THE 2011 CHIEF JUSTICE JOSEPH WEINTRAUB LECTURE*

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Rutgers School of Law—Newark

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Good evening everybody, it's a great honor to be asked to deliver the Twenty-Ninth Annual Chief Justice Joseph Weintraub Lecture here at Rutgers Law School. When I accepted this assignment, I reviewed the list of prior speakers and the topics that they addressed.[1] It reads like a who's who of the bench and bar of this state over the last two decades. Indeed, half a dozen of them were my colleagues on the district and circuit courts. I'm both pleased and humbled to now be included among them, and I thank Dean Farmer and President Walker for making this event possible.

Now, considering that this lecture is named after Chief Justice Weintraub, I thought I would consider a review of his court in an article published by the *Cornell Law Review* in 1974, shortly after he retired.[2] It aptly notes that "[o]f all the honors bestowed upon Joseph Weintraub, his greatest must be the entirety of the work and achievements of the New Jersey Supreme Court during his tenure."[3] The Weintraub Court, as it has become known, applied common sense and practical solutions to complex legal problems. And that's what we're here to talk about tonight: common sense, practical solutions to legal problems.

But before I go further, I would note that I am an alumnus of that court myself; I clerked for Justice Connor in the Weintraub

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* The Weintraub lecture is an annual event held at Rutgers School of Law—Newark to honor Justice Joseph Weintraub. *The 29th Annual Chief Justice Joseph Weintraub Lecture*, RUTGERS L. LIBR. (Dec. 1, 2011), http://lawevents.rutgers.edu/events/WeintraubLecture/2011/.

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1. *See, e.g.*, Robert N. Wilentz, *Standards of Judicial Conduct—The First Annual Chief Justice Joseph Weintraub Lecture*, 49 RUTGERS L. REV. 795 (1997); Daniel J. O'Hern, *The Twelfth Annual Chief Justice Joseph Weintraub Lecture: Brennan and Weintraub: Two Stars to Guide Us*, 46 RUTGERS L. REV. 1049 (1994); Virginia A. Long, *The 2006 Chief Justice Joseph Weintraub Lecture: The Purple Thread: Social Justice as a Recurring Theme in the Decisions of the* Poritz *Court,* 59 RUTGERS L. REV. 533 (2007).

2. *See* Dominick A. Mazzagetti, *Chief Justice Joseph Weintraub: The New Jersey Supreme Court 1957-1973*, 59 CORNELL L. REV. 197 (1974).

3. *Id.* at 197.

Court. And, when my predecessor as Chief Judge, John W. Bissell, gave the Weintraub Lecture in 2002, his topic was a tribute to the Weintraub Court, and he began with a tribute to my Justice, Vincent S. Haneman, whom I clerked for in 1968-69.[4] Quoting the Honorable Frank M. Lario, Jr., another honorable clerk, he said, "Justice Haneman was a loved and respected jurist and man. He was an imposing figure both in and out of the courtroom. Standing six-feet-three-inches tall, he had a deep, booming voice that would admonish an irascible attorney to refrain from obfuscating the issues of a case; yet his appreciation of people and their sensitivities gave him the ability to calm instantly a nervous young attorney who was in court for the first time."[5] While serving as his law secretary, I came to know Justice Haneman as a kind, considerate, and intellectually honest man. His code of ethics, generated from childhood, guided his lifestyle. Judge Bissell also was kind enough to include a quote from me, perhaps on a little bit lighter note. As I said, when I was offered the job, the Justice said one of the requirements was a valid driver's license because we drove from Atlantic City to Trenton every week for arguments and conferences. The drive up was largely silent, since the justice spent his time reviewing briefs, trial records, and memorandum. The trip home, however, was different as the justice had an endless supply of jokes, anecdotes, and legal war stories based on his many years of practice and on the bench. That was one of the most rewarding aspects of the clerkship—a real practical education. We stand on the shoulders of giants, and we're immensely grateful for that. So, I'm just noting the Weintraub Court and my Justice in the Weintraub Court, and I'm glad to lecture here tonight.

