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Transcript of Hearing on Procedural Reform

Joint Committee on Tort Liability

JOINT COMMITTEE ON TORT LIABILITY

Transcript of Hearing

on

PROCEDURAL REFORM

Sacramento, California

November 15, 1977

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Senator Robert G. Beverly, Vice-Chairman

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California Legislature

Joint Committee on Tort Liability

ASSEMBLYMAN JOHN T. KNOX
CHAIRMAN

A G E N D A

John T. Knox, Chairman
Joint Committee on Tort Liability
Room 2170, State Capitol
Sacramento
November 15, 1977

1. Hon. Winslow Christian
   Justice, 1st District Court of Appeal
   Chairman, ABA Committee to Implement
   Standards for Judicial Administration

2. Dana Hobart, Attorney
   California Trial Lawyers Assoc.

3. Michael Curtis, Administrator
   Sacramento County Superior Court
   Arbitration Program

4. Hon. Robert Thompson
   Justice, 2nd District Court of Appeal
   Member, California Citizen's
   Commission on Tort Reform

5. Howard Hassard, Attorney
   Hassard, Bonnington, Rogers
   and Huber

6. Hon. G. Dennis Adams
   Judge, Municipal Court, El Cajon

7. John D. Chinello, Jr.
   President, Association of Defense
   Counsel

8. Hon. John A. Loomis
   Judge, Superior Court, Los Angeles
   Chairman, Arbitration Administrative
   Committee, Los Angeles County

9. Thomas Conneely, Marialee Neighbors
   Alliance of American Insurers

10. Thomas C. Waterhouse,
    Attorney
    Linton, Waterhouse,
    Cushman & Hammond

Joint Committee on Tort Liability
John T. Knox, Chairman
Sacramento, California
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SJ-1-87

CHAIRMAN JOHN T. KNOX: Additional members will be coming in during the day, but I think that because we have a fairly long agenda we should get started. The hearing is being recorded in case anyone doesn't know that and we will have a transcript of it available at a later time. The subject of today's hearing is procedural reform, hopefully for the purpose of improving the operation of our tort system in California. During the past decade, California has witnessed a virtual "explosion" in the field of tort litigation. That's been manifested in the enormous numbers of civil cases brought before our courts.

The Judicial Council has reported that 80,341 personal injury cases were filed in the fiscal year 1975-76 compared to 75,239 in the previous year. Although many of these matters can be settled or will be settled without actually coming to trial, an estimated 10% will eventually go to trial according to the experience so far and will not be disposed of until 1980 or 1981. Thus many victims of accidents who are in need and deserving of compensation have had to borrow substantial sums of money or be placed on the public assistance rolls. This delay is oftentimes due to the need for investigation and pretrial discovery rather than the calendar itself, so while it's important that we try to make the court system more efficient in order for cases to be tried when they are ready, it's equally important that we ascertain whether there are some reforms that could result in a lesser time for trial preparation.

Maybe, for instance, the number of boiler plate interrogatories and depositions could be reduced. That's assuming a fact that may not be in evidence at this point. The California Citizens' Commission on Tort Reform has recommended a number of procedural changes which they believe will not only speed up the process but will also make our tort system more efficient and less costly, including the use of arbitration for small cases; bifurcation of tort trials; giving the trial judge sole discretion for setting punitive damages; early judicial review in the form of pretrial conference for the purpose of removing frivolous or delaying actions; and periodic payment of awards. As will be seen from the agenda, we have a list of distinguished speakers today and we will introduce the first witness very shortly. First, I would like to indicate the members of the Committee who are here. To my far left is Senator Robert Beverly of Los Angeles County, and to his right is Assemblyman Bill McVittie, also of Los Angeles County. Just coming in the door is Senator Alfred Alquist of Santa Clara County. Our first witness this morning will be Justice Winslow Christian, Chairman of the ABA Committee to Implement Standards for Judicial Administration. Justice Christian is also a former Executive Secretary to Governor Brown, Sr., as he is referred to around here, as well as for his other positions. I am pleased to see you, Justice Christian. Please proceed.

JUSTICE WINSLOW CHRISTIAN: Thank you, Mr. Chairman. In company with I think all lawyers and most laymen, I do have personal opinions of my own about the way our tort system has evolved, but I am going to keep those opinions to myself this morning because my purpose here is another one entirely. And that is to invite the

attention of the Joint Committee to some issues that have to do with the sound functioning of the court system, whatever business it may be given by the tort system of the day. And it is in my capacity as Chairman of the American Bar Association's Committee to Implement Standards of Judicial Administration that I will be speaking to you this morning. Each member has on his desk a set of 3 volumes of the American Bar Association's Standards. We are engaged now in attempting to implement these Standards of Judicial Administration in the American states. California does not happen to be one of the states in which the Committee and its staff is devoting principal attention at the present time, but I assure you that there are materials in these Standards that bear directly on the concerns of this Committee.

CHAIRMAN KNOX: Excuse me, Justice Christian. Can everybody hear the witness? You might want to bring that microphone just a little bit closer.

JUSTICE CHRISTIAN: Leaving aside the policy issues that confront this Committee in regard to the content or values of the tort system, let's look for a minute about the health and good functioning of a judicial system that is to be handling the people's legal business. It is recognized by all people working in the California courts at present that we are operating under a condition of bloat at present, both in trial courts and in the appellate courts. The volume of cases is continually rising as statistics that your Chairman just read out from the Judicial Council established the validity of this. There are several approaches theoretically that are available to give our system a greater capacity to

deal with this load. I want to say in the beginning that none of these answers is easy. The curses for court system bloat that are available -- some of them are expensive, all have policy implications that go far beyond merely trying to administer a court system in a convenient and economic manner. First, it would be possible to approach the problem by attempting to enlarge the capacity of the court system. This can be done, of course, by creating more judgeships. There are some that think that process has gone far enough already. The second possibility is to unify the court system for better use of its resources. And here I want to invite your attention to Standard 1.10 on pages 2 and 3 of the ABA Standards on Court Organization. The Standards do recommend after a careful study that a court system should have a single level of trial courts and then an appellate system appropriate to provide review for the decisions of those trial courts. I suggest to you that there are great economies and great potential for more efficient mobilization of the court system resources in unification of the trial courts into a single level of trial court. It is an axiom of good administration that like work should be gathered together and assigned without arbitrary division. At present, of course, we are arbitrarily dividing some categories of work of the trial courts and assigning them to the municipal court, so that you have in various parts of the state great differences in the caseload pressures at the two levels of trial court. It seems quite obvious from an administrative point of view that greater mileage can be obtained out of this by a unification of the two levels of trial court as the Standards of the American Bar Association do recommend. Another possibility

that has in my own view less potential but is worthy of consideration is the consolidation on some area basis of trial courts for the purpose of equalizing work and obtaining a more efficient use of resources. I have in mind here the perhaps 12 or 15 counties still remaining mostly in the northeastern part of the state where I came from where there is either not enough judicial business to keep a court busy full time, or although the judge may be quite busy the use of resources is truly not effective. You cannot schedule cases on a statistical basis in a one judge court. So some marginal improvement in the use of resources could be obtained by a district or circuit system which would create a method of truly scheduling cases according to a busier system in these northeastern counties. Now others who will be speaking this morning will have some things to say on some measures that are available to shorten the process. That is to get greater capacity for dispositions in the system by shortening the pipeline as it were through which the cases pass. In the criminal area there is a good deal that could be done following federal practice, the practice of the federal trial courts in shortening the process of jury selection, by expecting the court to take a more authoritative hand in this. Now I indicate again that these proposals are not easy. They are controversial. Trial lawyers will generally resist proposals like this, but that is a measure that is available for shortening the time span that the courts must invest in trying criminal cases, thus making more space available for other purposes. In the civil area similarly there are measures available to shorten the caseflow pipeline such as greater court control of jury selection

and the use of a 6-person jury as is done in some jurisdictions at present. Still more controversial, the abolition or limitation of a jury trial in some classes of civil cases.

CHAIRMAN KNOX: Is that a constitutional problem in your judgment?

JUSTICE CHRISTIAN: Yes, it is. It surely is. I think the 6-person jury would not be, but the total abolition of trial by jury in cases which traditionally were tried by jury at the time of the adoption of the Constitution, I think, would require a constitutional amendment.

CHAIRMAN KNOX: How about in cases against the governmental liability?

JUSTICE CHRISTIAN: I'm not prepared to answer.

CHAIRMAN KNOX: All right.

JUSTICE CHRISTIAN: Now the third major heading that I want to touch on is the whole issue of diversion. I will say first off that in the criminal area there is a good deal of what I would term liberal folklore to the effect that there is a lot of court time, judicial resource, that is available that is being wasted on so-called victimless crimes, and that if cases of this character could be diverted out of the court system, the court capacity could be saved for better purposes. Just judging from the kinds of cases that I am seeing at present, there's not a lot of this kind of litigation in our courts at the present time. Prosecutors are not bringing cases of this kind into court. Criminal cases that we see are very, very serious crimes indeed which cannot be diverted and should not be diverted out of the criminal system. So I question

whether there is much to be done in terms of diversion in the criminal area. In the civil area, of course, there is a great deal that can be done and that is right in the area in which your Committee is working and in which other speakers will have something to say later in the morning. I do want to before closing invite other questions that the members may have to raise regarding the whole question of the adequacy of numbers in our system. It seems to me it might be time to match the court capacity that we have provided our state against the expectations of our public and try to determine on the basis of some serious economic analysis of whether it is true that the court system has been allowed to proliferate unduly. I have not made such an analysis, but I have an impression that if you compared the cost to state and local government of operating our court system at the present time to the cost say in 1930 or thereabouts, that you would find that that cost is a smaller proportion now of public revenues to be sure. That is very plain. I think you would also find that it is a smaller proportion of what you might term the state gross economic product. And it may be that in this rich society in which institutions of the family, church and school have atrophied to a degree that we are expecting the courts to do work that otherwise formerly did not come to the courts, that we should simply be prepared to spend more than we are at the present and to go ahead and provide additional court capacity to handle the people's legal business. Are there any questions, Mr. Chairman?

CHAIRMAN KNOX: Questions? Senator Beverly.

SENATOR BEVERLY: Are there comments in any of these

publications, Judge, on the bifurcation of the issue of liability...

JUSTICE CHRISTIAN: Yes, in the second volume, the volume on trial courts, you will see a great deal of detail, which it is not appropriate to try to cover orally this morning, on active and very sharp management of trial proceedings within the trial court and the issue of bifurcation is dealt with from those Standards.

CHAIRMAN KNOX: Mr. McVittie. Were you through, Mr. Beverly?

ASSEMBLYMAN McVITTIE: In line with your recommendation that there be one unified trial court system, I would assume that inherent in that recommendation is the recommendation that the state take over all financing of the court system in California.

JUSTICE CHRISTIAN: Yes. Now I did not touch on that because that is an issue that I think is entirely tangential to the concerns of this Committee in terms of how the system functions. For other reasons entirely these Standards do recommend that a court system should be funded entirely by the state. And, of course, it does go hand in hand with trial court unification.

ASSEMBLYMAN McVITTIE: That is one of the problems that we will have to grope with when the recommendations come about when we do go into the unified system. Thank you.

CHAIRMAN KNOX: When we create a new superior judgeship now, what do we have to put up? $60,000, don't we?

ASSEMBLYMAN McVITTIE: I think it is more than $60,000. Maybe we pay about $75,000 for each superior court judge.

CHAIRMAN KNOX: $75,000 for each superior court judge. Okay, anything further? Thank you very much. I appreciate your

attendance. We now have Mr. Dana Hobart, California Trial Lawyers Association. Oh, just before you start, Mr. Hobart, I should mention we have several additional members who have come. On my far left sitting next to Senator Alquist is Senator Newton Russell of Los Angeles County. On my far right, Assemblyman Floyd Mori of Alameda County and Assemblyman Richard Hayden of Santa Clara County. Mr. Hobart.

MR. DANA HOBART: Thank you, Mr. Chairman. Good morning, gentlemen and ladies. I initially had no intention of making an introductory comment, but after listening to Judge Christian, I thought that perhaps some thoughts of mine should be shared with you for your consideration. To begin with, it seems to me that the most serious policy question that you have to keep in mind at all times with respect to court reform in general is that what you are dealing with is cost and expense versus injured people. It has been my observation and feeling that during the last 4 or 5 years that there has been a great deal of departure from consideration of who it is we are talking about. You gentlemen are faced with the responsibilities of writing laws. Can you deal with statistics? As I looked through the Righting the Liability Balance Report of the California Citizens' Commission on Tort Reform, it all gets boiled down to statistics and numbers, dollars and cents and percentages. And until you have a feeling of who it is you are talking about, it seems to me that it is very easy to get carried away with the decisions in favor of efficiency. I was most distressed to see or at least read about Chief Justice Burger referring to the judicial system for its streamline and success. I suspect

they have no criminal backlog there. And if they do, I suspect they have places to take care of people to make sure that the system remains efficient. But I think in terms of, for example, I don't mean to be laying out a sob story, but I think in terms of a 75 year-old black woman, who I have as a client, and who has been waiting to get to trial for some period of time, who has lost her foot as a result of the allegations of the complaint as a result of the negligence of another person. Court congestion, of course, is serious to her. And this is a real live individual. I have other people, as most trial lawyers do who represent injured people. We are talking about people who have serious injuries, have serious pain, and who have complaints and problems that very much disrupt their lives. And I would hope that you would keep that in the foremost of your consideration, that this is not abstract, not to the people who are involved. And as trial lawyers we occasionally make that point, and every time we make it someone comes to our attack and points out that you are making money from this system, and that is our motivation for talking in the terms that we do. Well, there is no question that we make money from this system. We earn a living like everybody else. If anyone wants to see my income tax records, I would be glad to show them. I have had some degree of success in the field and I don't make so much money that I wouldn't show to anybody here my income tax records. We are not getting rich, and I personally resent the attacks that people make. Senator Warren Magnuson, in his introductory remarks to the United States Senate in introducing Senate Bill 1381, I think it is, the new federal no-fault bill,

attacked lawyers several times as part of the overall presentation of his bill. My feeling is that if issues are to rise and fall, they should rise and fall on the merits, and not simply say, "Well, you trial lawyers make money out of the system." Doctors make money out of the system, out of injured people. Insurance people make money. All the people who work for insurance companies make money. The ambulance drivers, manufacturers, everybody does. We are no different. And to some extent, speaking at least for myself, we resent the implication that what we have to say lacks merit because we earn a living. With respect to the balancing of these equities, we are talking about injured people versus the cost of insurance premiums many times. The same arguments could be leveled against the introduction of padded dashboards to automobiles. And by the way, the manufacturers did raise those levels. Why we can't put padded dashes up there. Look how much more it's going to cost. Well, in that case, protection of the injured was a consideration. And we said, even though it is going to cost more, we are going to protect people. It seems to me that that is a philosophy that has wider use and should have wider consideration than it does. Justice Winslow mentioned voir dire.

