looks around as Jon says, and you round up all the usual suspects. They do their best. What’s the old line about the legislative process being like sausage? You shouldn’t watch either being made. What emerged was this statute which was not perfect. But that’s what happened.

It’s very, very difficult. Indeed, I would challenge Jon or anybody else, if we were to craft one of these processes today, in advance, to know who ought to be at the table. As Jon has pointed out, it is very difficult to anticipate until you know what the dispute is and who the affected interests really are. That’s what makes this fundamentally a very difficult process to institutionalize in any formal way.

I think that when you deal with a situation, the first and most important thing is making sure that the parties on both sides want to reach a resolution. There has to be an externality that requires alternative dispute resolution. If there’s not an externality—something or somebody to put two people in a room, requiring them to reach a solution for some reason—they’re not going to have a solution. Think about Judge Simandle. His externality is that he’s a judge and can go to trial. He may have other externalities that will say, “If you don’t solve the problem, the EPA’s going to jump in and do something that may not work.” Another externality in the Massachusetts situation is that the state has decided that the facility is going to be located there. “Now you citizens, the only thing you can do, is decide what is the best way for it to go in that location.” If you give the citizens the opportunity to say no, then their position is going to be no, and you are never going to have an opportunity to reach an agreement. The lesson to the story which I just told about the first statute is that there’s no way that you can take away the power of the citizens to say, “No.” If they have felt that power, then the question is, can you create an incentive for them to say, “Yes?”

The way in which I think that should be done is by crafting a compensation agreement, giving them some reason why they would want it there. Massachusetts missed the boat on siting a hazardous waste facility recently. The first facility that was proposed was for solvent reprocessing. You take solvents to clean printed circuit boards, which we manufacture a lot of, and once
you clean the circuit boards, the solvent is contaminated. It becomes a hazardous waste. The way you recycle it is basically to distill the stuff. It’s very straight forward. Massachusetts needed a place to put it and that’s what everybody was objecting to in the first two or three proposals to site facilities in Massachusetts under the new statute.

Let me offer you an illustration of how you can now get the community to say yes. Four years ago, Massachusetts was looking for an in-state site for a micro-computer chip center. This was going to be a new place in Massachusetts that was devoted to developing new technologies in the manufacturing of chips. There were several communities in Massachusetts that were eager to have it located there. There was a big political fight between Westboro and Tauton to see which community would get it, with everybody lobbying the governor. The way it should have been handled is this: the governor should have announced, “This is going to be a state of the art chip technology center manufacturing facility. We’re going to design into it the technology to reprocess the solvents that are being contaminated at this site. By the way, it is economic for us to design this facility to be a little bit bigger to accommodate more than just the solvents that are contaminated on that site. It’s going to have to take solvents that are contaminated from other sites as well.” Then we would have had our first solvent reprocessing center in Massachusetts.

So, if you had bundled the goodie with the baddie, we would have had some chance of getting inside it.

MEMBER OF AUDIENCE:

I submit to you that the people were hot to have that chip center because of jobs. With the separate solvent reprocessing facility there weren’t many jobs. With the chip technology center there were lots. That’s what people want, jobs and tax write-offs.

HENRY PERRITT:

It seems to me that maybe the two of you don’t disagree as much as you both suggest. In both cases you seem to be talking about some kind of external creation of options.

JONATHAN BROCK:

I’ve been playing with that due process concept in my mind. If all that the court is doing when its saying due process is pro-
tecting a traditional way of doing things, it's dysfunctional and it's a very costly tradition to uphold. My personal view is that due process is a much more evolved concept than that. Tomorrow's due process may bear very little resemblance to today's processes. That's becoming apparent in disputes like these, that may not be susceptible to typical adversarial litigation in any court system that we presently have. A challenge to the students who are in this room is to look forward to the practice of law in an environmental area knowing that there are an awful lot of unanswered questions. The question of what process is due to each and every party in a multi-party litigation is one of the most vexing questions that we have.