Next question: what am I going to lecture about? I asked this question: "What do you want to talk to me about?" The answer was: "About twenty to forty minutes." That didn't help me too much. I didn't plan on taking longer than that anyway. I know all about attention spans, even among the learned, like you. If you can't get your message across in thirty minutes, stop trying. I tell that to lawyers and they don't always seem to get it; with their three-hour summations and opening statements, the jury tunes out very quickly. So, what could I say that you would like to hear and find useful? It would be folly for me to endeavor to lecture such a distinguished audience on any subject. Rather, I thought it best to share my perspective and experiences regarding the one subject that all of us know as attorneys—the business of dispute resolution. It is my hope that through hearing my perspective and experiences you may find

4. John W. Bissell, Chief Judge, U.S. Dist. Court for the Dist. of N.J., Chief Justice Weintraub Lecture (Apr. 10, 2002), *available at* http://njlegallib.rutgers.edu/weintraub/PDF/weintraub.2002.html.

5. *Id.*

something to take forward. And, as importantly, I hope that at the end of my talk, many of you will share your perspective and experiences with me, so that I too can learn from the vast collective knowledge that I see here before me.

Lawyers are fundamentally in the business of dispute resolution, be it resolving disputes through litigation or through alternative dispute resolution, or endeavoring to avoid conflicts in the first place by structuring transactions, contracts, et cetera. In the end, the goal of dispute resolution, regardless of form, is the same—the establishment of certainty and predictability in an uncertain world. I have been dealing with dispute resolution for some forty-two years in various capacities as a trial lawyer, general counsel, and on the bench. I've also considered dispute resolution from an academic perspective, having for many years taught classes in negotiation and trial advocacy. Although disputes can be considered a constant in society throughout history, society has of course evolved. Has dispute resolution evolved with it?

Well, if you turn back, from earlier societies, maybe by combat, by appeal to the sovereign, on to the efforts of the Federal Rules of Civil Procedure, dispute resolution has evolved to hopefully simplify the public dispute resolution system and avoid trial by ambush. Indeed, Rule 1 of the Federal Rules of Civil Procedure states that the rules should be "administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[6] But, in our collective experience, have the Federal Rules and our public dispute resolution system, embodied in the state and federal courts generally, really put that objective into uniform practice? Or have we had a situation where litigation proliferates, limited only by the ingenuity of the attorneys?

Now, let me talk about the jury. Why a jury? How did it get there? To answer these questions, we must travel back in time about 1000 years, and in distance about 3000 miles to the east. When William, the Duke of Normandy, crossed the channel to claim what he asserted was his English inheritance, there was already in place a medieval Saxon institution for fact finding, which came to be known as the jury.[7] After defeating Harold at Hastings, William the First utilized this body in making an inventory of his new realm.[8] This was an inventory so detailed that it became known as the Doomsday book, an analogy of the formal accounting expected on the day of judgment.[9]

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6. FED. R. CIV. P. 1.

7. *See* DANIEL R. COQUILLETTE, THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS 55 (2d ed. 2004).

8. *Id.* at 56-57.

9. *Id.* at 56.

Two centuries later, the church abolished trial by ordeal, and the jury became the primary method for resolution of disputes, both civil and criminal.[10] Trial by combat, on the other hand, did not really disappear, but rather evolved with higher champions battling with words and paper instead of swords and battleaxes.[11] The jury itself evolved over the centuries, from a group selected for its local knowledge of the dispute and the participants, to one selected at random for its lack of pretrial knowledge; it's right to render a verdict—from old Norman-French "to speak the truth," similar root as voir dire[12]—slowly became established.[13]

The jury's functions diverged over time. What became the grand jury performed the traditional early jury function of bringing criminal charges, which the law court would then hear.[14] The petty, or small, jury composed of twelve rather than twenty-four, later twenty-three, evolved into a body of judges of the facts under the instruction and supervision of the law judges.[15] The chancery courts, the conscience of the king, did not use juries,[16] nor did the admiralty courts.[17] This, then, was the common-law right to jury trial, as it existed in English law at the time of the Revolution.

We preserved it as it then existed, and it was expressly written into our Constitution in the Sixth and Seventh Amendments.[18] You may recall that one of the major grievances voiced against George III in the Declaration of Independence was "depriving us in many cases, of the benefit of Trial by Jury."[19] And the rebellious colonists wanted to make sure that they always had that right. The Fifth Amendment, of course, provides for the grand jury,[20] the Sixth Amendment provides for a speedy public trial by an impartial jury in a criminal case,[21] and the Seventh Amendment provides that in suits of common law, the right of trial by jury shall be preserved and no fact tried by a jury shall otherwise be reexamined in any court of the United States

10. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 74-75 (4th ed. 2002).

11. *See id.* at 72 ("[A] different, more investigative approach began to appear in the twelfth century in certain kinds of case, and its advantages very soon made the older ways obsolescent.").