CHAIRMAN KNOX: It is Justice Winslow Christian.

MR. HOBART: Oh, I'm sorry. I'm sorry. Pardon me, Justice Winslow Christian. I guess if I ever appear before him, I'm in trouble. (Laughter) I apologize in advance, Justice Christian. In talking about efficiency and speed, referred as oftentimes judges do to the voir dire process, my view is that judges are lawyers who had a bit more political connection than the

rest of us who are still trying cases. Well, considering the fact that I am talking to people who are in the field of politics, I would say that is an envious position to be in. I say that to Senator Newton Russell who is my Senator. The voir dire process is far more important than judges make it out to be. Getting a fair jury is not simply asking, if I may be excused, the slander of lawyers and judges, stupid questions such as: can you promise to be fair? Is there any reason you can't be fair to all the litigants in this case? Well, those kinds of questions, which I have seen come from the mouths of judges in the course of their voir dire, produce only one answer every time. I have never seen a juror say no unless he has already disclosed some bias that we have explored. Voir dire by judges is basically ineffective. Well, they say trial lawyers want to condition juries. To some extent I suppose we would love to condition juries. We would love to have all juries see everything our way, but judges don't let us condition them. I have asked judges, for example, well, when we ask a jury if they have any limitations in their minds, could they award a full verdict to the plaintiff if the facts in the law support a verdict of say a million dollars, to pick a number, do you have the capability of awarding such a verdict or are you reserved in some manner so that you could not, for whatever reason, award that if the law and the facts required such a verdict? Now is that type of questioning conditioning the jury to give a big verdict? Well, some judges would say yes, and I would say that you could make the argument that on the other hand don't we also want to find out if we have jurors who are sitting on that case

who have mental limitations because they are so hung up over their insurance rates. You may have all seen, for example, the Aetna ad in the last week or two in Time and Newsweek where they said, isn't it too bad that we can't tell the juries, that the judge can't read this to the jury. And it says that the money that you pay out is coming out of premiums out of people just like yourselves. Well, you see all that is an attempt to detract from the reasonable award, placing our own private and personal interest into the consideration of what is fair in making an award. All of these are very complicated issues and on the issue of voir dire, I suggest that it is not as time-consuming as some make it out to be and that if it is kept within reasonable bounds, as it is now under the present rules where the judge does the basic voir dire of the standard questions but the attorneys are allowed some latitude, that helps the process. It doesn't hurt the process. And if it takes a few more minutes, then it takes a few more minutes. It is something that is necessary. It is a necessary ingredient in my opinion, and I say that from the defense point of view. I don't know any defense attorney who doesn't feel the same way. It is important to the whole process. Well, enough of my introductory remarks. Skipping some of these, except by the way, I should mention from the California Trial Lawyers' point of view that there are a couple of issues that Judge Christian raised that we have open minds on. We are not inflexible on the issue of court consolidation. We recognize that we have many friends on the superior court bench who don't want consolidation for whatever reasons they have and we sympathize with them, but maybe there is

room for exploration there. We are open for that. Perhaps the answer to some extent can be to raise the municipal court level of jurisdiction from $5,000 which is an arbitrary figure that seems to have little real relevance to today's marketplace. Maybe that should be higher to accommodate some of the smaller personal injury cases. We have open minds on that. We are not suggesting those, we are not proposing them, we are not endorsing those positions, but they are areas where exploration can be considered. I have reviewed the recommendations of the Citizens' Commission, and assuming that the overall package remains viable and preserves the rights of injured people to have a day in court and to obtain adequate compensation, we are not opposed to considering the issue of raising arbitration limits. As you know, under the present plan a plantiff may demand arbitration of a case with a ceiling, except by stipulation if it is increased, a ceiling $7,500. Perhaps we could support raising that. I might point out that it was the plaintiff's and defense bar in Los Angeles County that got that program started years ago in a voluntary program. We give of our time to that. I have served twice as an arbitrator in that program. I know that most people that do are conscientious. We are not opposed to various concepts of arbitration in general. What we are opposed to is to some extent fear that if you open the door, all of a sudden the whole thing gets flooded out and we have lost the right to a jury trial. But within the limits we can work with you and would be glad to assist in any way that we are requested to. I noticed that the Commission had a recommendation that a letter of some type of notification should be sent to all

parties that are named as defendants. The concept is not a bad concept. It is something that we can live with and work with. The suggestion that it be done simultaneously is where certain problems arise. But that is a concept that seems reasonable. If a person is named as a defendant, why can't he be told about it up front? Well, it produces certain problems to the plaintiffs' Bar. We are not totally in love with that, but on balance, on fairness, that is something that we think can be worked into the procedure to make some benefits available for the defense. They have recommended that the statutory rights should be provided to defendants to join parties not named in the plaintiff's complaint. Frankly, I have always thought they had that right. They say they don't there. I have reviewed the Code of Civil Procedure and I still think they do.

CHAIRMAN KNOX: I do, too. I don't understand it.

MR. HOBART: I don't understand it either, but my basic feeling is, of course, if someone else should be named as a defendant in the case, they should have the right, assuming that it is done within certain periods of time. They shouldn't be able to bring in someone if some new rule is going to be written, bring in someone after the plaintiff could no longer join them as a party, but at some early stage, I think it is absolutely appropriate. There is no reason that appropriate defendants should not be before the court.

CHAIRMAN KNOX: Well, we have a little matter of American Motorcycle that is sitting over there in the Supreme Court.

MR. HOBART: Yes, Mr. Chairman, that is a little matter

of some monumental concern to us all. I think it's a concern to this Committee because...

CHAIRMAN KNOX: Mr. Thompson who wrote it is here so be careful what you say. (Laughter)

MR. HOBART: Justice Thompson and I rode in from the airport together and he didn't see the needles. I was sitting behind him and I was punching the doll and all that sort of thing. (Laughter) Justice Thompson and I see that matter differently. In basic areas of fairness, I see it differently than he. His modus, however, is not questioned by me. He sees it one way and I see it another. Trial lawyers see it from the point of view of compensating injured people. That is how we see it. We think that injured people should be able to be compensated and then people who are a proximate cause of the injuries, let them wrestle from there. But at any rate, that is one subject. One of the things that I think it's very important that the Committee know is that the trial lawyers do oppose giving a judge the authority at the very early stages -- the Commission recommended 90 days -- to tell us that our litigation is frivolous, without merit, and of that sort. Keeping in mind, as I said, judges are nothing but trial lawyers, and many of the judges were never trial lawyers, I must say that I have tried cases with judges who have never served as trial lawyers and who are not as efficient and as knowledgeable as a person would be if he had had that experience. Things in the abstract are not the same if you have lived through them. We don't think that judges should have that kind of authority. The law provides a great many remedies for malicious or non-meritorious

actions. Summary judgment exists. The penalty of malicious prosecution exists. A great many things exist that make me think that that is an unnecessary requirement. The recommendation F I will just make a quick comment on. The title of the section is, Making Large Awards for Future Losses Payable in Periodic Payments. What we are talking about in that regard is a judgment in favor of a plaintiff, and that boils down to a judgment in favor of a person who has suffered an injury. And when you are talking about future payments or future losses of earning capacity, things of that nature, you are talking about a person who has a rather substantial injury. For an insurance company to sit on those funds, for them to draw interest, is absolutely contrary to the way I think the law should go. It's the injured person's money. He is entitled to it. He has been injured and something very valuable has been deprived from him. Let him make the interest on that money. One of the reasons that we have the congestion that we have now in the trial court is the problem that we do not have prejudgment interest. It cannot be awarded under present law to a successful personal injury litigant. That means the interest begins only at the time of judgment. And then insurance companies know that they are paying 7% to the injured litigant as long as they keep that matter alive by way of appeal or motions and they know also that they can make 10, 12, 15% assuming that they do not have the same advisors that Argonaut Insurance Company had a couple of years ago, and that they can make additional money, more money than that. So we are faced with appeals all the time because it's simply profitable for them to keep those cases alive. Cases don't get settled early because

there is no incentive on an insurance company to settle early. And the recommendations that you will observe from the Citizens' Commission are in almost every respect intended to place a financial onus, or the threat of a financial onus, on the injured person. If the judge decides it is not a meritorious action or that there is a frivolous defense, then costs will shift. There is no such thing as a frivolous defense as long as they are arguing about how much.

CHAIRMAN KNOX: On this point, Senator Russell.

SENATOR RUSSELL: You're talking about those cases that do go to trial?

MR. HOBART: Well, Senator Russell, I'm talking about them, but also from the beginning of the process, what we find is we have -- say you have a dead bang liability case. Well, that insurance company knows that sooner or later they are going to pay something on it. The question then is, assuming that we are not too far apart on how much we think the value of the case is, but let us say we have a case that we pretty much agree is a $15,000 case. Now from the beginning of time, after that case gets filed, we all evaluate it as liability because we understand the facts. The defense lawyers know what is liability and the plaintiff's lawyers do, too. I have been on both sides. I have represented insurance companies in my earlier years of practice, and I tell them that this is a case of liability and you should be thinking in terms of reserves of so much money. Now if we agree that that case has a value of around $15,000, the insurance company sets that aside, but they are drawing interest on that $15,000. And if

they are assuming that they are making or drawing interest or making money with it...

SENATOR RUSSELL: Oh, I understand that part of it. The part that I was going to zero in on is your statement that the insurance companies, it's to their advantage to prolong as long as possible. Your reasons would be they would make interest and they would try to knock you down or maybe present different facts and win the case. My understanding, and maybe you could correct me, is that by far the majority of the cases do not go to court, and those that are settled, only about 10% go to court. The rest are settled out of court before it goes to trial.

MR. HOBART: There are various categories of cases. Most trial lawyers prefer, for example, defense and plaintiff, not to use too much time, or any more time than necessary, on the smaller cases. And the system provides a pretty good mechanism for getting those cases settled, and they don't generally get into the system. It's after they get into the system on the case of the moderate value case.

SENATOR RUSSELL: So that is what you are talking about. The cases that are of a fairly good size. The cases that go into court.

MR. HOBART: That's right. I used the figure of $15,000 or so, but say you are talking about $50,000 or $100,000. I don't know what the actuarial authorities would say what you can earn with that kind of money if you have the right investment counselling, but our feeling is that the absence of free judgment interest is a motivating factor to keep insurance companies from settling

cases. I do know this. I have had verdict after verdict where the insurance company representatives, lawyers, or the claim man -- sometimes you deal with both -- tell me that they are going to appeal this case, and that they are doing it because they can make money by appealing that case.

SENATOR RUSSELL: You mean the interest they have earned is in excess of the amount of fees that they will pay their attorneys and all the rest of it to prolong this?

MR. HOBART: You see, I cannot tell you that that is a fact, but I can tell you that that is what they have said to me time and time again. They use it as a double-edged sword in a sense. They use that as a threat to you so that you will reduce the judgment yourself, voluntarily, and say, well okay, if you will skip the appeal, I will cut 5 or 10% off and then they might pay it. But if it goes on to appeal, I just know that I have heard it announced to me many, many times that the money that they can make by keeping that case alive instead of paying out that money is incentive for them not to pay it out.

SENATOR RUSSELL: Is it just the interest or is it the potential that you may back off or reduce your claim or settle for less?

CHAIRMAN KNOX: It's probably all of those things.

MR. HOBART: I think it's all of the above.

SENATOR RUSSELL: It's not just the interest alone, it's the combination of all those things.

MR. HOBART: It is the combination, but I think the issue alone -- for example, if you wanted to have some settlement situation --

we have talked about the arbitration program where both parties are entitled to a trial de novo if they are not satisfied with the award of the arbitrator. Now you notice that the penalties imposed are relatively minimal for if you fail to improve your position, you are only going to pay certain court costs, or certain costs experts have used in preparation of the case, not even trial experts. Now how about if you added to that to give people motivation to get out of the trial de novo type of thing, and perhaps you can relate it also to this general issue that we have been talking about. How about if the insurance company didn't improve its position at the trial, that they had to pay pre-trial interest as a penalty, right from the date of the accident. You see because it's no threat to an insurance company to say trial de novo. Big deal. All they are talking about is some attorney's fees, but nothing much more. And for many of them it's not even additional attorney's fees if they have house counsel. But the usage of prejudgment interest to weed out frivolous defenses and weed out the shams of not settling cases at certain points is more of a tool against the insurance company that would be effective, I think, than any of these awarding of costs. Plaintiffs don't have costs. You know, I offer my clients an hourly rate or contingent fee. And I explain to them that in the hourly rate I would expect to be paid when I bill you and that is irrespective of winning or losing. I have never had one client even ask me how much I charge. I tell them eventually. But they don't even ask me because they don't have any money. So to say to them that they are going to pay certain costs when they haven't got much, that is a real threat. It scares them.

And it is a leverage to get them to settle cases. But that is not a leverage to the insurance company. And my hope would be that we cross-balance that a little bit and see if we can't find some mechanism to streamline the settlement process.

CHAIRMAN KNOX: Yes, Mr. McVittie.

ASSEMBLYMAN McVITTIE: Mr. Hobart, are you suggesting that perhaps the statutory demand for settlement should be amended to provide for interest in addition to court costs in the court's discretion if the demand for settlement is rejected from that point forward? Because I assume you have to make a demand before you can have the interest accrue.

MR. HOBART: Yes, I think you do have to make the demand. The opportunity must be there before you can hold anybody chargeable for failing to move forward. I think at that point that if the defendant fails to accept the settlement, he should enter into that the consideration of prejudgment interest. I think it will have a big motivating factor on getting cases settled.

ASSEMBLYMAN McVITTIE: With that demand right now, the court can award what, expert witness fees?

MR. HOBART: They can only award expert witness fees used in the preparation of trials. They can't even award expert witness fees used for the experts that actually came into the trial. Very few lawyers know that. I once wrote an article on that point, and when I tried to get the expert witness fees for the expert who appeared in trial, they attached a copy of my article, which I thought was pretty dirty pool. So that is not much of a threat. And how much of a threat is it to a litigant? A litigant gets

worried by it. And I try to tell them, well, how are they going to take anything from you? What have you got? You have two kids and nobody wants them, even you don't. So don't worry about it. But there is no real threat on the insurance companies to settle and prejudgment interest worked in a variety of ways will help that issue. I know I am taking longer than I should. Let me just simply say one last thing with respect to the judges determining how much punitive damages should be awarded. All I can say to you is we oppose that for all the reasons that, to use a trial lawyers argument, you in your heart know exist. If there are any other questions, I will be glad to respond.