To me it's inconceivable that we could convene a trial, in a case I'm thinking of, that has five hundred parties in it now in which each and every one of them would have had their day in court, and an ability to point a finger at the other 499. It's tough enough when there are three parties, but what do you do in this other situation. There have to be alternatives. The alternatives are going to be extracted at some expense to the individual notion of a pure day in court. One day Congress may have to invent a completely different environmental hearing board, court, whatever you want to call it, as a last resort for the resolution of these sorts of disputes. There lies a terrific challenge for each of us in the courts and for those of us who are coming along as young lawyers.

JOHN HYSON:

I'd like to just add a kind of practical footnote. In the area of Superfund disputes, disputes about a presently contaminated site, it would be historically and factually correct to say that the vast majority of people who have gotten themselves into that kind of legal business are people who view themselves as litigators. I spent a little time last spring back in the real world with a firm in Philadelphia. I became acquainted with how the environmental bar looks at itself. First, right now there's no question but that the legal profession sees environmental law as a growth area. There's hardly a day goes by that I don't get some kind of a formal notice from a firm about how it has established or expanded its environmental practice. I know that most of the people who are identifying themselves as setting up this environmental practice are people whom I know as litigators, with perhaps a litigation mindset.
There's a question, it seems to me, within a firm as to whether or not you ought to allow litigators to go out and do this kind of work which ideally would have a non-litigation response. Within the firm where I was for a period of time, the environmental department and the litigation department were separate. My perception was that the people in the two departments had different mindsets in terms of how to deal with an environmental dispute. The litigators wanted to litigate, and the other folks thought of more cost-efficient responses.

HENRY PERRITT:

I promised each participant some concluding remarks. They can, of course, say whatever they like in their remarks. I would like to give them the opportunity to speak to a question that in many ways is implied by what Professor Hyson said and what Judge Simandle said.

I started this symposium by talking somewhat inartfully of institutionalization, and the notion of a more formal institutional framework.

Suppose that we were going to institutionalize the processes. One also can come at this institutionalization question in another way. One can talk—and I really mean it now—talk about institutionalizing people. If you're an educational institution, or if you're a law firm as John Hyson talked about, you would ask yourself, “What is it that we should be doing to get people to function more like the kind of decision-maker that Judge Simandle represents, as opposed to a more traditional and more rigid judicial decision-maker?”

Not only that, because that would focus on judges, but, “What is it that we can do to institutionalize the kind of lawyer that John Hyson and Judge Simandle also talk about?” As you recall, he described four different types of litigators. If, as several people have suggested, the existing political and litigation systems are flexible enough to accommodate the kind of dispute resolution processes that everybody has been talking about this afternoon, what is it that all of us ought to do about the people? We certainly have the power to do something about ourselves. As a law school we have the power to do something about law students. Others of you, Jon [Brock] and others, have the power to do something about public administration specialists. Larry Bacow can influence engineers and city planners, some of whom become lawyers to do something about it. Maybe it would be fair-
est to start by giving an opportunity to comment on this or anything else that's been said to Mr. Charla.

LEONARD CHARLA:

We live in this society that has a legal system that is adversarial. That doesn't mean every dispute or every question needs to be fought tooth and nail, until one of the parties or maybe both of them is lying on the floor in a pool of blood.

There is a concept called "win-win." In a "win-win" the parties can explore avenues to solution or resolution of the questions. It doesn't result in death or its legal equivalent. My feeling is that today we have talked about a new resource that is available to us selectively. I think that's the one word, selectively, that we've all talked about this afternoon. One needs to look selectively at these tools to see if they can be useful.

If there's one thing I want to leave you with, it is that we've got an onion here. The center of the onion may not look like the surface of it. Before you go in to resolve a problem or represent a client, whomever the client is, make sure you take a core sample of the onion to see what all the layers are.

HENRY PERRITT:

Judge Simandle.

JUDGE SIMANDLE:

Thanks. I guess this is the time when the candidate looks straight into the camera and gives a two minute speech that sums up his world view, but I'm not going to do that. I'd like to make mention of one case study you may find interesting because I think that it ties together several of the ideas that have been expressed this afternoon.