12. BLACK'S LAW DICTIONARY 1710 (9th ed. 2009).

13. *See* BAKER, *supra* note 10, at 75.

14. *See id.* at 72-73 ("The Norman kings continued to make use of the Anglo-Saxon jury of accusation, sworn to name suspected criminals . . . .").

15. *See id.* at 73.

16. *See id.* at 105-06 (explaining the chancellor "combined the role of judge and jury," and the "court [was one] of conscience").

17. *Id.* at 122.

18. U.S. CONST. amends. VI & VII.

19. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

20. U.S. CONST. amend. V.

21. *Id.* amend. VI.

other than according to the rules of the common law.[22] Coincidentally, the eighteenth century was the high-water mark of the common-law jury.

Our system is to some degree frozen in time by our written Constitution and our own culture. Like a mosquito preserved in amber, there it is in its entire eighteenth-century splendor. The key, as we all know, to the interpretation of Sixth and Seventh Amendment rights is—what was the right, as it existed in 1789?

Meanwhile, the mother country moved on. While Lord Devlin called the jury "the lamp that shows that freedom lives"[23] and Lord Denny called it "the bulwark of our liberties,"[24] in modern times, that lamp has been dimmed and that bulwark weakened. The grand jury was abolished in the United Kingdom in 1933.[25] The right to civil jury trial has been greatly diminishing over the past hundred years. Since 1981, it exists only with respect to libel, slander, malicious prosecution, false imprisonment, and fraud.[26] Even as to these, the judge can deny a jury trial where prolonged examination of documents, or accounts, or scientific or local investigation, or other complex material is involved. So, goodbye jury in a complex case.

Of all the common-law nations, the United States is the only one that routinely uses juries in civil cases.[27] Even in British criminal cases, the right was eroded by the allowance of nonunanimous verdicts and of juries less than twelve.[28] Peremptory challenges were abolished in 1988.[29] The British, unimpeded by a written constitution, can make these changes by an act of Parliament.[30] Even among other common-law countries, our jury system is somewhat unique. Of course the continental jury systems are wholly different.

Now let's travel back in time, from London to Newark, and back to the year 2011. We have this unique system here. We as a profession are in love with the public trial—the public *jury* trial. When I was in law school, I wanted to get out and try cases. Indeed,

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22. *Id.* amend. VII.

23. PATRICK DEVLIN, TRIAL BY JURY 164 (3d ed. 1966).

24. Bushell's Case, [1670] 124 Eng. Rep. 1006 (P.C.).

25. Robert G. Scigliano, *The Grand Jury, the Information, and the Judicial Inquiry*, 38 OR. L. REV. 303, 308 (1958).

26. Andrew Tettenborn, *Punitive Damages—A View from England*, 41 SAN DIEGO L. REV. 1551, 1554 n.23 (2004).

27. Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1336 (2012).

28. *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 172 (1986).

29. Patricia Henley, *Improving the Jury System: Peremptory Challenges*, PUB. L. RES. INST., http://www.uchastings.edu/public-law/plri/spr96tex/juryper.html (last visited Jan. 31, 2013).

30. *See* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 869 (1960).

that was one reason why I decided to clerk for the New Jersey Supreme Court, which only required a one-year term as opposed to my own U.S. District Court, which required a two-year term. I wanted to get out there and get into the court as soon as I could.

The public at large has shared these affections. Consider movies like *To Kill A Mockingbird*[31] and *My Cousin Vinny*,[32] lawyer shows on television, and the media fascination with high-profile trials.[33] One of my law school professors told me that there are two things you won't learn in law school: the first is how to get to the courthouse, and the second is what to do when you get there! I would note that this was before Mapquest and before trial advocacy classes.

Off I went, in search of the courthouse, to learn what to do there. I found it, and I've been learning ever since. I couldn't wait for my first trial, and I'll never forget it. I won't bore you with the details now, but over a drink perhaps later. Suffice to say that it was challenging, but I won it and I was hooked. I've tried hundreds of cases over the years, and I am still trying them.

To paraphrase Mark Twain, "[R]eports of [the vanishing trial's demise] are greatly exaggerated."[34] You see stories, "Where Have All the Trials Gone?"[35] Yes, they are down, but there are still a substantial number of them. To me it seems like they were quite active. So I checked my records of last year, and I tried fifteen cases, both jury and nonjury, plus another ten patent claim construction hearings. I was on trial for ninety days or so. And that's not unusual for our court—the average is at least a dozen trials per year. So the trial is not dead, and those that say it is are wrong. But it certainly has diminished.