CHAIRMAN KNOX: All right. Thank you. Any further questions, Senator?

SENATOR RUSSELL: One thing that concerns me -- you see things, of course, from your perspective. And we all see things from our own perspective. Do you, as representing the trial lawyers, not just yourself, feel that there are some serious problems in our system in terms of ability to serve the public in an efficient, cost-effective, meaningful way to do justice to the injured party as well as to society?

MR. HOBART: I do indeed, and that is why so many times those of us active in the Trial Lawyers Association feel that sometimes we are viewed as nothing but resistors of change, and we don't want to be that. Most of us want change. We want to streamline it. The answer is yes, we feel that problem.

SENATOR RUSSELL: Have you, as a group then, come forward with a study, a list of recommendations or suggestions as to how you think from your viewpoint this system can be improved? I say that

because in medical malpractice, and in this tort liability thing, we see so many attorneys from your particular profession who seem to be just nay-sayers. You know that this isn't any good and this is a bad suggestion, you can't do it this way, and you can't do it that way. And everything is okay if we just didn't have bad doctors and people who make bad materials, products and so forth, which is easy to say but really doesn't solve the problem.

MR. HOBART: You are right. We have those who are as superficial in attempting to solve legitimate problems as every other group does. And, I suppose, we are at the bottom of the barrel of public concern. We are seen in that manner as being resistors and not offering the programs. Senator Russell, we have during this past year had a Tort Reform Committee, which has been working, and I have been a part of it. We have been working long and hard and we will be coming forward with our recommendations to the extent that they are viable. We have made some and some of them have been made public already. Of course, some of the bigger problems like the court congestion type of thing, like I said at my beginning there, we have an open mind on some of the broader issues, court consolidation type of issues and raising levels and arbitration and things of that nature.

SENATOR RUSSELL: I think you would be in a better position, public-image wise, if you had a positive set of recommendations of where you thought the fault was and what could be done.

MR. HOBART: I think you are absolutely right. We should. If I may just close with one thought that I wanted to get...

CHAIRMAN KNOX: Before you close, I have one brief question.

What is the position of the organization, or how do you feel about the 6-man, 6-person jury?

MR. HOBART: Well, if it is to be patterned after the Federal Court, I, and anyone who has tried a case in the Federal Court, would be very much opposed to it. Now the reason I say that is this. Over in the Federal Court of the 6-man jury, you have to have a unanimous verdict, and unanimity of thought is something that rarely exists in our society and it means one recalcitrant member who may be angered because he wasn't elected foreman or some other non-meritorious reason can totally devastate a trial and can cause a hung jury.

CHAIRMAN KNOX: Would you go for it if it were four out of six?

MR. HOBART: Well, our feeling, as an Association, is that it is not wise to change from the 12. If anybody says, why is 12 a magic number, I can't tell you why it is a magic number except that it has worked well. The costs that would be saved are relatively minimal. One of the things that we have been studying in our Tort Reform Committee is that very issue. How do we feel collectively about 12-man juries, 8-man juries, 6-man juries? Of course, like the doctors, who didn't want Medicare or Medi-Cal, thinking that was opening the door to socialized medicine, we sort of feel that when you start cutting at that area, there's continued tendency to say, well, 6 works great. Why don't we get down to one, which judges want, because they know they will be the one, and that will really streamline things. Our position at this moment is, we are simply open-minded on it, but we are leaning against it. But,

again, we are maintaining an open mind on it. We are not here to say no and we are not trying to fight against it. We just want to see where we can go on balance.

CHAIRMAN KNOX: Parties can stipulate to that now, can they not?

MR. HOBART: Yes, they can. And I might add with respect to stipulation, you have raised a point that is extremely important. One of the reasons that we have all the jury trials we have is not because of the plaintiffs, it's because of insurance companies. I know that when I represented insurance companies that we, our office, had express instructions never to try a case without a jury. Never. And so I know that what is happening is the insurance company lawyers go in and demand a jury because they know that gives them one shot by the jury. If they can convince the jury, super. If they can't, then they have a shot at the trial judge who can change the verdict all around by additur or remittitur. And three, that failing, they have the appellate process. So they have 3 shots. They won't leave the jury. It is not so much the plaintiff who won't. From time to time we don't want to, but they always want it. And the point I wanted to conclude with, and if there is still a question, I will be happy to answer, but I just want to get this point in. One of the reasons we have this entire court congestion problem to the extent that it is a problem, keeping in mind the personal injury cases by the way are a very small percentage of the cases in the court system, Wylie Aitken in his article said it was something like less than 5%. Perhaps he is right or perhaps he is wrong, but that is the only figure that I

am aware of, and I don't want to give it any more credibility than that's what our Association President wrote in a report. But part of the problem is because of the criminal litigations going on, where you don't have a procedure for plea bargaining. What you've got is every criminal insisting on a trial because he has absolutely nothing to lose. He can't work it out, he can't dispose of it, so he wants to go to trial. He says why should I give the system anything, what has it given me? The criminal who probably pays no taxes and probably never has has displaced one civil litigant, who is ready to go to trial, but all of a sudden can't because the Constitution says that criminal is entitled to a speedy trial, and that means 60 days. So he comes in and takes the civil judge away from the civil litigant who is paying for the whole damn system who can't get in. And not only that, it's the injured civil litigant, the saddest person in our society, the one that is at the bottom of the barrel, and he is the one we are talking about stripping the rights from in order to clean up the mess. Well, the criminal problem has really created serious problems for civil litigants, and I think to a large extent as you can make recommendations in that cross field, it would benefit the court congestion problem tremendously. Plea bargaining is one area. I know it's a very political hot potato to be anti-crime and to come in really gung ho strong and all that sort of thing. Give nothing, ask no quarter, and give none. It is politically popular and I can understand it. I once ran for the Assembly against Dave Roberti, and I am not sure which one of us was most law and order, but I think I was, and I could have conceivably been such a tough guy as that.

But the problem, nevertheless, is that lack of plea bargaining forcing all those criminal cases into the civil trial process, or taking civil judges, I should say, and we, who are sitting back representing the people who pay for the whole system, can't get anywhere with it. How to solve the problem, we are going to take some more rights away from them. Well, it's a dilemma and I hope that to some extent we have been able to assist some of your thinking.

CHAIRMAN KNOX: Thank you very much, Mr. Hobart. We appreciate your attendance very much. Our next witness is Mr. Michael Curtis, Administrator of the Sacramento County Superior Court Arbitration Program. Mr. Curtis.

MR. MICHAEL CURTIS: Mr. Chairman, members. I thought I would just give a brief rundown on the history of arbitration in Sacramento County and some of the problems we have had and some of the benefits as I see them. We started the arbitration in accordance with the rules adopted by the Judicial Council last July. We set up our Committee and adopted, pretty much adopted verbatim, the rules already provided. We didn't add any additional rules. We started with two panels: one to handle personal injury cases and one panel to handle general practice or contracts and anything other than personal injury type cases. The program started kind of slow. We initially had a meeting with the local bar association at McGeorge School of Law where we tried to educate them and make them aware of arbitration and new procedures, and gave them samples of forms that they could use. Once we did this initially, we also published it in the newspapers and tried to make everybody aware of it. After 6 months we still were only averaging probably 10 cases

a month where people were filing for arbitration, and at that time we decided to send an additional memo to all counsels at the time we sent notices of the trial settings. Since we have been sending that memo, we have had a great deal more response. We average now between 25 and 30 cases per month filed. Since the program started, we have had 302 cases filed in our court, of which 90 have already gone through the complete process.

CHAIRMAN KNOX: How many of them asked for a trial de novo?

MR. CURTIS: That was the part I was getting to next. Of that 90, we have had 31 request trial de novo which is a little over 30%. However, I have checked the cases where they did request trial de novo and of that 31, 19 have already settled, and only one of them has actually gone to trial. So, to my way of thinking, effective trial de novo request is around 15% right now which is, I think, an acceptable level for that. Some of the benefits I have seen are that they do get the cases through the system faster. Sacramento apparently has a 13 to 16 month waiting period from the time that you had issue memos filed until the case can go to trial. Under the arbitration, initially we kept between 60 to 90 days to be completely through. At this time, believe it or not, we do have a backlog in arbitration now. It takes anywhere from 4 to 4½ months to get through the process which is still a great deal faster than going through the normal trial procedures. Another benefit I have noticed, I have said only 90 have actually gone through to completion, another 61 have settled, so I feel that by having arbitration filed against them, it does cause the attorneys to get together when they have a date certain a lot sooner than they normally would have. It does cause them to settle the cases

a lot sooner than they probably would have otherwise. As a result, also, we have had fewer jury trials. Obviously, if these cases are being tried by arbitration, they are not going to jury trial. That does cause a lot of dollar savings, as well as judge time, which allows the judges to try other cases. In fact, last Friday I went to the workshop in Los Angeles which reviewed the results for the whole State and they way they figured the costs there, which I just adopted for us, is if we figured the average case under arbitration with a $7,500 limit, it took 4 days of jury trial, it would cost around $650 or so. So even if half of these cases didn't go to jury where they would have, we would save probably around $300,000 since we have started this program. So that is a pretty significant savings as well as the time the judges have been able to spend on other types of litigation and help get rid of the backlog we have had. Some of the problems we have had, other than procedural ones, we do have a backlog, as I have mentioned. The cause of the backlog is that we have tried to limit the panel of arbitrators to 100 members. The reason being that the committee members feel they want to keep only the better known, more experienced trial lawyers as arbitrators so that both sides have more confidence in them trying their cases. So for this reason we have kept it to 100 members, and since they can only serve every 3 months and we have to use 3 names for each case, it sort of ties up names and they are not available as often as they were. To handle that situation, we initially started with the arbitrators only serving every 6 months. We reduced that to 3 months just about 6 weeks ago, so that now we right off the bat have 61

arbitrators available that were not available by just doing that. So that has helped our backlog and now the waiting time before an arbitrator can be appointed is about 4 to 6 weeks. So the whole process still, as I said earlier, takes about 5 months to get through the whole thing. And that is barring any continuances. That is the other problem I have noticed in arbitration as well as regular litigation. There are a great deal of continuances. I really am never told the reasons particularly once the arbitrator is appointed. He, of course, grants the continuances, but they do seem to continue a lot of cases many times. Some of the suggestions that came up at the workshop and some that I thought of and one that was mentioned earlier today was the $7,500 limit. It was almost unanimous among the members in the workshop and the committee members on my own arbitration committee that they feel the limit ought to be raised. The figures were $10,000 and $15,000, with $15,000 being the more common figure mentioned. This would increase the filings in arbitration by a considerable number. That was the only unanimous suggestion at the workshop and some of the other ones that I have thought of, one that was also mentioned today, was additional sanctions to people requesting trial de novo. The one that was brought up earlier today was one that was also brought up in Los Angeles by one of the Los Angeles attorneys as it was. And another suggestion was that in addition to the party having to pay costs if they don't get more than the arbitration award is that they also have to pay the attorney's fees or pay a percentage of the judgment. I think that was the interest on the judgment which was mentioned earlier. These types of sanctions might convince

people not to request trial de novo at the conclusion of the arbitration. Another suggestion made, which had some objection by plaintiffs' attorneys, was to allow defendants to elect for arbitration, also. I think the objection made there by the plaintiffs' attorney was that some defense attorneys would just elect for arbitration no matter how much their case was actually worth. And one of the ways suggested to get around that problem was to have the defense attorney and his clients sign some sort of a document stating that the case is actually only worth from 0-$15,000 and not more than that. So that was one of the suggestions made. Another suggestion made was only to send out one name for an arbitrator rather than letting each side pick between 3 names as the current rules allow, just to send one name. They would still have the same authority to object to that person that they do to file an affidavit as they do against judges in regular civil trial. But this way would free the names up so we could try more cases. That is really all I have.

CHAIRMAN KNOX: What arguments are made against raising the limit?

MR. CURTIS: Who is against it?

CHAIRMAN KNOX: Why would there be an argument against making it $25,000 or having any limit at all?

MR. CURTIS: I really don't know. I haven't heard of anybody suggesting a limit higher than $15,000. I think probably the reason it comes to my mind is that most cases seem to fall in that range.

CHAIRMAN KNOX: Why is there a limit at all? That is what I am getting at.

MR. CURTIS: Why the $7,500 limit?

CHAIRMAN KNOX: Why any limit?

MR. CURTIS: I don't know.

CHAIRMAN KNOX: Senator Wilson. This is Senator Bob Wilson of San Diego County.

SENATOR WILSON: I think the reason why there is a limit now is that we passed the Moscone bill setting the limit at $7,500, and the argument at that time was that it was the denial to have a jury trial. Because the way I understand it, if one party wants to go into arbitration, the other party must go into arbitration also. So when you start getting up to 25 - $30,000 then that argument becomes more and more important.

MR. CURTIS: That's true. However, we have had some cases where they can't stipulate as well as elect arbitration. However, once they stipulate, they can ask for a higher amount. They can stipulate that...

SENATOR WILSON: Right, but they can do that under the current law?

MR. CURTIS: Right. Yes.

SENATOR WILSON: So what you are suggesting is to go to 15 or $25,000 and can tell the other party to go into arbitration and give up that party's...

CHAIRMAN KNOX: I see. I didn't ask that question to argue it either way. I was just curious...

MR. CURTIS: I think as long as they have the right to the trial de novo, don't they still eventually have the right to jury trial?

CHAIRMAN KNOX: Okay, anything further? Mr. Hayden.

ASSEMBLYMAN HAYDEN: Could you make a brief comment on how successful you feel that your program has been? What percentage of success have you had?

MR. CURTIS: On a scale of 1 to 100, I would say at this point probably 75% success. 300 cases out of, I think our backlog is somewhere around 3,000 isn't a great significance. Part of the reason is in educating the local bar. Some of them are still reluctant. Defense attorneys, a lot of them, still don't like the idea. So it's a process of education. That was also brought up at the workshop that we should also make an attempt to educate the public as well as educate the local bar of the existence of the program. Some attorneys, I believe, still aren't even aware that they can go to arbitration.

ASSEMBLYMAN HAYDEN: Say if 10% have gone to arbitration, roughly, and you have around a 75-80% success, it's probably about the same as the other areas of experience. You personally are supportive of it?