It was a hybrid situation where in-court and out-of-court settlement processes worked hand-in-hand to achieve an overall settlement. For that reason I think it's particularly interesting. There was a case filed regarding the landfill in New Jersey that threatened Atlantic City's water supply. The name of the case was United States v. Price,² and the site was Price's Pit. After a period of time of pure litigation, the parties came forward, the government and the PRPs, and said, "We'd like to see if we could negotiate a remedy." This came after a substantial amount of

case management. It came after a reverse trifurcation of the trial. That is, the issue of remedy was going to be tried first; liability was going to be tried second; costs were to be tried third. So in the issue of remedy the parties came forward and said, "We'd like to see if we can negotiate a remedy. If we negotiate a remedy, then we'd like to see if we could negotiate how much it would cost to fund that remedy. The third thing we'd like to negotiate is what should each parties' share of that cost be, taking into account the risks and what's allegedly hazardous waste."

We spent at least six months trying to negotiate a remedy and it couldn't be done. It was very frustrating. Parties would walk out of negotiations. There were completely disparate views about whether the government's remedy or the PRPs' remedy would be the one and neither was willing to give in to the other. Trying to negotiate about money is difficult enough, but at least there's a common denominator.

So a decision was made to switch this from a negotiation about processes to a negotiation which said, "We're going to talk about money and how much. However, into the money we're going to factor a couple of things. We're going to factor the defendants' belief that they don't trust the government's remedy, but they're nonetheless willing to fund it, albeit on somewhat of a discounted basis. We're going to factor in the degree of risk that a party is retaining in the end." In other words those paying into this settlement won't be able to walk away, to "pay and walk" as they say, but rather will have to pay and then be on the tab under certain reopeners in the event that new conditions emerge. Or, if some party has held back material information, then it could be reopened.

That was, believe it or not, a breakthrough in the process. Talking about money helped considerably. The remedy was selected, it would be the government's remedy. An amount of money had to be negotiated. It was unclear how much it would cost. The litigation process and this court-supervised settlement process, addressed this question of money and finally reached an overall agreement between the government on the one hand and the parties on the other, as to the gross amount of money. And subject to funding, the defendants were able to come forward as a group. There were about fifty of them. They said as a group, "If we can agree upon a mutually agreeable allocation among us, then we agree as a group to fund this amount of money. We've got to know if the government will go for that." More negotia-
tions, and eventually the government said, "Yes, subject to the defendants’ ability to allocate among themselves, we’ll take $17.25 million.”

This is where the private resolution process came into the picture. In fact, it was Mr. Charla’s organization. The defendants went out on their own and hired a private dispute resolution process. They gave all the data that they had to the private dispute resolvers. The dispute resolvers conducted interviews, massaged the data, did computer analysis and everything. They gave a first array of the data and everybody could tell them why it was wrong, why it was too much for their particular client. Then they did a second array of the data. All that happened very quickly. Within 90 days, the allocation was completed by the private group.

It came back to me. Everybody squawked, everybody was being required to pay too much. The question arose should there be any adjustments at all because it was like a fifty way compact. If you took one brick out of the yard the rest of it would collapse. We got over that hurdle somehow. We did a little bit of massaging of that data, and arrived at a final allocation that everybody could say was mutually unfair.

But it was a process that people had confidence in. They knew where the numbers came from, they knew that if they had the goods on their neighbor that this was the time to come forward with it. Everybody had that much of a chance to be heard.

Eventually the process reaches completion, the case is settled, the clean-up is in process.

Now what was learned? What was learned was that some issues can be negotiated and others can’t. Some can be negotiated in court and others are better left for dispute resolution. The court ought to know enough to take time out so that the parties can explore private resolution. Private resolution was not an expensive proposition. Well, it was expensive but it wasn’t unduly expensive. I don’t want Mr. Charla’s firm to raise the rates.

LEONARD CHARLA:

We’re raising our rates.