But still, ninety-five percent or more of all federal cases do not go to trial.[36] Do the math. Fifteen trials, four hundred closures—ninety-five percent or more. That is about the average there. Now that is nice for lawyers, nice for image, et cetera. But what about the clients? Most clients, and parties, don't share the profession's affection for a trial—and with good reason. They have different

31. TO KILL A MOCKINGBIRD (Universal Pictures 1962).

32. MY COUSIN VINNY (20th Century Fox 1992).

33. *See, e.g.,* T.L. Stanley, *A Trial Too Juicy to Resist: Casey Anthony's Acquittal Fuels Outrage Online as TV Outlets Reap Huge Ratings*, L.A. TIMES, July 6, 2011, at D1; *The O.J. Verdict: Rating the Media's Performance*, FRONTLINE (Oct. 4, 2005), http://www.pbs.org/wgbh/pages/frontline/oj/themes/media.html.

34. *See* ALEX AYRES, THE WIT AND WISDOM OF MARK TWAIN 55 (1st ed. 1987).

35. Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEG. STUD. 705 (2004) (discussing the diminishment of federal trials and "whether this trend reflects an increase in private settlements . . . or an increase in public non trial adjudication").

36. Marc Galanter, *Worlds of Deals: Using Negotiations to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 269 (1984).

perspectives. To paraphrase another one of my professors, he said that when you get out of school, every trial lawyer—in those days they were trial lawyers, not litigators—should have, besides the statutes and the case reporters, three works in the library. And yes they had libraries then and not databases. Those three works include the Bible, Shakespeare, and Aesop's fables. He said that if you consult those three, you can always find a story, simile, anecdote, or parable to illustrate every point or argument. I'm going to do that right now.

Some years ago, I heard a story about a farmer who was going to town. In the back of his pickup truck were a hen and a pig. And as they drove by the diners, big signs read, "Ham and Eggs, Ham and Eggs." And the hen said to the pig, "Look at that, piggy-boy, we're famous! We're top billing!" And the pig said, "That's alright for you to say. You're just another cackle. For me it's a mortal sacrifice."

You may know about the lawyer and the client. The client comes to see the lawyer and claims that he's wrongfully accused. The lawyer takes on the case and says, "It's a sure win." Next scene, jury didn't agree with the lawyer—conviction! We move ahead, and they're discussing it, and the client says, "What do we do now?" And the lawyer says, "We will appeal!" And they appeal. Months later, the court of appeals agrees with the trial court and the jury. The client is now worried and says, "What do we do now?" "We file a petition with the Supreme Court." Well, last scene, the client and the lawyer are sitting there; the Supreme Court has denied the petition, and the client says, "What do we do now?" The lawyer says, "What's this 'we' stuff? I go to lunch and you go to jail!"

These stories illustrate that the clients have a different perspective from the lawyers. Very few clients enjoy litigation. It's stressful. It's disruptive. It's uncertain. And it is interminable. It's not a sprint, but a marathon—a marathon where the finish line keeps moving. Disputes are not discrete events like births and deaths. They are more like illnesses and friendships, composed in part of the perceptions and understandings of those who participate in and observe them.

Trials are not something that the parties or clients like, but of course they all see them from different perspectives. And one of the most effective things that a lawyer can do, and that a judge can help lawyers to do, is to try to bring the parties together. What do we do? Do what we do best: provide prompt, efficient justice. But that is not as easy to do, as it is to say. Cases take a substantial amount of time, even with the courts working at full speed. Prompt, efficient justice is a goal of the courts but, over the years, people have had complaints about the speed of justice. Learned Hand said,

> [I]n the third millennium before Christ men were complaining about the inefficiency of legal procedure, and I fancy that if any of

> you are destined in the year 7000 A.D. to revisit . . . you will be obliged to report . . . that mankind still exhibits the same discontentment with its methods of adjusting human differences that you know to-day.[37]

Consider also the modern alternative dispute resolution industry. Private extrajudicial dispute resolution was conceived, and has thrived, entirely in the post-Federal-Rules-of-Civil-Procedure era. Are things getting more or less complex? Now, what's the best way to resolve this? There is no one best way; it depends on the dispute. There is no one single approach or system that can possibly meet the challenges presented by the infinite disputes that humanity inevitably generates—some small, simple, and isolated, others almost incomprehensible in scope. But in my experience, there's one maxim that can be applied in all or nearly all instances. It is as follows: the best way to resolve a dispute is through prompt, efficient decision making, or the certain prospect thereof.