MR. CURTIS: Yes.

ASSEMBLYMAN HAYDEN: You, obviously, since you hold the position...

MR. CURTIS: Well, actually, my secretary does all the work to be honest with you. I set up the procedures.

CHAIRMAN KNOX: He is what is known as an administrator.

ASSEMBLYMAN HAYDEN: But you feel that it...

CHAIRMAN KNOX: That's like when I go to a construction project, I'm a supervisor.

MR. CURTIS: I feel that anytime you can cut into the backlog in any way, it's a benefit, and I do feel it has been beneficial in that respect.

CHAIRMAN KNOX: Well, he calculates a savings of $300,000 since last year.

ASSEMBLYMAN HAYDEN: I have had a rather positive response from attorneys throughout my own area when I talk about this kind of program.

MR. CURTIS: Many of the people I talked to at the workshop -- it was for arbitrators and the judicial councilmen and attorneys also -- had different experiences. Some had fewer cases while Los Angeles, I think, had over 3,000 filed already. So it is really working a lot better in some areas than other areas in the State. And I think the main reason for that is education of the public and attorneys that it is available.

ASSEMBLYMAN HAYDEN: How do you educate the attorneys?

MR. CURTIS: Well, we do it by the memo I mentioned earlier that we send out. We also publish the results of arbitration every month in a local attorneys' newspaper, and things like this. Our presiding judge is very supportive of it and he also will bring it up at trial setting and things like that. If he feels the case should be arbitrated, he will ask the attorneys, have you thought of arbitration? And sometimes, I won't say arm-twisting particularly, but sometimes they do come over and request arbitration after they have seen him.

ASSEMBLYMAN HAYDEN: Would you say that attorneys generally are reluctant to enter arbitration?

MR. CURTIS: Some of them are very supportive of it and some of them are reluctant. One committee member that is actually on our arbitration committee is kind of reluctant. He says it still hasn't proven itself out. I think it will take a little more time. We can educate them more and go another 6 months or so and see how it is going then.

ASSEMBLYMAN HAYDEN: Very good. Thank you.

CHAIRMAN KNOX: Mr. McVittie.

ASSEMBLYMAN McVITTIE: How do you deal with the 5-year statute? Because if you have a case set for trial and you have waited that long and you want to arbitrate, there is no statutory provision for delay or an extension of the statute. So it seems to me that there may be a problem there.

MR. CURTIS: You mean about waiting until the last minute and then go into arbitration?

ASSEMBLYMAN McVITTIE: Right, or in between it. For example, if you are in Los Angeles County where it may take 3 years to get to trial, let's say you have your case at issue and then you find out that because of various circumstances it doesn't have the value that you originally estimated and then you would like to arbitrate it. Maybe the liability is much poorer than you thought originally. At that point in time, if you decide to make the request for arbitration, you go off the civil active list. And if you arbitrate it, you are going to have a problem getting back on the calendar if the defendant then later requires a de novo hearing. I think it all has to be done within the 5 years.

MR. CURTIS: That could be a problem.

ASSEMBLYMAN McVITTIE: You haven't had that problem yet?

MR. CURTIS: No. I haven't had that problem. About the only thing I would do if an attorney brought an election for arbitration and the time was just about running out, I would give it preference so he got his arbitrators sooner. But as to the problem of someone requesting a trial afterwards, I don't know.

ASSEMBLYMAN McVITTIE: You see the problem is the plaintiff may want it. Unless the defendant stipulates to extend the statute, you really have a problem.

MR. CURTIS: That's true.

CHAIRMAN KNOX: Okay, thank you very much. I appreciate your attendance. The next witness is Justice Robert Thompson of the Second District Court of Appeals. Justice Thompson, I listened to Chief Justice Bird the other day and about 15% of her speech was quoting you.

JUSTICE ROBERT THOMPSON: The way the Supreme Court is granting hearings on me now, I get quoted a lot. At the outset, let me echo one thing that Winslow Christian mentioned. And that is that there are no magic bullets in court reorganization or procedural change. If we look at an objective which says either we must do a job of equal quality with fewer people, or do a better job with the number of people we have in the system, we are going to reach that objective in my judgment only by a number, a rather substantial number of changes, each one of which picks up a very small amount, percentage, in efficiency. Having thought about this since I have been in this judging racket, something like 13 years, I can't tell you anything that I know of that can pick up a

10 or 20% increase in the efficiency of the system. I think most people who have given any thought to it can think up devices that pick up a half percent here, one or two percent there, and where in combination we can accomplish something. Another problem that I think has to be kept in mind in everything we do is that we are dealing with a changing system. What we talk about today, as far as problems, as far as what the system is designed to do, will not necessarily be reflective of what happens 5 or 10 years down the road. Long-range then, I would support one recommendation of the Citizens' Commission that has not yet been discussed here, and that is the creation, and it will require a constitutional amendment, of a commission, something like the Constitutional Revision Commission, something like the Law Revision Commission. Hopefully, it will work better and quicker. A commission that is charged with the on-going task of researching, collecting information on, and recommending to the Legislature procedural and court organizational reform. I suggest to you that unless we do something like that, what we will have done at best here is put some bandaids on the system that probably will come off.

CHAIRMAN KNOX: Why would you need a constitutional amendment for that?

JUSTICE THOMPSON: Jack, you probably know better than I do. If it could be done without a constitutional amendment, I would be all for it. I assumed that the other devices are in the Constitution so this would have to be, but I suspect it could be done legislatively.

CHAIRMAN KNOX: Mr. McVittie.

ASSEMBLYMAN McVITTIE: Justice Thompson, it seems to me that the Judicial Council, which is created by the Constitution through the Constitution, would have authority right now to make the recommendations concerning procedural and substantive changes to the Legislature. Where is the Judicial Council in terms of these proposals?

JUSTICE THOMPSON: I think this, Bill, that the Council has the power to do this. I would not at all be adverse to expanding their budget and facilities to permit them to do it. I think now that they are so busy putting out short-range fires, insofar as legislation is concerned, that they simply do not have the resources to do this. The Council afterall has a wide function. It is charged primarily with supervising judicial education. Its primary job is the formulation of the rules of court, a job that takes an enormous amount of its resources. And, incidentally, only with research and development. If the R & D function, and that is really what we are talking about here, is to be expanded, there is no reason why it could not be expanded in the Council. My only suggestion of a separate body is to give it a primacy in that body. Because any organization will tend to get to the hottest, immediate problem first and research and develop long-range planning last. This, I think, is a fact of human nature, but I do not disagree with you that the Council could do it. I would suggest that they would need quite an expanded budget to do it.

ASSEMBLYMAN McVITTIE: I have the Committee that handles their budget, and they have never asked for more money. We give them everything they ask for.

JUSTICE THOMPSON: And you have never offered either.

CHAIRMAN KNOX: I was on it one year and they asked for more money.

ASSEMBLYMAN McVITTIE: We funded the -- that is in your pension plans, but the Governor took that out.

JUSTICE THOMPSON: What else is new?

CHAIRMAN KNOX: All right.

JUSTICE THOMPSON: Now turning to some short-range specifics, let's use short-range as being a 3 or 4 year program. In my mind the most promising vehicle for development of improved methods of litigation, whether it be in tort or in any other field, is the Chairman's successful legislative effort of last year which was then called AB 3704, a number I will never forget. That is the program which adopts the heresy that it is not necessary to design a perfect program of procedure that is immune from all theoretical possibility of attack. Before the information is in as to what will work and what will not, that bill applies to the court system something that industry has been doing probably for a hundred years, which says let's design something that has a very substantial chance of being better and try it on a small scale with the only test being that it will not be any worse and will not harm anybody. To the extent changes that are then developed work, they then, based on the information that comes from the program, can be built into the system as a whole. The program that was enacted in that bill goes into operation January 1 of next year. The rules for procedure in the program were, for all practical purposes, adopted at last Friday's meeting of the Judicial Council. What those rules do are

to greatly simplify the processes of litigation. The pleading process is put into English, taken from the mumbo jumbo of what has become to be very formalistic pleading. Discovery, which is a hellishly expensive operation in litigation now, is greatly restricted. The processes of trial are drastically changed and the post-trial procedures are to a degree simplified. My hope is that to the extent that process works, at least two things will happen. One is that we will be able to suggest to the Legislature sometime before the end of the 3-year period of an experiment, drastic revisions in the Code of Civil Procedure, which will reduce the transactional cost of the process, both to the parties and to government. Hopefully, that will also reduce the legal fees in any individual case while permitting more cases to be litigated, particularly those where a lawyer must now say, I can't take your case because there is not enough involved in it. The second aspect probably that will come out of that process because it is experimental and can be changed from time to time in the 4 courts where it is operating, is the development of different procedural tracks for different types of cases. It defies logic and it defies good sense that somehow or other we have through the years lived with and accepted a set of California procedure that is equally applicable to an anti-trust litigation and to a case of who went through the red light. If we develop different tracks that are tailored to different types of litigation, then there is a reason to reorganize the court system, possibly to unify it with judges with different degrees of expertise in the various tracks. Unification then becomes desirable because, at that point, a switching

mechanism is needed because, after all, the initial decision to put a case on a particular track may be wrong. If you want to switch it to the other one, it is a lot easier to do in the same court than in a different one. My personal view is that until that is developed, it is premature to consider unification, that now unification is primarily cosmetic. It looks like we are doing something when we are really not unless we do change the procedures that are applicable.

CHAIRMAN KNOX: Which four courts have that program?

JUSTICE THOMPSON: Municipal and Superior Courts in Fresno County and Municipal and Superior Courts in Los Angeles County.

CHAIRMAN KNOX: I remember my county was offered it and turned it down.

JUSTICE THOMPSON: In my mind, also, still short-range, arbitration looks promising. If I were dictator, I would raise the limits. So long as there is the potential of a trial de novo before a jury, I don't see that anyone is particularly hurt by it except by the cost of the arbitration itself, and that could be covered. And I would agree by changing the sanctions applicable against the party who demands a trial de novo and does not substantially improve his position. The Citizens' Commission Report recommends two other devices that I think are to a degree related. Both of which Mr. Hobart opposes. Parenthetically, I might add that I went from being Appellate Judge of the Year to needing a food taster at all California Trial Lawyers affairs after American Motorcycle. Irrespective of that, bifurcation of the issues of liability and damages seems to promise a substantial savings in the

time to litigate most cases--substantial, like you might pick up one-half to 1%, maybe a little better, of the total system. The reason for that statement is not pulled from the air; it develops from the few experiments that have been conducted, one in California, others elsewhere, that indicate two things. The obvious, that if there is a defense verdict, there is no reason to take testimony, to spend lawyer, court, client time on the issue of damages. Probably more significantly, the experiments indicate that where there is a determination of liability the damage issue settles in over three-quarters of the cases so that damages are tried only in a small fraction of the total litigation process. Particularly in the tort area where damages are the function of expert testimony, it at least takes a doctor to talk about the degree of permanent disability. It may require an economist to testify to future economic loss. There will be a substantial savings in the litigation process by not determining those issues of damage once liability is determined. Related to that issue is another which is typical of something else that Winslow Christian mentioned. That is, we are dealing with trade-offs. Every time we say do something, we say there is a matter of giving up something else. And here the trade-off is substantial. This suggestion is that punitive damages, which are in the last analysis penal in character, be set by the judge rather than the jury as the judge would impose a penalty in a criminal offense. Now there is a logic in it. There is the trade-off that the wealth of the defendant is not available or would not then be available to the jury to influence it in determining the issue of liability or of non-punitive damages. But there is another

plus. A large part of the pre-trial discovery process involved where there is a claim of punitive damages deals with discovery of the wealth of the defendant. Those of us who have sat in law and motion courts know the extent to which defendants resist it and the extent to which plaintiffs pursue it. By having the judge set punitive damages, the discovery issue can be deferred until after the jury has found the necessary factual predicate, the unconscionable conduct, malice or the like, for assessing punitive damages in the first place. I would suggest also...

CHAIRMAN KNOX: You mean the jury finds that there is a cause for punitive damage, they just don't set the amount?

JUSTICE THOMPSON: Right. The same way that the jury would find the defendant is guilty in a criminal case.

CHAIRMAN KNOX: The jury is finding two things; one, liability and the other, the unconscionable.

JUSTICE THOMPSON: The only difference from the present process would be that the judge would set the amount. The evidence that was relevant to the amount would go to the judge and not to the jury.

CHAIRMAN KNOX: Of course, there are a lot of subtle issues there. If the defendant's name is Rockefeller, you know the jury, even on the finding of fact, might well say, what the heck, the guy can pay the money so we will find this.

JUSTICE THOMPSON: No question about this. General Motors is the same thing. The difference only is that nobody will have gone through the pre-trial skirmishing, prior to the issue of liability, of what is the balance sheet, P & L, and the like, of

the defendant. And you will only go through that if there is a finding of the factual predicate for setting the amount. The probable cause hearing is also suggested in the Citizens' Commission Report to which Mr. Hobart objected. I would advance to you, and I think Mr. Hobart's objection may be on the basis of not fully comprehending what the process involves, and I suspect that in turn is a function of the Report of the Citizens' Commission not being all that clear on the subject. The probable cause hearing that is recommended is related to fee shifting. There keeps surfacing a concept that if we can make the losing party pay the fees of the winner, including attorney's fees, that there would be a lot less litigation. There would be early settlements. There are all sorts of objections to fee shifting and such. It is an absolute. You can deny somebody access to the court, just simply the threat of it. What the probable cause hearing is designed to do is to say early on in the proceeding and the Citizens' Commission recommends 90 days after the case at issue. There is nothing magic about that. There is a hearing before a judge that looks an awful lot like what we would now call a mandatory settlement conference. That judge, based on that hearing, says to the defendant, we don't think you should defend beyond a certain amount. You should pay it. Or to the plaintiff, you should not ask for more than x amount. If the case, nevertheless, proceeds to trial and the parties do not better that position, that becomes presumptive under the Citizens' Commission recommendation, that the cause of action was either pursued or defended without good cause, and in that event, the court would be empowered to shift fees. This is one device of

using fee shifting on a limited basis, but triggered by, in effect, an early hearing on what appears to be the merits of the case. It is not an absolute. If something happens after the hearing that changes the situation, there might very well show good cause to reject what the judge suggested, but it is one mechanism. I would suggest to you also that one of these days, and I hope soon, we have to approach the problem of the professional expert witness, both from the standpoint of fairness of the trial process, and from the standpoint of conservation of resources of the justice system. Remember that expert testimony is admissible in the first instance, only if laymen are deemed incapable of making the particular determination without expert help. The system developed in common law in the context of persons who had an expertise in a particular field occasionally testifying based upon that expertise. In our free enterprise system that particular common law concept has changed so that the best expert witnesses are professional expert witnesses. There are medical experts that you would not let treat your dog, but they sure come across to a judge or jury. There are experts on the valuation of property whose opinion you would never seek if you were buying or selling, but they come across very well. I think there are probably two potential solutions to the problem, neither one of which is by any means perfect, and both of which have their own set of problems. One is the expansion of the power of the court to appoint its neutral expert, particularly a power to finance that appointment, with the jury to be informed that that expert is court-appointed while the others are compensated by the parties that have called them. Up to now the courts have had

the power to appoint experts, but they have not had the power to pay them except in the criminal area. In the civil area, the court might assess the expert witness fee as a cost to the losing party. But if the losing party is insolvent, the judge has appointed an expert who is no longer a friend. A simple method of financing would make that feasible. The other is more drastic. It accepts the proposition that the court or jury is not the only vehicle for resolving a dispute over facts. Many countries in the world get by without much of a court system by using other means of dispute resolution. That model contemplates in this instance that the issue to which the expert testimony is relevant be determined by a board of commissioners, or a single commissioner, appointed by the court. If there were a dispute among neurologists who were experts on two sides of the case, not necessarily that another neurologist make the decision, but a good general practitioner is probably more capable of making that determination than is a judge or jury. If that were the case, that issue would be split off. The judge or jury would simply be informed as to how that issue had been determined. Depending on the constitutional problem, the information is either binding or not binding. There isn't still another model for that in the court system. The federal courts have a rule which I think is 77A that permits the judge to use that device in eminent domain proceedings. Well, the rule had tremendous resistance at one point. It resisted me all the way to the Supreme Court on one case I litigated. Nevertheless, it now has wide acceptance, it seems to be working, and seems greatly to simplify the process with all sides to it quite happy with the operation.