JUDGE SIMANDLE:

The proof of the process was that it led to settlement with fifty parties who had very different views of what ought to be done when the whole thing started. I assumed a different judicial role
that was more like being a ringmaster. But eventually it worked. That's what I want to leave you with because it touches on the points of flexibility, goodness of fit, and willingness to settle.

The final point—and I don't know if anybody has made this today—is if you have a settlement that's fitting into place and you have a couple of recalcitrants outside of it, the process can make it almost unbearable to the nonsettling parties to remain outside. The risks become too great. Now you can say that that's good or you can say that that's bad. It's good if you believe in the finality of a settlement and the fact that if 48 of these parties settled and two of them were outside, those two were taking an enormous risk. The government goes after the two. Maybe the two are not liable, but if they are liable then they're going to be on the tab forever, they won't have the benefit of the settlement.

You could say that it's bad to put that sort of pressure on the parties who are "in the weeds" (you've heard that expression earlier) because it's not fair to them. Economically it's unfair, it's cheaper for them to pay the half million that you want from them, then for them to litigate from now 'til kingdom come as the only parties left in the case. I think one of the judge's roles is to mediate that situation and not let a tyranny of the majority grow up in the settlement, even though it can be counter-productive to achieving an overall settlement. Once there is a critical mass in the settlement, it's wonderful to see this sort of momentum go through the rest of the case. Then all the people who are saying this can't be done, then have to reconsider.

HENRY PERRITT:

Professor Brock.

JONATHAN BROCK:

This is sort of a kitchen sink time: everything that didn't get said before gets said now. There are some themes here that I'd like to mention and underline, beginning with some of the things that just proceeded me on the part of the Judge. They reminded me of the terms we've been using. We've been talking about institutionalization. I think the issue is in some ways less the question of institutionalizing it. Clearly the court has institutionalized, through the judge's efforts, alternative dispute resolution procedures. The real issue is that ADR procedures not be prescribed and rigid. The real issue is to the extent that we use them and make them a tool as an adjunct to existing procedures or in some
instances perhaps as a substitute. They must remain flexible, so that they can match the circumstances, the parties, the issues, the politics, and so on. That’s one of the central themes that I heard in the course of the conversation. It’s very much agreed upon here, from all of our different perspectives. If you do become involved in this, recognize the importance of the flexibility.

Germane to Hank’s question that he asked us to consider, we really do need to find some other ways to institutionalize alternative dispute resolution beyond passing a law or regulation that requires parties to use it in hazardous waste siting or certain kinds of regulatory disputes. The kind of institutionalization that is likely to have more value is to make alternative dispute resolution procedures more readily available. I don’t know if it’s the most value. Hopefully five years from now I’ll have learned something that suggests some better ideas. In the meantime we’ll want to find ways like the way the court is using them in Judge Simandle’s case. Very often the procedures that we have in place are not ADR procedures, and don’t even make ADR available. That’s a big mistake. Making ADR available is important, by having it based with the university, or based with state government, or based with federal government or based in some non-profit group, all providing some generic alternative dispute resolution services. There are certainly private firms that do that and that’s fine.

Secondly, in terms of institutionalizing these things, it’s important to create a greater understanding among professionals like yourselves, as lawyers or soon to be lawyers, government administrators, and private business persons. Professionals must create a greater acceptance and understanding of what these ADR processes are like. People perceive them very often (you’ve felt that way or may have felt that way) as secret things that go on in barrooms, in backrooms or someplace on a street corner, where the public interest isn’t represented, and parties’ interests aren’t represented. Hundreds and hundreds of examples in ADR show that no one needs to fear for their rights. We also should make it clear and evident that those of us who use ADR understand what the risks are and what the risks aren’t.

Let’s be creative as professionals in resolving conflicts, having a greater understanding and acceptance of what these procedures are. Professionals also need to develop better skills, the capacity to negotiate, the capacity to represent multiple clients and mediate among them so that they can settle with the other
side. These skills are important in our training and in our experience. To try to get these in better order behooves those of us on the professorial side, as well as in practice.