We all know that the likelihood of trial encourages settlement. In this regard, I think that public dispute resolution, represented by the courts, and private dispute resolution, represented by various modes of alternative dispute resolution,[38] can function efficiently together to achieve superior results. Scholars talk about the concept of bargaining within the shadow of the law,[39] figuring out what the likely outcomes are, and trying to reduce uncertainty. The court system, of course, provides a binary resolution: you win; I lose. There is no compromise. There is no effort to try to enlarge the pie. And, of course, even the winner may, in fact, be the loser. Also, the parties are not in control of the decision at all. Some neutral fact finder is in control, whether it is a jury or a judge. And they are somewhat unpredictable, even if fair.

During my time on the bench, I've seen, again and again, courts' ability to move cases along. A serious way to settle a case is through establishment of a prompt, realistic trial date. There is no substitute for prompt, efficient justice. I hate to see cases languish, and I do everything that I can to try to move them along. If you want to resolve a dispute promptly and efficiently, I've always subscribed to, and attempted to employ, a concept that I've heard in Baby Judges

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37. Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, *in* LECTURES ON LEGAL TOPICS 87, 89 (1926).

38. *See, e.g.*, Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 FLA. L. REV. 1 (1985) (discussing alternative dispute resolution methods such as negotiation, mediation, and arbitration).

39. *See, e.g.*, Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Certainty*, 56 EMORY L.J. 619 (2006) (discussing how techniques such as cost-benefit analysis and probability analysis can be used to determine whether to negotiate a settlement or go to trial).

School as being reasonably arbitrary.[40] You don't like that date? Fine, how about next week, but not six months from now. A trial court, where I sit, is a fast-paced organization, a bit like playing the whack-a-mole carnival game. Issues pop up and you've got to deal with them again and again.

Again, I've got a story to tell you the difference between appellate judges and trial judges. We trial judges see things differently down in the trenches, or should I say, the duck blind. The story goes, three judges went duck hunting. One was a Supreme Court justice, one was a court of appeals judge, and one was a trial judge. While they were out, things were rather slow, and then a duck came along. They raised their guns, and the Supreme Court justice said, "Is that a duck? I'm not sure, perhaps the issues should percolate to the various courts of appeal." The duck flies off, and they wait awhile until another duck comes. Now it's the turn of the appellate court judge. He says, "A duck. They require a five-part test. The first three parts . . . ," and the duck flies off. Nothing happens; the sun is going down. Here comes another duck, and the trial judge raises the gun and BANG! And the trial judge says, "Well, I sure hope that was a duck." That's the perspective at the trial court. We try to move the cases along.

We're moving along or trying five percent of the cases. Ninety-five percent have to be resolved elsewhere, and hopefully as fairly as possible. That's where both court-provided and court-assisted mediation and arbitration come in. The system cannot handle one hundred percent, obviously. It never could. Private dispute resolution is designed to be relatively inexpensive and expedient, and it generally allows the parties to craft an outcome through negotiation. The outcome need not be binary; the result need not be black and white. But, of course, alternative dispute resolution lacks the inherent power of the courts to compel, which can be essential to the prompt and efficient resolution of disputes.[41] I think that the two systems can work well together.

Alternative dispute resolution can also be a product of delay and abuse. People didn't think that at first when the alternative dispute resolution movement came about. But you have people who can stall arbitrations and say, "Judge, put off this matter for six months.

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40. Baby Judges School is the nickname for the orientation seminar for newly appointed district court judges. *See "Baby Judges School" Jump Starts Learning Process*, THE THIRD BRANCH (Aug. 2005), http://www.uscourts.gov/News/TheThirdBranch/05-08-01/quot_Baby_Judges_School_quot_Jump_Starts_Learning_Process.aspx (explaining that the orientation seminar is a series of lectures and small group discussions to prepare federal judges for their position).

41. *See* Robert J. Pushaw, Jr., *The Inherent Powers of the Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001) (explaining the history, use, and value of the court's inherent powers).

We're in arbitration, and it will just drag on." Or, "We're in mediation, but that's fine, let's just keep the case moving in the meantime." And, as the lawyers have become savvier, you see CLE programs titled "How to Win a Mediation." But that is considered somewhat foreign to the whole concept of mediation—a win-win situation, a negotiation. How does one win? Lawyers, of course, have found some way to do that.