CHAIRMAN KNOX: In other words, you have testimony from the defense expert and the plaintiff expert and then that testimony is evaluated by an expert appointed by the court and the decision is made.

JUSTICE THOMPSON: Under Rule 77A, the testimony is recorded, it is evaluated by the court or by the expert who makes a recommendation. A recommendation is not binding. It's like a master. And then the report of his proceedings becomes available to the trier of fact.

CHAIRMAN KNOX: I see.

JUSTICE THOMPSON: As I say, it seems to work. Now turning away for the moment from the tort system as such, but looking at the devices to find some more time, short-range, in the system, there seems to be quite a bit we can do with jury selection. Again, the trade-offs are enormous. I'm not saying it as a matter of policy we should do it. I'm saying that this is something that can be done. The federal judges conduct a voir dire of the jury. If it takes a federal judge more than half a day to select a jury, he's just not functioning as other federal judges do. It can take a state judge two, three days, a week, two weeks, simply to impanel a jury. Short of the federal system of voir dire, there are other devices which I think have promise. They don't pick up as much time, but they pick up some. A lot of the questions that are asked on voir dire could be asked on a jury questionnaire, certainly a lot of the statistical information. Some of that statistical information will disclose jurors who will be the subject of a preemptory challenge, possibly a challenge for cause, irrespective

of anything else. We could engraft on the California system, the system that is used in other states in lieu of voir dire which is called "jury striking" where the panel is given a counsel. Counsel are permitted and pretty well encouraged to strike from the list people to whom they have an objection based upon what we would call a preemptory challenge. I know of no state that combines the striking system with the preemptory, but I know of no reason why it could not be combined in the sense that the statistical information, however expanded from the jury questionnaire, could be given to counsel. They would then be permitted to strike those obvious jurors that should be stricken and then left with a number of preemptories that were not related to their striking. How that would work in practice is a function of how much good faith there is in the bar.

CHAIRMAN KNOX: Mr. McVittie.

ASSEMBLYMAN McVITTIE: Doesn't Arizona have the modified system there where the attorneys do pick and strike to the various...

JUSTICE THOMPSON: I think Arizona has it. I ran across it in Alabama when we were looking at a constitutional case on preemptories in California, and the U.S. Supreme Court case dealt with the Alabama system. But that particular case, the name now escapes me, mentioned several other states. I think Arizona was one of them. There are other areas I think that we can talk about. I don't know if they're within the scope of this Committee or not. There are two sets of problems in the efficiency of this system. One is the way it operates when a judge can get his hands on the case. I guess there's a third one I should mention first, and

that is the diligence of judges. But assuming the diligent judge, there are two categories of problems. One, what happens after the judge can get at the case? And secondly, a whole flock of problems that preclude a judge from getting at a case at a particular time. A great number of things must mesh before the judge can operate. Lawyers for both sides have to be present. In the criminal field, in most instances, virtually all, the defendant must be present. This is fine and necessary if we're dealing with contested issues of fact particularly. But there may be much better ways to do it in routine matters. Going back to my own experience sitting in a criminal court, I suspect things have improved. With what I hear, not that much. I would spend a great deal of my time and my fellow judges in the criminal courts would spend an equal amount at least waiting for defendants to be transported from the jail so we could hear a motion for continuance that was going to be uncontested where we would conduct an arraignment. We would spend more time waiting on a lawyer because private defense counsel and even the public defenders to a great extent were often required to be in more than one court at the same time. They have a pretty good caseload. So we have to wait for a lawyer. In the big counties, Los Angeles being the classic, one court might be 20 miles away. It could very easily be 5 or 10. No reason, I would suggest to you, that physical presence is required if electronic presence is possible. This isn't even my idea. It was developed in Santa Barbara County where the courts are almost a hundred miles apart, and where there a simple speaker phone arrangement was used with a private means of communication between lawyer and client in criminal cases. And

the necessary motion was heard by way of telephone. If we wanted to spend the money to put in a closed TV circuit on this kind of a system, we'd probably pick up the capital cost in a matter of a year or two, simply in the savings of time. We can expand it in the civil area in many ways. We now have a trial setting conference. Lawyers have to come down to a courtroom and a judge often has to wait until they get there and while he's waiting he can't do anything because as sure as heck the minute he starts on something else, they're there. I don't know why we couldn't do trial setting conferences by conference telephone calls. So there's merit in that field. And then finally, and again this is totally outside the scope of this committee, but I suspect it picks up a lot of court time, we have failed to recognize in our system that to a large degree family law controversies are no longer legal. They're accounting problems. Fault is not a factor. What we are concerned about is dividing community property equally and deciding who gets the TV set and who gets the hi-fi. And in the more complex cases, reading financial statements of businesses to see what they're worth. Judges are not particularly good at that kind of thing. Court employed accountants cost less and I suspect would do a much better job. So what we'd be doing in that kind of an area is taking judicial personnel who are now spending the time doing something they don't do too well, and using them in the criminal system and in the tort system or wherever they do have that degree of ability and expertise. It's a concept of using parajudges in a particular area. Since the family law area, Ralph Gampell tells me, takes something like 13% to 14% of judicial time, if this device made a 10% or 20%

bulge in that, it would make a substantial bulge in the entire system. That's the end of everything I know. (Laughter)

CHAIRMAN KNOX: I doubt that, Justice Thompson. I don't think that's the case. Yes, Mr. McVittie.

ASSEMBLYMAN McVITTIE: Yes, Justice, I can see where use of accountants and other paralegals would help in terms of resolution of custody issues in all the domestic area, but in terms of the ultimate decision to be made, isn't the purpose of the court system to allow somebody to come in, an independent person with the judicial training, to make that ultimate decision?

JUSTICE THOMPSON: I don't think this is that different from what we do in other areas. I would not suggest to you that the accountant commissioners finding be determinative. I would suggest that it would be like the finding of any other referee in an equitable action so that the parties could attack it. But the facts of life are, I suspect, that that attack would occur in only a very small proportion of the cases.

ASSEMBLYMAN McVITTIE: But right now, isn't the court empowered to appoint an accountant referee? It seems to me in my experience that judges have done this in the past.

JUSTICE THOMPSON: They have the power. The problem is that you have to go outside to get them.

ASSEMBLYMAN McVITTIE: I see. Outside funds.

JUSTICE THOMPSON: And you have the same problem. How do you pay them?

ASSEMBLYMAN McVITTIE: Sure.

CHAIRMAN KNOX: Any further questions? Thank you very

much, Bob. I appreciate your being here. It's the intention of the Committee to recess for lunch at twelve and return about an hour and a half later. We'll try to hear Mr. Hassard, however. Mr. Howard Hassard.

MR. HOWARD HASSARD: Between Justice Christian and Justice Thompson, there isn't much left for the witnesses. Obviously they are both well-prepared and excellent. For the members of the Committee who may not know me, I'm a lawyer. Our law firm represents the California Medical Association. My firm and its predecessors have represented the California Medical Association since 1917, so that I think that we have some experience at least in that portion of tort law that deals with medical professional liability. In addition, our firm represents various construction concerns, and we have considerable experience in that facet of tort law. Your Committee has received, I assume, copies of the Report of the California Citizens' Commission on Tort Reform of which Justice Thompson was a member. I can say that on behalf of the California Medical Association, it has officially supported those recommendations relating to tort law reform that are mentioned in the Chairman's opening statement today as well as some of the others. I guess we are all the products of our own experience, and so I have comments that I would like to submit to the Committee with respect to some, not all, of the many, many issues that are before you.

First of all, with respect to the use of arbitration in the judicial proceedings, it was mentioned this morning -- and in my experience it's very, very true -- that trial lawyers, both those who normally represent plaintiffs and those who normally represent

defendants, are very comfortable in the existing environment, and they tend to resist any change of any kind. I think there is a great need for the concepts both of contractual arbitration, a la the AB 1XX approach, and the concept of arbitration as a process in cases that have been commenced. It needs to be given a great deal more publicity and more explanation amongst the legal profession than it has to date. One device that occurred to me that I would suggest is worth consideration, would be that if you agree with the recommendation that there should be an early conference after a case has been filed with the judge to find out whether the case has any particular merit or not, that there should be a routine arbitration offer from the court to the litigants automatically, and not wait for the lawyer to find out that there is an arbitration proceeding. I also have a question of why the low limits. In view of the fact that either party can demand a trial de novo and get a jury trial, the arbitration process doesn't seem to me to be all that earth-shaking to either party, and I don't see why it can't be utilized in cases of more significance than the present low limit of $7,500, or even the proposed $10,000, or even the proposed $15,000.

CHAIRMAN KNOX: Mr. Wilson.

SENATOR WILSON: I thought that historically the California Medical Association opposed arbitration.

MR. HASSARD: Opposed?

SENATOR WILSON: Yes.

MR. HASSARD: No, the reverse.

SENATOR WILSON: Well, I thought the argument was made

that many cases now that attorneys are unwilling to take because they would take too long and because the final settlement would not be very large are not taken at all. But if you had arbitration where you could get into court in a matter of weeks and have the matter resolved, that many of these cases against doctors where there might be negligence but there isn't extensive damages that are now not going to trial would in fact be heard in the arbitration.

MR. HASSARD: Number one, that argument may have been made, but to the best of my knowledge, not by the California Medical Association. It may have been made by a physician for that matter, because there are 25,000 independent thinkers in the CMA. But the California Medical Association is sponsoring arbitration on a contractual basis, and I don't see how we could be in favor of arbitration on a contractual basis and...

CHAIRMAN KNOX: We've asked for a Legislative Counsel Opinion of the standard contract to see whether or not...

SENATOR WILSON: I guess that's why Keene took it out of his bill.

CHAIRMAN KNOX: No, it's in the bill. Well, my recollection is that doctors generally were all for it. Of course, during the so-called crisis there were about 6 different groups of doctors up here besides the CMA, and they didn't all agree on what should be done.

MR. HASSARD: There are arbitration provisions in AB 1XX and there are contractual arbitration projects in the state. And I might mention one thing. The Sacramento area is about to launch

on the basis of all of the hospitals in the area, and the physicians on the medical staffs of the hospital, a contractual arbitration project. I will furnish the Committee with copies of it. So as legislators in the Sacramento area, you're likely to hear about it fairly soon. I might say that the California Medical Association opposes arbitration as a condition or a prerequisite of providing care.

CHAIRMAN KNOX: Mr. McVittie, you have a question.

ASSEMBLYMAN McVITTIE: Mr. Hassard, I can see where we would all want to get rid of the frivolous claims and those without merit at the earliest possible time, but it seems to me that if we're requiring early review with the court that we're depriving the claimants of their opportunity to get discovery. That is to get the basis for any negligence that may be there. It seems that so often that you'd have to take, let's say, a deposition or get other experts to prove your case. I'm just wondering if there wouldn't be prejudice to the claimants...

MR. HASSARD: I understand your question, and I accept and agree with your concern. I don't believe that the proposal intends nor should it be worded in such a fashion that it would either authorize or require a judge to make a snap decision on inadequate information. Now the discovery works both ways. Sometimes the defense doesn't really know what the plaintiff's true condition is, or what the circumstances are. So I would think that with respect to both the claimant and the defense, there should not be an interference if it is needed for a discovery to take place. I'd also concur with the thoughts that were expressed earlier this

morning, that while I don't see how anyone can argue against the concept of discovery, the way it has developed, it's really massive. It's a war of paper. In our practice, we frequently get boiler-plate interrogatories that are just yea thick and you can tell that they are machine produced and they're a waste of time and money. I don't know what the answer is that your Committee should come up with, but I do believe that there should be a streamlining of discovery. And I think the pilot projects in Fresno and Los Angeles that are going to take place as the result of the Chairman's bill may be very, very meaningful in finding out just what happens when you limit discovery considerably.

CHAIRMAN KNOX: Yes, Senator Russell.

SENATOR RUSSELL: In discovery, do you think it's fair or do you think it makes a positive contribution or a negative one to be able to go into the financial capabilities and assets of the defendants so that they're all there for the plaintiff's attorneys to review?

MR. HASSARD: Well, as was mentioned I think by Justice Thompson, that comes into play when punitive damages are sought.

SENATOR RUSSELL: At the beginning they ask for this, don't they, whether they've asked for punitive damages at the beginning or not? Don't punitive damages usually come on later?

MR. HASSARD: No. Punitive damages have to be alleged in a complaint. And, as such, the inquest part of the whole discovery process, absent requests for punitive damages, in the ordinary tort case, I can think of circumstances where the wealth of the defendant might be a fact issue that has a causal connection with the injury. But absent that, it wouldn't be relevant to the case.

SENATOR RUSSELL: Do you think it ought to be part of the standard procedure?