Also we should encourage the use of alternative dispute resolution procedures as management techniques among regulators and among business persons, who can resolve problems before someone has to get involved in litigation or some other more formal process. There are some very nice examples increasingly emerging of senior administrators in government agencies and in private business evoking these techniques prior to going to court.

One caution is very important. The comment about externalities is what reminded me of it. Something that's not commonly talked about by professionals who advocate ADR is the issue of power. One of the reasons that the courts are important to this is that parties who would not otherwise have had access to discuss the matter with the other party who may be the actor need a way to get on the playing field. There needs to be a way to have relatively equivalent power among parties; otherwise you cannot negotiate. These legal procedures are one place that a party can get standing. That's why they argue about the environmental impact statement and all the other stuff. It doesn't really matter to the solution, but it gets you standing.

There are other kinds of externalities that get you standing, and I think it's important to recognize those. Lawyers are good at settlement. Despite all the nasty things I said about lawyers or other people may say about you, it's common in the business, I gather, to resolve things before a judgement is rendered—to negotiate a settlement. Institutionalizing ADR practices concerns what it is that allows you to settle. Think about what works, then consider the different roles that a judge or an attorney can play. See whether or not there are some dimensions, a piece of what we've learned about dispute resolution. Consider what will allow you to play an even more constructive role earlier in the process that helps the solution be an even better one. There's already quite a tradition in your profession that could be capitalized on by what's been learned about alternative dispute resolution. That's something to build upon and look for.

Two final things to say. I do think the possibilities for ADR really are in situation by situation application, perhaps under the umbrella of an institution that often has conflicts come to it. I don't think the subject by subject hazardous waste siting, or a particular regulatory approach for application of ADR is as fruitful.
It attracts too many opponents and has these problems of overspecifying the mechanism so that flexibility is lost. Situation by situation is the better way to do it.

Finally, now that we've had several hours of telling you all of the great principles of dispute resolution, I should tell you what the real secret is in solving problems like this. It comes from Casey Stengle, whom some of you may remember if you've ever been involved with the Yankees or the Mets. He had a saying widely quoted at one time that suggests to me the way that you should do these things—that the secret of settling problems, I think he called them the "secrets of good management," the secret of settling problems is taking four people who hate your guts, and keeping them away from the five who haven't yet made up their minds.

HENRY PERRITT:

Professor Bacow.

LAWRENCE BACOW:

I've been sitting here thinking about this question of how do you work on the people here and "What would you do differently if you were to train people differently?" This is a law school and we are educators, my colleagues on the panel who do other things have, I'm sure, spent time educating in the past, either from the bench or when you're lecturing at various places such as this. I know part of your job also involves educating.

As I sit here thinking about it, I also recognize that probably most of you, who are training to be lawyers, will not spend much of your time actually in court because very few lawyers do that. Yet we spend a disproportionately large amount of time training our students to do that.

It's much harder to be a problem solver than it is to be an advocate. When you're an advocate you take your clients' interest as given and you run with it. You are tenacious and try and do as best for your client as you possibly can. You rely upon somebody else to be fair and to decide what represents a just outcome. That's not your responsibility.

To be a problem solver is much tougher. It requires not only that you see what your clients' interests are, but you see what the other side's interests are, because only in that way can you discover an outcome that really represents a meeting of the minds.
It’s tougher because once you accept responsibility for solving the problem or see it as part of your role, then you have to muck around in things which aren’t so easily understood, which go beyond just advocating the interest of your clients. Because there are externalities, you do get involved in drawing in other parts of the problem or other problems or thinking about how to package things. By necessity you’re drawn into disputes which occur in places other than inside the courthouse or in a room where one is taking a deposition or outside the formal bounds of discovery.

It means that you have to start understanding politics, and how the world works. You have to understand deals which you might craft, solutions that are actually going to be implemented. What are people going to do tomorrow in order to make this thing work? You’re taking some responsibility for figuring out how to make it work. That’s very hard.