Why have the courts become so busy? In part, growth of the criminal docket, and substantial increase in the number of civil actions. And, bare in mind, we are not talking about the ordinary civil wrongs of yesteryear. Some are purely statutory and some are designed to generate litigation. Think of some of the fee shifting in the civil rights actions and antitrust actions.[42] We had a whole new generation of litigation that arose out of the Hatch-Waxman Act[43] all of a sudden; you could challenge a patent without having to infringe it. So we have a substantial amount of that litigation here in New Jersey. Originally, when those cases were newer, it was difficult to settle—nobody knew what the results were going to be. Now that we have a track record, I'm finding it increasingly likely to settle those cases as well. But, again, you have to have some basis to determine them.

We have a concept now that scholars have called "litigotiation," a combination of negotiation and litigating at the same time.[44] Litigating certainly gets somebody's attention, and then you try to talk. We utilize the magistrate judges, use court-annexed arbitration and mediation, try to move the cases along to a prompt, just conclusion. Of course you have to stay on top of the cases and make sure there is a deadline given every time. And, of course, you have to be reasonable, because, as Justice Holmes told us, "The . . . life of the law has not been logic; it has been experience."[45] And Judge Story told us that a good lawyerly judge will "be taught to distrust theory, and cling to practical good; to rely more upon experience, than reasoning; more upon institutions, than laws; more upon checks to vice, than upon motives to virtue. He will become . . . more wise, more candid, more forgiving, more disinterested."[46]

I have worked with alternative dispute for a substantial period

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42. *See* 42 U.S.C. § 1988 (2006) (allowing the award of attorney fees in civil rights cases); 15 U.S.C. § 15 (2006) (allowing for the recovery of reasonable attorney fees in antitrust suits).

43. 21 U.S.C. § 355 (2006).

44. Galanter, *supra* note 36, at 268. Professor Galanter coined the term "litigotiation," which refers to the relationship between litigation and negotiation when attempting to reach a settlement. *Id.*

45. John Dewey, *Logical Method and Law*, 33 PHIL. REV. 560, 564 (1924).

46. JOSEPH STORY, DISCOURSE PRONOUNCED UPON THE INAUGURATION OF THE AUTHOR, AS DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY 35 (1829).

of time, and I find that it works best in combination with trials. I don't simply say, "Let's stay it for months!" Let's move along. Sometimes you need a decision to be made on a dispositive motion or a discovery motion or other logjam breaking before you can talk reasonable settlement. I find that resolving cases and settling them is perhaps one of the most pleasant aspects of the job. It may not be the best result for everybody, but the parties don't go away totally empty-handed. The binary system means somebody has miscalculated, somebody on the bench made a decision based on the facts they see in the courtroom. Is it right? Is it wrong? The parties may dispute that, but as long as it's not clear error, it's not going to be reversed. That's why I tell people, what are your chances of winning, and they say, "Seventy percent, Judge!" Now, would you get in an elevator if you knew that three times out of ten, you'd crash? You might be lucky with the seventh. Isn't it better to take the stairs? To try to eliminate the risk?

Another one that can be used on occasion, without impugning our valiant jurors, is to say, "Did you take the turnpike in this morning? What did you think of the drivers? Well, where do you think we get the jury pool from?" Sometimes, a few comments go a long way toward trying to get people to see that there is no such thing as an ironclad case and that maybe they ought to try to start considering what the possibilities are. I find that very rewarding, which is why, when the time came for me to decide what to do next, I decided to follow the path of many experienced judges before me and continue what I found socially useful and personally rewarding—continue to assist parties in the voluntary resolution of disputes.

I will finish up by going back to what I began with, the benefit of the New Jersey Supreme Court during the Weintraub era—applying common sense and practical solutions to complex legal problems. That's what we're trying to do as we resolve these cases. I talked about the Bible, Shakespeare, and Aesop's fables, but I'll only talk now about one of them. We'll turn to the Bible, where St. Luke said, "When thou goest with thine adversary to the magistrate, as thou art in the way, give diligence that thou mayest [resolve and] be delivered from him; lest he hale thee to the judge, and the judge deliver thee to the officer, and the officer cast thee into prison."[47] Well that's saying, "Please settle while you can." Moving on a little bit, Abraham Lincoln, in the 1850s wrote, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."[48]

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47. *Luke* 12:58 (King James).

48. Abraham Lincoln, *Fragment: Notes for a Law Lecture (July 1, 1850?)*, *in* 2

I couldn't say it any better than that. I encourage all of you to be peacemakers and to promote fairness and justice. Thank you.

COLLECTED WORKS OF ABRAHAM LINCOLN 82, 82 (1953).