MR. HASSARD: No, I don't because this Committee is addressing itself to tort law as a whole. Tort law as a whole involves a variety of circumstances and a variety of claimed injuries, both injuries to persons and injuries to property. And I don't think you could have an across-the-board rule on the defendant's wealth. Other members of the Committee who are lawyers may have better ideas than I do on that one.

SENATOR RUSSELL: What would happen if a law was passed barring the divulging of that information in every case? Would that mean that if an attorney felt or if a plaintiff felt that they had a justified cause of action and there should be punitives, they would just pick a figure arbitrarily which might completely wipe the guy out, or...

MR. HASSARD: Senator, I think I have to give the same answer in the whole of tort law. I don't think you could have an absolute rule, either that the wealth is admissible or the wealth was not admissible. What if you had a claim against a real estate developer on misrepresentation on the development of property and one of the issues was whether he was selling it for 4 times what it was worth and was making himself a fortune. I can conceive where that might be a fact issue that would be essential.

CHAIRMAN KNOX: There would be a protection there. The judge can simply state that you can't ask that question because it's not relative to that proceeding. But I can see where a flat rule would be difficult to apply.

MR. HASSARD: In the area that you went through in 1975 of medical tort legislation...

CHAIRMAN KNOX: I remember that. (Laughter) It was all okay until the doctors started bringing their wives up here to lobby us, too.

MR. HASSARD: You weren't the only State Legislature that was so involved. In fact, all but 2 of the 50 states have enacted so-called tort reform. Now whether it is a reform or not may be debatable. Tort reform legislation in the area of medical professional liability. The legislative department of the American Medical Association has summarized various statutes enacted in the various states by subject matter, with the number of states that have enacted this and that type of thing. They have two brochures. They're not very long and they're quite readable and I think the information therein contained will be useful background for at least Committee staff and the Committee, and I've ordered 50 copies of each. They haven't arrived yet but they will come. One thing that interested me. Something that we did not do in California, but 27 states have enacted pretrial screening panel provisions. They vary in their format, but essentially provide really a compulsory arbitration process. The composition of the panels vary. Some Legislatures went one way and some Legislatures went another. But essentially most of them call for 3 members: a judge, someone who is not in the health field at all, and someone in the health field. But as I said, they do vary. All of them provide that there can be a trial before a jury afterwards just as our arbitration provides for de novo trial before a jury. The bulk of them,

20 out of the 27 I believe it is, say that the jury may be told of the findings of the screening panel, and 7 states do not permit the jury to know the findings of the screening panel. That apparently is the basic objection of the plaintiff's bar to the screening panel approach, that the jury should be innocent of any knowledge of what the screening panel did. So far, the courts that have considered the screening panel approach on various constitutional issues, have all held -- that's only about 3 courts -- that the screening panel approach is constitutional. It has pro and con arguments. It certainly is a device that could speed up the disposition of cases if it was properly used. And it certainly is a device that could save money of the taxpayer and of the litigants if properly used. And I suggest that it's worth pursuing by this Committee with respect to how it is functioning in other states and whether it is a worthwhile device or not. This is something that has not been previously mentioned this morning. As you all know, I'm sure, one of the problems with respect to any changes in tort law is that whatever the Legislature does, the courts ultimately have the last word. And the time lag between an act of the Legislature and its disposition in the courts can be many, many years. I just read this morning that a little known constitutional provision called Proposition 9...

CHAIRMAN KNOX: That was a very fine judge down there in L.A. (laughter) Very perceptive fellow.

MR. HASSARD: It was voted in November 1974. This is November 1977. And it was a Superior Court decision. It now has to go to the Court of Appeal and then to the Supreme Court so it

may be another 2 or 3 or 4 years before you know whether Proposition 9...

CHAIRMAN KNOX: Well, I have a view in the tort field that not even the courts have the final word. It's the casualty underwriters. I mean they don't have to pay any attention to it.

MR. HASSARD: They can have the final word in certain aspects, it may not all be true, but generally the courts... There is one state, and that's Massachusetts, that permits the Supreme Court of the state to give advisory opinions. As a net result, new legislative enactments in Massachusetts can be tested quickly. Query: should we think about giving the California Supreme Court the power to issue an advisory opinion, power it does not now have?

CHAIRMAN KNOX: Well, we have declaratory judgement actions.

MR. HASSARD: Well, they have the power to decide the issue. The only question is, when would they have the power to decide the issue?

CHAIRMAN KNOX: Well, they'd have to wait for a case of controversy. We filed a writ on this AB 1XX.

MR. HASSARD: Yes, our office has written a brief in support of the members of the Legislature and the Attorney General who commenced that action.

CHAIRMAN KNOX: Senator Wilson, do you have another question?

SENATOR WILSON: In Massachusetts, where the Supreme Court can give an advisory opinion, can you have the situation where the advisory opinion is given, but then the litigation of the question

takes place. While that's taking place, even though there's been an advisory opinion, the insurance underwriters do not factor in the cost-savings that the reform may mean in premiums until the actual question has been litigated, not relying on the advisory opinion. What would happen in that situation?

MR. HASSARD: I really cannot answer that question.

CHAIRMAN KNOX: We'll take a look at that question, Bob.

MR. HASSARD: Essentially, I think that this Committee will want to, and ought to, look at just about every aspect of tort law, and it occurred to me that I have seen Massachusetts' advisory opinions. There was one just recently on one aspect of the Massachusetts medical professional liability statute. I have seen them on others. I know they had one on no-fault automobile insurance when it went into effect and I'm not an expert on Massachusetts. I'm only suggesting that it is an item that I think warrants a look see.

CHAIRMAN KNOX: Yes, Mr. Hayden.

ASSEMBLYMAN HAYDEN: I don't quite understand at what point the advisory opinions are given. Is it at some point in the legislative process or is it anytime in the legislative process?

MR. HASSARD: And also it can be after litigation has started. The trial judge can certify a question to the Supreme Court right at the outset of the case, but it is also my understanding that under the advisory opinion route the Legislature can itself take advantage. I am not prepared to answer specific questions on the Massachusetts' advisory opinion because I only thought of it this morning during the course of Justice Thompson's presentation.

ASSEMBLYMAN HAYDEN: But it's as far as you are aware at any point from the time a measure might be introduced into the Massachusetts Legislature?

MR. HASSARD: I'm not sure of that and I will find out and respond to the Committee to your question.

ASSEMBLYMAN HAYDEN: All right. Very good. Thank you.

MR. HASSARD: One other point that was brought up by Justice Thompson that I'd like to underscore. That is the matter of selection of jurors. Earlier this year by virtue of change in the eligibility of people to be jurors, I was on the jury panel in San Francisco for several months. Twice, fifty of us sat for an entire day in an empty courtroom and at the end of the day the lawyers emerged, put their papers in their briefcases and rushed out without looking at us. Then the judge came out and spent about 15 minutes carefully and patiently and very thoughtfully explaining to us what had happened. In each instance what had happened was that a month before there had been a mandatory settlement conference under the requirements that now exist for that it could happen. That at the mandatory settlement conference both sides were intransigent. Nothing happened. But then when the jury panel was brought into the courtroom and lawyers on both sides were faced with the necessity of interrogating prospective jurors, they both decided they wanted to talk settlement and so back to the judge's chambers they went and they spent all day going back and forth and finally settling each case about 3:45 in the afternoon. Fifty people sat there for a whole day. I'm only using that by way of illustration. I thoroughly agree that there ought to be computerized data on

jurors. Jurors should fill out questionnaires. All of the material that could be needed regarding jurors should be obtained at the outset. I like the idea of the strike jury system proposed in other states. It seems to me that our jury process is geared to the horse and buggy and that it's a waste of both time and money under the present setup and it certainly could be modernized to the advantage of everyone without doing anything to jeopardize the right to a jury trial. Earlier this morning the periodic payment provisions of AB 1XX were criticized. I can tell you that in the last year or so in California there have been several what we call structured settlements that were negotiated between parties involving the purchase of annuities and the lifetime care of the injured patient and compensation to the plaintiff's lawyer that gave the plaintiff security and everything that he or she would have obtained from a long drawn out trial at about one fourth the total cost. I think it is a shame that injured people are given a monetary award, money turned over to them, and then they are turned loose by society. We all must know that the management of money isn't easy. It isn't something that everybody can do, that it is much easier to lose money than it is to earn it and just because a person is severely injured doesn't mean that individual or his or her relatives have any ability to handle a large lump sum. I have some personal experience in this regard. I know of a couple of instances where fortunes were just taken away from gullible people who had been given large awards. I would like to see a study made of some cases at random where there have been large lump sum awards to severely injured people and the money just given to them, and see what has

happened to it. I think that such a study would demonstrate the real need for some kind of custody care for the welfare of people who are severely injured and permanently injured.

CHAIRMAN KNOX: On the periodic payment you mentioned the possibility of inflationary adjustments built into the...

MR. HASSARD: Yes, that is right. It has to be. We call it the structured system. If the structured system is going to work, it has to be fair. If it isn't fair, it won't last very long. And to be fair, it must take into account the possibility that the needs of five years from now will be different than the needs of today.

CHAIRMAN KNOX: I'm fortunately very sympathetic with the periodic payments thing. Our office just settled a couple of fairly substantial cases involving minors where we agreed on a periodic payment approach and felt much more secure about the minors getting the value of their money over the years.

MR. HASSARD: Mr. Chairman, it's 12:15.

CHAIRMAN KNOX: Well, thank you very much. We appreciate your attendance. We'll recess the hearing at this time and return in about an hour and a half from now and then complete the testimony.

RECESS

CHAIRMAN KNOX: Our first witness this afternoon is Judge Dennis Adams of the Municipal Court in El Cajon. Judge Adams.

JUDGE G. DENNIS ADAMS: Good afternoon. Mr. Chairman, ladies and gentlemen, I would like to say I appreciate very much this opportunity to come here and talk to you gentlemen today.

Mr. Hobart was talking about the jury selection process

and then Senator Russell brought up the point that it really is your point of view. I grew up in the federal court and had quite a bit of trial experience in the federal court and the ten years or so I was there I couldn't imagine a more unfair system to pick a jury than you had in federal court. I've been on the bench now for about two years and I'm beginning to see the wisdom in the method. It really comes down to your question of point of view. One of the other people was talking about a stipulation for a six-man jury and that you can stipulate to a six-man jury. I've been conducting an experiment in our area relative to this and you know it seems like one day I can get a defense counsel to agree on a six-man jury and the prosecutor doesn't want one or vice versa. Very rarely can I get them both to agree on six-man juries.

CHAIRMAN KNOX: What do you think about six-man juries?

JUDGE ADAMS: I've tried three cases with six-man juries in federal courts. I had two acquittals and one conviction. I think they are great. I think...

CHAIRMAN KNOX: You were defense or...

JUDGE ADAMS: I was a defense attorney in three criminal cases where the judge conned me into stipulating to the six-man jury and I liked it. I liked it in the sense I felt much more at ease and much more comfortable with that size jury and I had fairly good results with it. I was reading some interesting statistics the other day where in areas where they have had six-man juries it seems that the percentage of convictions increases a half or three quarters of a percentage point if you look at the overall picture. You're going to run into a great deal of resistance on the defense

level I think because of the statistical likelihood of an increased conviction rate.

CHAIRMAN KNOX: You think that slops over to the civil area as well as far as...

JUDGE ADAMS: No, no I don't think it has any relation frankly. I would think a six-man jury in a civil case would be a godsend frankly. What we do to jurors in this system, the amount of time we waste, that they waste having to wait for the court system to catch up with them is just incredible and Mr. Hassard's comments are not unusual in this state. We do it. Like in our area, we have five judges and we really watch the calendar very closely to try to keep the jurors' waste of time at a minimum. And it's generally misdemeanor criminal trials in the morning and we run the calendar pretty close the day before so we know what's going that day, but nothing in the world is going to prevent a defendant from coming in and telling his counsel that he wants to change his mind and wants to plead guilty that morning. Five out of six times, one time out of six, we'll have a jury in there on a given day when we've had certain cases that assured us that we're going to go and nothing goes and you've got to go out and apologize to juries. Sometimes it just doesn't happen until you see the whites of their eyes and it's the same problem with settlements. You know there was a story one time of a gentleman who was an attorney, like most of us, and he died and he went to heaven and as he got to heaven he found out that he could still practice law and he opened up his law office. As he opened up his law office his first client came in and the man had a whiplash injury and he indicated that he would

take the case. He drew up the complaint and he took it down to the clerk's office he filed it and he asked the clerk for a trial date and the clerk said, well, we're awfully busy up here and we really just don't have the courts available and I can't give you a trial date for six months, but you come back then and I'll give you a trial date. Well, he came back in six months and he went to the same clerk and he asked for a trial date and the clerk said well, I was awfully optimistic. We've just been so busy I can't give you a trial date. And he says well, this is an awful way to do business. The clerk up there was upset and he said well, if you don't like the way we're doing business, why don't you go try the other place? And he said okay, I will. So he goes down to the other place and he goes to the clerk and he says Mr. Clerk, I've got a whiplash injury and I need a trial court. And the clerk goes down the calendar and he says well sure, Department 4 is available. Why don't you just go right down? And he says well that is amazing. How can this be? And the clerk says well, that's very simple. He says most of the judges are with our court. I got involved very heavily last year with what Senator Beverly called Bob's dog bill, SB 1134 and...

CHAIRMAN KNOX: Please don't say that. He finally got me to vote for it.

JUDGE ADAMS: Okay, excuse me. I didn't mean to disclose it, but I got quite involved with that bill and quite involved with the question of unification. When I was a lawyer I had never gotten into the debate and as a judge it took me about a year and a half

to come out of my cocoon so I could have the time to see the forest for the trees. I got into it with AB 1134 and you know the point that this story seems to me to bring out is that the single most overriding problem...

CHAIRMAN KNOX: Judge, you should explain what the bill was because I'm not sure everybody on the Committee knows. While you're explaining it I want to introduce a new member of the Committee who has just arrived. The Chairman of the Finance and Insurance Committee, Assemblyman Alister McAlister is here also.