As I think about what one might do if you were to try and train people differently, it would be to think hard about what a legal education would look like if we invested more time in teaching our students how to be problem solvers. The really good lawyers are just not litigators. The lawyers who are not just litigators, who are really respected by their peers, and are good problem-solvers—the people who are really good at figuring out how to crack the nut. The education might look a little bit different if we spend more time on thinking about how to train people to do that.

Now, what would that entail? It would entail a curriculum in which we spent more time teaching negotiation skills. Although these are found now in just about every law school curriculum, I think we can still do more there. It would involve a curriculum in which we spent more time teaching about the tip of the iceberg that tends to be represented by the cases that we read, in rooms like this. I always like to tell my students when we read a case that behind every case there’s a story. All you’re reading is the judge’s view of the story. What else was going on? It would take a lot more work thinking about curriculum that expanded beyond our own confines of what we traditionally view as the lawyer’s role.

One of the reasons why this is an interesting profession to be in, is while we have an exclusive franchise, practicing law, we also have a free hunting license to invade the territory of all sorts of other people to do other interesting things. If we are going to do that—and that’s one of the reasons that many of us have been attracted to the law and this training—then the institutions, the
trainers, at least, have some responsibility to equip us better to go forth and do these things.

JOHN HYSON:

I had not intended to say anything in my role as officious intermeddler, but I must say I’ve been inspired by, truly inspired by Larry’s comments. I agree with everything he said. I just want to kind of put a more specific spin on it, shall we say. It seems to me that those of us who are involved in teaching law are easily attracted to courses and ways of teaching that provide clear rules. Procedure, to those of us who teach procedure, provides a clear framework in which disputes are resolved. Also, some of us are attracted to the litigation model because there are clear winners and losers. You don’t want to be a clear loser, but lotteries are attractive because we all have in our minds psychologically the potential of being clear winners. The difficulty with ADR, what makes it somewhat unattractive, to law teachers is that the rules don’t seem very clear. We may have a hunting license to get into other areas that may be interesting, and I agree that’s a fascination, an attraction of what we do. But when we get into other areas, such as alternative dispute resolution, we have to understand that dealing with ADR means thinking about politics. Even more, it requires thinking about people and what people need, what various interest groups need.

Those kinds of inquiries do not lend themselves to clear rules and they are unattractive, therefore, to the teacher who wants to present the student with the idea that the teacher knows the rule, and has mastered the rules. From the teacher’s perspective, too, when you get into ADR, you don’t know exactly what you’re getting yourself into. Those that are involved in the ADR process know when you get a large number of people together in a room, you walk in there and you don’t know what’s going to come out of it. You don’t have much control. And I think deep within all of us is this need to have control. At least one person here is working against that, my colleague who is moderating this particular program. Hank Perritt, I think, has more comfort with uncertainty than just about anyone else I know around here. Hank is willing to go into areas where I know I fear to tread, but I’m convinced, especially by what has happened today and by Larry Bacow’s comments, that we have to persuade ourselves as teachers of the law to get into these areas of law, however uncomfortable we may find them, and to give our students confidence in
getting into these areas so that they can be more effective lawyers in the kind of problems that we are talking about. Thank you.

HENRY PERRITT:

I wanted to make sure that each participant got his guaranteed time to wrap up, so, what I did, was to borrow some of your [the audience's] time for that purpose. Now I can yield back your time. I know that some of you have additional questions or comments. I promise that we will adjourn at exactly 4:30 which is the scheduled commencement time for the reception. Other questions or comments?

MEMBER OF AUDIENCE:

I have a problem. I like what you’re saying; I like the idea. You’re saying that lawyers need to be more creative in resolving issues. Perhaps, some of the things that I do, like fundraising, all need to be part of the education of attorneys as well. You also mentioned that there are some societies that resolve disputes without courts, and I’m thinking particularly of civil law countries. Do you see evolution more in that direction?