JUDGE ADAMS: AB 1134 is an experimental bill and it applies only to the El Cajon Municipal Court. It's of five years duration. The bill has a criminal jurisdiction limit in the municipal court of all criminal matters except where death or life imprisonment are involved and all civil matters up to $30,000. It's a limited experimental bill for a five year period relating only to that jurisdiction. But as I was saying one of the points that this little story brings out is that the single most overriding problem in the area of court reform is the inability of the tort case to get to trial. There are long delays in our courts, our superior courts. And secondly, you know a lot of the people that have solutions from the judiciary don't always have the most altruistic motives. As a practical matter, if I as a judge were asked to decide a question that would affect the day-to-day routine of my life for the rest of my working life, I'd have to disqualify myself for conflict of interest. I mean I just couldn't hear the case and that's what we are talking about in the judiciary when we're talking about unification because I think in a rather

fundamental sense that any unification is going to affect many of us, the daily routine of many of us, for the rest of our lives. In anticipation of AB 1134 and the effective date, January 1st of next year, on September 1st the Chief Justice appointed the five judges in El Cajon, acting Superior Court judges, and we have been hearing all felony matters as if AB 1134 were in effect since September 1st and the experience we've had there has really been rather interesting. Some very interesting things have been happening and some of the suspicions that we've had about these matters have been confirmed. Now all the cases under AB 1134 and under the criminal experiment that we've been trying so far are there only with the consent of all the parties. That's the consent of the district attorney and the consent of the judge. If the judge for some reason doesn't want it to stay there, he just sends it downtown as if he always -- as all felonies were treated that were bound over.

CHAIRMAN KNOX: Why does it have to be by consent?

JUDGE ADAMS: Well, it does not. But the problem is, as we were drafting this bill, I was absolutely frankly amazed about the amount of opposition that came out of the woodwork on this thing. And in attempting to mollify to some extent, we put this consent aspect in it so if you really didn't want to be there, you could go downtown. But even under this type of procedure, the cases since September 1st, 66% of the felony cases that have come up before us have remained in El Cajon and you know in the preliminary hearing area in our court and in most courts of the larger areas you have a bifurcated structure. You have different defense

lawyers, different defenders at the Municipal Court level and different defenders at the Superior Court level. You have different prosecutors at the defense level or at the Municipal Court level and different prosecutors at the Superior Court level. Well, in effect you have different judges, so what AB 1134 did was to do away with this bifurcated system and allow a criminal defendant that's going through the system to be confronted at a very early date with a judge who has ultimate authority to sentence the case. And we've found that a lot of cases, and I must stress that the experience that we've had since September 1st could not be said to be definitive, but a lot of things are happening there that I've never seen happen in this system. We have felony dispositions at a very, very early date in the proceedings that as a practical matter, when you were talking about a felony disposition, you would have to, before AB 1134, go through an arraignment in the Municipal Court, a preliminary hearing, a bind over, an arraignment in the Superior Court and a readiness conference.

CHAIRMAN KNOX: Plus all the motions?

JUDGE ADAMS: Plus anything else you want to throw in to get it but, I mean if it was just a question of throwing yourself on the mercy of everybody and trying to get the best deal you could, you were literally talking ninety days at a minimum before you could get down to where you had a judge who was going to sentence, a district attorney who was really in charge of the case and a defender who was in charge of the case and had some idea of what he wanted to do.

CHAIRMAN KNOX: And how is this going to affect the civil situation?

JUDGE ADAMS: Well, when we have done this in El Cajon, we found, Chairman Knox, that if you project the Judicial Council weighted points over a year in terms of the cases that we've been able to hold back for the last two and a half months, that it amounts to about 100,000 weighted case points and what you're talking about -- that's weighted case points by the Judicial Council -- is us being able to handle these things and integrate them in our system and settling out at a much earlier date. It's just a feeling, but a lot of things that used to go to preliminary hearings are not going. They are disposing. And so it's cutting down our time there and what it amounts to is it looks now, the feeling is that we're able to handle this load without any difficulty and what it amounts to down in the Superior Court as weighted by the Judicial Council is about a judge and a half. A judge and a half in the Superior Court. What the bottom line is and what the tentative conclusions indicate is that this procedure with five judges in the Municipal Court has been able to save one and a half judge's time in the Superior Court in downtown San Diego. It seems to me that if it can work here, and if you would project it over the whole Municipal Court system of San Diego County, what you're talking about is an eleven Superior Court judge saving and it seems to me this could have substantial impact on the civil calendar. The problem is the vast civil backlog in San Diego, San Francisco and LA and many of the other counties and it seems to me that this is the kind of procedure that could free up a lot of upper court judges to handle the matter.

CHAIRMAN KNOX: What's been the attitude of the Superior judges towards the thing? If you'd care to characterize it.

JUDGE ADAMS: Well, to say that they oppose AB 1134 violently would be an understatement.

CHAIRMAN KNOX: Oh, really.

JUDGE ADAMS: I was amazed frankly at how emotional the brothers of the upper branch were about this and then you know I tried to look at it from their point of view. Well, how would I feel if the Commissioner came up and said he could be a real judge. That wouldn't bother me but it seems to me it bothers them. But once the bill had passed and once the writing was on the wall they induced the Chief Justice to appoint us this way and we've been conducting this experiment. I don't know what the real reaction is. They really are not talking to me on a regular basis but...

CHAIRMAN KNOX: We don't expect to see them all at Senator Wilson's testimonial dinner shortly either.

JUDGE ADAMS: They aren't his biggest fans. So one of the things that we tried to do with AB 1134 was to set a civil limit that was more realistic. Now we have no idea how this $30,000 limit is going to work. Under this experiment from September 1st, today is the first day that we're accepting domestic relations filings out in the El Cajon court and the estimates of what's going to happen there, God only knows. It's still the same kind of consent procedure. You can go downtown if you want to, but if the court's handy and you want to use it, come on and we'll fit as much as we can within our calendar limitations and whatever we can't fit we'll send back downtown. We're going to make a bona fide effort to be of use as a Superior Court to a lot of the lawyers and a lot of the cases coming out of the El Cajon area. The question

with the civil limit, you know I was not a big time civil lawyer. I had a practice with my father and two other lawyers for about ten years and we had a lot of poor clients and it was 50% criminal practice and a lot of poor civil clients and did not specialize. I was a general practitioner, but I had over the ten year period quite a number of smaller PI cases and it always seemed to me at that juncture that it was a particular catastrophe in terms of the delay that you had to wait. I mean if you have a case that's worth a million dollars and you really think you have a case, then you can wait on that kind of case because the carrot at the end of the trial is worth it. But when you're talking about the person with a $17,000 or a $25,000 or a $45,000 whiplash, you're looking at a dog fight down the road and you're looking at two and a half years delay. It would almost seem to me that trying to settle these types of cases with that kind of delay built in, you really weren't making fair settlements on those cases because of the delay. For instance, now in El Cajon you can get a civil trial to trial in sixty days. Now we're not going to be able to keep that up with what we expect to happen here, but we're hoping we can keep it at four months so if you have one of these smaller cases that comes within the limit of the $30,000 jurisdiction you can file it and we can give you a real trial date where you can get your case in front of a jury within four months. We think that this will be the whites of their eyes situation and there will be a real trial date and a lot of these littler cases can come through our system and be disposed of or settled or tried and gotten out of the way much more quickly. We hope that's the case. This question of AB 1134 and

how it fits into the situation kind of leads inevitably to the question of unification. I think that the question of unification of the courts is really amongst the brethren of the upper and lower benches. Really a kind of hopeless division of opinion. I really think it's unrealistic where self-interest is so close at hand to expect a solution as the Governor has been stating he wants to come out of the judiciary. I just don't really feel that it is a realistic approach to the problem. I quite frankly think it's going to have to come out of you gentlemen and you're going to have to put our rear ends to the flame because we can't agree on it and I think it's unreasonable to expect us to agree where it hits so close to home. I really do. I think the majority, and I'm speaking generally here now because there are a lot of exceptions, but the majority of the Superior Court judges oppose unification and it's done largely for prestige reasons. Polls have been conducted of their attitudes toward what matters are heard by the Municipal Court. They don't want to hear lower court matters. They think that the lower court matters that are handled in Municipal Court are demeaning and a waste of their judicial expertise. I really think that it is unfortunate and to the extent that that is a real attitude amongst the Superior Court, they've become really an elitist group to whom the common and ordinary problems of the citizenry of this state are demeaning and wasteful of their expertise and I just think that's very unfortunate. You know the Municipal Court judges look to unification of the pay raise. They look at it as a way to get out of this dilemma. The why can't I ever get appointed to the Superior Court dilemma that every Municipal Court

judge runs into in this state. No matter what they say, that kind of sits in the background. But they look at it too as a way to get out many of the job frustrations that you have as a Municipal Court judge. Any Municipal Court judge in this state will tell you that there's just a lot of wasted duplicated effort in the system as it now exists. You know it's clear, gentlemen, that in terms of numbers of people that come before the Municipal Court that there are ten times as many citizens of the State of California that come before the Municipal Court as do the Superior Court and to a very large extent the perceptions of the citizens of the State of California of what justice is and what justice does is determined by what's done in the Municipal Court. What's been created here amongst the Municipal Court judges , and most of the Municipal Court judges would not admit it and this is only my personal opinion, but there is a Municipal Court inferiority complex that permeates the whole system whether it's admitted or not admitted and I think it can be fairly asked that a system that has created this type of atmosphere where the party who comes there doesn't really feel that he is before a real judge and this inferiority complex amongst the judges is in the best interests of anybody including the brethren of the upper branch.

In listening to the statements that were made here today and the various things that were talked about, I couldn't help but feel that much of the problems in the Judiciary here is this question of unification. What you are really talking about is, if you don't get to that and you don't solve it in some manner, you are just putting bandaids on those things. It was John J. who

said in 1790 that other than doing justice in the administration of justice, you ought to satisfy the public. And I really question if the system is doing that as a whole. You have over a thousand judges here in the state, and to try to manage this class of largely unmanageable people that are all individualists to a very large degree, very opinionated people, very strong people generally speaking, I think is largely a forlorn path. People with real managerial ability do not as a rule come out of the lawyer class. They're just not managers. When they do, you end up in a situation where the presiding judge is elected by the majority of his brothers. That is a very gentlemanly and delicate situation, and you really are not in a situation to do a lot of the things that could very easily be done if you had some strong central authority to manage the group of judges.

CHAIRMAN KNOX: Has the Judicial Council been of assistance in helping you with getting ready for AB 1134?

JUDGE ADAMS: Yes, very much so. They opposed it, but once it was passed they were very helpful to us. Mr. Gampell and the Chief Justice have been very helpful, and a number of the Superior Court judges have been very, very helpful, especially in the Domestic Relations area. We have had conferences with them and the clerical staff. I think that the question of unification has really been studied a lot. It has been studied to death. And I think an ideal unification would be that that the Colby Commission recommended in 1975, and out of the Colby came the old SB 1500 which died in the Senate. But the problem, I think, and the great failure of the Colby Commission was to try to sit down and analyze the various

elements of the Judiciary in an attempt to determine what their opposition would be in these things. If you will just bear with me for a few moments, I have had an opportunity to think a few of these things out to my own satisfaction, and I would just like to present them to you. I think that the political opposition of the Superior Court to unification is such that realistically you are never going to get a unified bill that isn't in some manner tiered. I mean I am not a believer in tiering, but I think realistically if we don't tier it, it just isn't going to happen.

CHAIRMAN KNOX: Do you mean that some kind of jurisdictional difference is going to have to exist?

JUDGE ADAMS: Well, what happened with SB 1500 was that they tiered it as it is today, then they put it in the Constitution, then it got on the Senate Judiciary, and then went over to Senate Finance. In Senate Finance the motion was made to take the tiering out of the Constitution and create one class of judges and leave the tiering in the legislation to be tinkered with later on, if need be, and it died on that amendment. That amendment ended up 5 to 5. The bill then went down 9 to 3, but interestingly enough it was opposed by the San Diego Municipal Court, it was opposed by the L. A. Municipal Court, and it was uniformly opposed by all the Superior Courts in the state. It was the feeling of the judges that I assessed at that time that what was tried in SB 1500, just recreating the reform system papering over the old, wouldn't be worth the effort and we wouldn't want to have anything to do with.

CHAIRMAN KNOX: It was an interesting time because the Supreme Court brought up every single Superior Court judge who had

ever served in the Legislature. It was kind of a reunion and we had a chance to see all of these folks again.

JUDGE ADAMS: But I think that the approach would have to be that if you are going to tier, let's tier it in some area where there is enough flexibility between the tiers that you can equalize the workload. It seems to me that some kind of a tiering situation as envisioned and set up to 1134 might work. Then get rid of the consent process and maybe set it up to the point where all of the cases that the lower courts can handle in the way of criminal cases are being handled by the lower courts and those that can't be handled because of staff limitations be sent downtown or sent upstairs. As a practical matter, what you would be looking at in that situation is that all but the most serious and all but the most time-consuming criminal cases would stay at the Municipal Court level. And it might be inappropriate of civil jurisdiction to up to $50,000 and see how it goes, but if you could up the lower jurisdictional limits of the courts in both criminal and civil areas, it seems to me that a lot of the more mundane cases that come by on a day-to-day basis would be able to get into the system and get out of the system. A $2,500 PI case is running on the same system as a $2 million PI case, and it just doesn't make sense. I mean there is a proper place for these six-months trials. There is a proper place for these long drawn-out shows that go on in some of these personal injury cases, but in a lot of the day-to-day mundane matters the reality is, if you can get them up to a trial date where the thing is going to go, it either goes to trial or is settled. A lot of this stuff will wash out of the system it seems to us. It seems

to me that any tiering that is put in the Constitution is really a mistake. You are right back in the same situation we are here. If you have got to tier it, it ought to be tiered in formal legislation and it ought not to be tiered in the Constitution where you have to go back to the people and do it. The Legislature ought to be able to tinker with this thing and change it and get rid of it. It seems to me that what ought to be is that if you have to tier it, you are looking down the road about 10 years when tiering and all distinction between judges ought to disappear. The Superior Court judge...

CHAIRMAN KNOX: Pardon me, Senator Russell has a question.

SENATOR RUSSELL: I was wondering if you might know, Sir, or perhaps the Chairman would know. Those members of the bench who have served in Municipal Courts and are now in the Superior Court, have they ever been polled as a group and are there differences as to consolidation...

JUDGE ADAMS: As between those that never served on them?

SENATOR RUSSELL: Yes. Having seen both sides...

JUDGE ADAMS: I don't know that there was a poll. I know from personal experience talking with Superior Court judges who were once on the Municipal Court Bench, generally they are in favor of it, the ones in San Diego that I know well and have talked to. I can name five or six on the Superior Court bench down there...

SENATOR RUSSELL: They are generally in favor of consolidation.

JUDGE ADAMS: Right. Generally in favor of unification. I might state though, once they got to the Superior Court their ardor went down on the issue.

CHAIRMAN KNOX: It is sort of like Sam Rayburn's description of the seniority system. The longer you are around, the better you like it.