JONATHAN BROCK:

I’m not sure I can say that we’re evolving in that direction. Are we more or less litigious today than we were 20 years ago? That’s, I think, probably an easy one to answer, we are more. So, the direction that we’re going in is not necessarily the one that I personally would like to see. However, I also feel compelled to issue a disclaimer. You’re talking to somebody who doesn’t practice law. I revealed my preferences. I am sort of self-selected into the kind of activity I do because of these sorts of beliefs that I have. But there are other societies (I would advise you to take a look at the Scandinavian countries). They deal with a whole range of disputes, ranging from disputes in the workplace to disputes of a public nature to private disputes as well, in a way that is very different from the way we do it here. Maybe we need only look a little bit to the north, Canadians also do things somewhat differently than we do. Perhaps, we need to spend more time looking at how others do things.

HENRY PERRITT:

Part of the evolution is what’s going on here. Never mind the
lawyers, the reason clients end up in court is that they don’t think they have any other process available to them to resolve the dispute. A lot of people that have commented about the increase in litigiousness have suggested that it has occurred because of a decline and a falling away of other kinds of mechanisms that formerly were available to us as real ways of resolving disputes. What hopefully can happen—and is happening, at least, this afternoon—is that we’re trying together to think of some new kinds of mechanisms that will work practically as better ways of resolving people’s disputes. As we really provide those, if we succeed in making them available and making them really useful, then litigiousness will take care of itself because people won’t go to court if they’ve got something else that works better. Sometimes that’s the case.

MEMBER OF AUDIENCE:

Four months ago I began with EPA as a Superfund attorney. I bought this whole mindset. Everyday there’s opportunities for me either to practice law strong or blatantly or to give them a chance to use some ADR techniques. As long as it’s a litigation contest, there’s an incentive and maybe an obligation, to keep putting up issues. There’s one machine that cranks out the same brief that strikes up the same affirmative defenses over and over again, and of course, on this side I have the same briefs that are used across the country. As long as there is litigation contests then this waste of resources will be there.

HENRY PERRITT:

So in some sense the transaction costs are lower if you litigate, then if you problem solve, because as Professor Bacow said, problem solving is hard and litigation can be mass produced.

LEONARD CHARLA:

There’s a trend in Superfund litigation that those affirmative defenses are falling. The Superfund PRP who litigates, litigates at his or her peril. The chances grow dimmer, so bright PRPs should tend to avoid mindless, knee-jerk litigation because it doesn’t solve their problem. What happens is they get to the end of it, and the bill is much, much more expensive. The more sophisticated players don’t litigate, but new folks who perceive the statute as unfair, and I suggest to everybody that it probably is an
unfair statute, will come in and will out of a sense of injury run to the courthouse.

LAWRENCE BACOW:

So, in some sense, to unite their points about evolution, and an earlier point about externalities, the way you ensure things will all be in a desirable direction is to manipulate the external disincentives. If I understood your last point, I find that it is an ironic externality, that may be helpful in an evolutionary sense, that the unsatisfactory nature of Superfund makes it better for people to work things out than litigate.

LEONARD CHARLA:

I don't know of its unsatisfactory nature, I do know that if you take someone off the street and explain that here's a statute that is retroactive, has joint and several liability, and you explain to them what that means, they feel it's not fair, and that's almost universal in business.

HENRY PERRITT:

Thank you. Yes, sir.

MEMBER OF AUDIENCE:

I wanted to pick up on both points—through my experience as a litigator and a problem solver. Most problems don't get solved until very close to the crisis point, even at the courthouse steps. You've got to make a decision when you're at a point where you're spending large sums of money on litigation. What that leads to very often is that people defer the crisis point. They spend a lot of money to avoid getting into a crisis sooner and therefore delay solving the problem. That's why solving a problem can be more expensive and why people waste time with several needless defenses—they are avoiding the crisis point. Often we do not necessarily need more enlightened attorneys, but more enlightened clients. Clients that are not going to stand for this waste of money, they're going to realize that you can pay me now or pay me later. Let's pay now to avoid paying more later. Another point, in terms of whether it's easier or harder to be a problem-solver rather than an advocate, is that there is a tremendous amount of money to be made in environmental litigation, there
are very few environmental problem-solvers out there. We can all ask ourselves why.

JUDGE SIMANDLE:

Speaking again of external disincentives to litigation, the EPA attorney, touches upon an important point. That is that even though the government can crunch down upon any number of PRPs at a particular site, even though the government can choose its own remedy, and do so within a pretty broad area of statutory discretion, the government has very limited resources for this purpose. Superfund is only funded to the tune of a small fraction of the total clean-up costs. The incentive for EPA has to be to encourage private party settlements. By private party settlements, I mean, one where the private parties put money up right from the get-go rather than EPA funding the studies and doing the clean-up and doing everything else, and then chasing after people through section 107 litigation later on. That's one strong incentive the government has for resolving these disputes without litigation.

If one were to say what improvements could be made in Superfund law that might enhance the prospects of private party settlements, the strongest one would be to reward the party that comes forward and actually does present an acceptable remedy. If a party does so and then launches a contribution action against fellow PRPs, it could be compensated with something of a multiplier similar to a private attorney general. On the one hand they have dirty hands, quite literally, on the other hand, they're performing a function that can't be performed with only a few hundred governmental attorneys throughout the country. It has to be performed at some level privately. I'm not suggesting that this ultimately has to be privatized litigation—not at all. However, I'm saying that I'm already seeing several lawsuits in which the small group of PRPs that is actually funding a governmental approved remedy is then taking the bull by the horns, launching the contribution action, but doing so at some risk. Risk of undercompensation and risk of transaction costs that won't be repaid.

HENRY PERRITT:

Yes, sir.
MEMBER OF AUDIENCE:

Well, I'm one of those hated and unrepresented litigators. I represent both sides, both for the government and for the private bar. I think there are factors that make it difficult to settle under Superfund, that are not just factors of traditional litigation. The most important factor is that Superfund is really a type of public interest law. Therefore, both sides, to some extent, can engage in negotiations, but they cannot give up—what purely private litigants can give up—money. In other words, if it is a specific question of money, and I think it was significant in Judge Simandle's case, which settled for money, I think that is the way most of them are going to go. It's very difficult for the government to say that I'm not going to do the remedy that I want to do, or I'm going to do something somewhat different. A neutral person, a neutral fact-finder, can say now wait a minute. You have your public position, and we understand that you can't take the position that you aren't protecting the public. It would be a politically difficult thing to do, but there are some realities of getting the job done and cleaning up the sites. That is a way which starts negotiations.

Flexibility often is not present in the system because the government enters the system saying, "I will not be flexible. I have a mandate to get to zero or whatever it may be." Then there is the crowd of people saying, "Well, no matter how much I like cleaning up the environment, and believe it or not, all companies do, I cannot spend an unlimited amount of money to reach zero." When we get into negotiations before Judge Simandle at that point there is still some secrecy. I'm not saying you should have complete secrecy, some secrecy allows the parties, just as they would in labor negotiations to say, "Okay, there is a reality here, do you want to move the program ahead?" Let's not go to the moon here, on either side. Let's start with some reasonable positions, then the litigation contest does allow the full process to go forward, but because of the cost pressures.

It is a shame that it's happening more. The whole purpose of Superfund is really a partnership. EPA said, "Let's see how we can clear these sites, in a partnership." That was the word used. Superfund is a partnership of public and private effort to clean up the sites. It's become more of a rigid type of statute with each one saying, "I can only do this much." However, I am hopeful that it'll join this whole thing together as an arbitrator or mediator mediates a solution to get the sites cleaned up.
HENRY PERRITT:

It seems to me that this is an appropriate place to end the discussion. I would like to thank our participants for an absolutely fascinating set of presentations. I would like to thank you for coming and for participating in this. I would like to thank Liz Grieco for organizing it and creating the opportunity for all of us, and thank Karen Palestini and the Board of Editors of the Villanova Environmental Law Journal.