JUDGE ADAMS: One of the things the Superior Court feels very strongly about as a bench is the grandfathering of their function into the system, and as I have talked to various Municipal Court judges, I am amazed at the number of Municipal Court judges who feel that they ought to be grandfathered in too. Mr. Chairman, I think you were talking about the judge who didn't want to be a Superior Court judge. I know quite a few of them who don't want to be Superior Court judges. They feel that -- it was Mr. Beverly, I'm sorry. They feel that...

CHAIRMAN KNOX: I was talking about a judge in my community, a Black judge, who has been offered the Superior Court two or three times and turned it down because he felt that in his position, his situation, he could better serve his community where he was, and he turned it down. He's a very able man.

JUDGE ADAMS: That is not an uncommon sentiment, believe me. But it seems to me that if you are going to be talking about grandfathering the Superior Court, maybe you ought to talk about grandfathering the Municipal Court, and then...

CHAIRMAN KNOX: With respect to unification, one of the problems that we had during the progress of the last major bill, I guess it was SB 1500, the American Civil Liberties Union had some concerns about the right of appeal. I don't remember the details, but is there a study going on with respect to making sure that people's rights are protected...

JUDGE ADAMS: In AB 1134, what we did was we left the misdemeanor appeal process through the Superior Court as it is, and the Superior Court felony type of thing, it goes up to the 4th District.

CHAIRMAN KNOX: It just goes to a different group.

JUDGE ADAMS: That is not a solution obviously. Something has to be worked out if it is going to be systemwide, but we had the same opposition to AB 1134 and in an attempt to work it out, that's what we did.

CHAIRMAN KNOX: Mr. Gampell is here. Did you want to make any comment, Ralph, with respect to this subject? The Judge indicated that you have been very cooperative in helping them to put the thing together.

MR. RALPH GAMPELL: Mr. Chairman and ladies and gentlemen, I certainly don't want to testify other than to listen, except to say that the Judicial Council took a position of opposition to AB 1134 originally. When I took over with the Chief Justice's consent, we did what we could to help the bill to conform to constitutional parameters and over and above that, the Chief Justice has issued a blanket assignment to the Municipal Court judges of El Cajon to act with the consent of the PJ of the Muni Court and PJ of the Superior Court to act as Superior Court judges as the need arises. And I certainly would say that the AOC is watching the whole progress of the El Cajon experiment because, I think, regardless of how it is presented, it is a microcosm of what may be a pattern for court consolidation if it goes that way. Other than that, viewing with interest and not viewing with alarm, I think, is the technical term.

CHAIRMAN KNOX: Ralph was much more definitive when he was an honest lawyer, but now he is an administrator so he has to be more cautious.

MR. GAMPELL: All I can say is, Mr. Chairman, in this connection that a department of government wanted to get back some of our budget money. They began at $130,000 and we ended up at $4,000. Not recognizing that I used to be a trial lawyer, his only comment was for someone who's been a bureaucrat such a short time, you've learned damn fast.

CHAIRMAN KNOX: Thanks, Ralph.

MR. GAMPELL: The other thing, of course, was that the Council made me swear a blood oath that I wouldn't take any positions now that I work for the Council. Therefore, I cannot do it. But I must say that I have been most interested in listening to what is going on and have seen some areas which I'm sure the Committee will explore further from the test run that occurred this morning. Thank you very much.

CHAIRMAN KNOX: Thank you very much. Pardon me, Judge, I just wanted to... Go ahead.

JUDGE ADAMS: It seems to me that if you get over the grandfathering, what you are going to do is create two classes of judges. You get down to the appointments. Any future appointments ought to be made to the court with the presiding judge able to appoint or assign that new judge where his time and talents are in most demand, rather than into any tier. One of the things that was amazing about this SB 1500 was that the number of people that had their irons in the fire. The marshals and the sheriffs all over

the state got into a fight on whether they are going to be a marshal, a statewide marshal...

CHAIRMAN KNOX: We are very familiar with that battle. That has been going on for some time.

JUDGE ADAMS: One thing I might suggest here that might be an avenue of approach is that there is no reason why this couldn't be county option. If the majority of the judges of any particular county want the sheriff, give them a sheriff.

CHAIRMAN KNOX: Judge, if you had served in the Legislature, you would know the issue is a little more complex than that.

JUDGE ADAMS: Okay. I may be...

CHAIRMAN KNOX: I happen to be a marshal's man myself, but there are various points of view I am sure represented on this Committee, so...

JUDGE ADAMS: But that's the problem, it seems to me, and maybe local option is an out because what is going to happen happens; if you say it is the marshal, you will have all the foes of the sheriff on the other side of it and maybe...

CHAIRMAN KNOX: No, we have no illusions about the complexity of the politics of this thing. Mr. McVittie has a question.

ASSEMBLYMAN McVITTIE: Judge, I was interested in your statement that you felt that certain members of the Judiciary would have an inherent bias in considering matters that affected their own particular background as judges, and your former partner, Senator Wilson, has indicated that the San Diego Tribune yesterday wrote an editorial saying that members of the Judiciary who are

lawyers have the same inherent bias in considering matters that involve the legal profession. Do you feel that we have the same problem that the judges have in terms of the institutional bias that affects all of us?

JUDGE ADAMS: It's a very cozy system. You have the judges who work in the Superior Court and specialize in trying large lawsuits and you have attorneys who specialize in this area. It's a kind of a mutual admiration society that gets going after a while, but the social impact really of that system, although to the individual litigant, it is very important. Over the whole spectrum of the thing, it really doesn't have that much to do with the system. These attorneys -- I don't think there are too many of them in the state, I don't think they amount to over 400 -- they try these types of cases. And the judges that try these types of cases, they have a very cozy system. They don't want it changed.

ASSEMBLYMAN McVITTIE: I don't mean to be facetious about my question, but I think that what we are saying is that those familiar with the system or have seen it, whether it's the institution of Judiciary or otherwise, feel very strongly about their own personal experiences, and they bring those experiences to bear whether they are the judges in the Municipal Court system or the Superior Court system, or even those attorneys who serve on the Judiciary Committee. I don't think necessarily there is a particular bias, but perhaps an experience or background which they feel very strongly about which is sometimes projected in terms of how they feel.

JUDGE ADAMS: Well, one of the interesting things that

became apparent when AB 1134 got going, what you would in effect be doing in many cases is create a Superior Court in El Cajon. And the more that the Bar thought about it, and 82% of the lawyers in San Diego County are located in the downtown area, this starts to mean dollars and cents. It is cheaper for them to have the people come to them with them being closely located to the court rather than having to run out to a branch court. There is quite a bit of opposition from the local Bar on this and a lot of attorneys in El Cajon because it was an economic godsend to them. They looked upon it in just the reverse. Maybe that's what makes up the common good.

ASSEMBLYMAN McVITTIE: I might point out to the Committee members that the witness here is working with our local Municipal Court judge in Chino to see whether we couldn't have a pilot project to have our local Municipal Court judges handle juvenile cases. It seems to me there is no good reason why since our Superior Courts are so tied up that they don't have adequate personnel, but the Municipal Court judges who are willing to take on that responsibility couldn't do so on appellate basis. That is a pilot bill that I will be introducing next year, and to me it is very logical and it makes sense.

CHAIRMAN KNOX: Thank you. Anything further?

JUDGE ADAMS: Mr. McVittie talked earlier about the financing of any combined court, and one of the problems that SB 1500 got into was the fact that the League of California Cities ended up opposing it on the grounds that their city take from the traffic infractions would become a very empty proposition and they

stood to lose up to $40 million in income from this. It seems to me that maybe a better approach to this thing would be to leave the financing as it is and have the state pick up the additional costs and salaries rather than get into this situation where you are putting the state in charge of new construction which they tried in SB 1500. All judges, no matter where they come from, fear that you are going to have a monolithic hand from the Judicial Council controlling this, but then you get into the local boards of supervisors. They want to have some say on whether or not there's going to be an additional judge or not.

CHAIRMAN KNOX: Well, many local boards of supervisors do not share the view that we have three branches of government -- legislative, judicial, and so on...

ASSEMBLYMAN McVITTIE: Very briefly, Judge, if we were to doubt your proposal, that is the state take over the financing of the courts, my background indicates that would be in a conservative estimate of about $1 billion a year. We do have that kind of money in surplus today, and the various legislative leaders have indicated they want to use that for some kind of property tax relief program. In terms of your judgment experience, do you feel that the money should be held in reserve and perhaps used to finance this court reform proposal?

JUDGE ADAMS: If you try it would be a billion dollar property tax relief bill. I mean, it is just that simple. It wouldn't...

ASSEMBLYMAN McVITTIE: Because once that money is spent, there isn't any more, you know, and you can see the problems of taxing the people for court reform.

JUDGE ADAMS: I don't know. You fellows are going to have to cross that bridge...

CHAIRMAN KNOX: We are tussling with the matter.

JUDGE ADAMS: It seems to me that any organization of a unified court ought to be on a county-wide basis, at least, and that I am opposed to inferior judicial positions. You know, the traffic commissioners, the probate commissioners, the domestic commissioners, or whatever you want to call them, that every judge seems to have a real need for. It is largely an effort to avoid the more onerous task that a judge should do, it seems to me. They created a traffic referee to handle the traffic department and then they don't have to think about it anymore. I think if a case needs to be decided, if we have a factual dispute that needs to be decided as a matter of policy, it ought to be in the courts. It ought to be decided by a real judge, not by these lesser judicial officers. I don't think it is a good thing because you are going to recreate the same problem that the debate is trying to solve it seems to me. One closing point. There is a Superior Court judge in San Diego that I have been close to over a number of years and I won't say his name, but he indicated to me the other day that the Superior Court is just getting tired of this fight. It just keeps going and it won't go away, and they are getting tired of the effort they have to put into this fight. Any kind of a bill that gives them some security on the selection of the presiding judge, grandfathers them in so they don't have to sit down in your court if they don't want to, they are not going to be opposed to in such a strong fashion. They may oppose it, but it is not going to be

as strongly opposed as it was. It kind of reminds me of an old story of Winston Churchill. He was in the House of Commons one night and was in a pit. He sauntered by a lady by the name of Bessie Brown, and she got a smell of him, and she said, Winston, you're drunk. He looked at her and he said, Bessie, you're ugly, and tomorrow I will be sober and you will still be ugly. This problem just isn't going to go away. This is a problem that is going to be with us for a lot of years. It seems to me that a lot of things are coalescent, a lot of political oppressions are coalescent, and maybe next year will be the year. I wish you luck. If I could be of any assistance, or my court, please don't hesitate to ask me. We are keeping good statistics on this experiment and will make them available to you as they become available.

CHAIRMAN KNOX: Well, thank you very much.

JUDGE ADAMS: I thank you for the opportunity...

CHAIRMAN KNOX: Thank you very much for coming. We really appreciate it.

JUDGE ADAMS: I have taken the opportunity to prepare a few remarks. I will just leave them here.

CHAIRMAN KNOX: Good. Thank you, Judge. Thank you very kindly. The next witness is John Chinello, President of the Association of Defense Counsel. Everybody keeps telling us this, so we might as well tell them. He's Ken Maddy's brother-in-law, Beverly Maddy's brother.

MR. JOHN CHINELLO, JR.: I'm not acting in that capacity. I'm not sure what my capacity is. Actually, I am John Chinello, Jr., and I am President of the Northern California Defense Association.

I thought really that it might be kind of important to start off today, particularly in light of one of Senator Russell's comments to the trial lawyer who spoke earlier this morning. You asked him a question and he said, you trial lawyers, etc. I want Senator Russell and everyone to know that there is more than one trial lawyer organization in the state. The Defense Association, which consists of actually two associations, the Northern and Southern California Associations, mainly consists of trial lawyers who are hired generally but not necessarily by insurance companies to defend their insureds in lawsuits. Now this goes all the way from the Municipal Court right on up to the Superior Court and into appellate practice. We have, as an Association, joined together on many occasions, that is the Northern and Southern California Associations, to try to promulgate what we consider to be important changes in this tort system, in the trial system, and in all aspects of the system that we deal with on a daily basis. And I don't know if any of you have seen it so I have brought copies with me and I brought a number of them so we can pass them out. We presented a Position Paper to the California Citizens' Commission on Tort Reform, and I will tell you a little bit about this. We presented on February 2, 1977 in Los Angeles to the California Citizens' Commission a joint paper, First Position Paper on Tort Reform, and I brought it here today to let you know that we believe we are doing something in this area. We want you to know that we have always done something in this area and have consistently attempted to do things, and I was delighted today to hear Justice Thompson talk because he is an eloquent man and an eloquent speaker. We were delighted with his

American Motorcycle case. He literally laid it on the Supreme Court and said, you had better do something now because we are all concerned about it and we don't know where to go. He did it, and we appreciate it. But I was delighted to hear some of the remarks he made because in our Position Paper we have made some comments about some recommendations and understand, of course, that these are not all the recommendations that we intend to make and they are not all we could have made. This was a preliminary First Position Paper that we wanted to get to the Citizens' Commission. We are working right now on an addendum or modification of this Position Paper which we hope to present to this Committee sometime in the immediate future. We don't have it ready yet. We will have other modifications of this paper plus some additional recommendations. Justice Thompson mentioned a couple of things. They are right here. "Varigated Procedures for Different Types of Cases". Remember what he talked about was that there are different tracks for different cases and we agree. There are different tracks and there ought to be different ways of handling different types of cases. We point out in this particular paper that you have the simple slip and fall to a complex products liability or medical malpractice case. We also pointed out in here various types of claim handling innovations, modifications of the collateral source rule, limitations on punitive damages. Again, talking about punitive damages like Justice Thompson mentioned, these should be bifurcated and we strongly recommended that. Basically, I was under the understanding that if I came up here to testify that I was supposed to talk about costs involved in the defense business, and I thought a lot about that. I'm the

President of the Association and the truth was that I couldn't find anyone to come up here, so I had to come up myself. And I started thinking about how are you going to analyze the costs as far as lawyers are concerned or the trial costs into the defense business. Well, I don't know. The reason I don't know is because every law firm does something a little different with each case. It is true, as pointed out by the California Citizens' Commission Report, that they couldn't find out any information unless they had some powers as this Commission would have to get into the insurance companies and find out this information. We have no way of finding out. We do know generally what lawyers in the defense business charge. We have some ideas of what their rate or fee schedule is. We have no idea of how they would handle a particular case on an individual basis. We as defense lawyers have the same problem in many respects as many doctors. We have to practice defensive legal work or defensive medicine. We can't take chances. I can give you a classic example of where costs are at a high level where they shouldn't be in one particular case. I'm involved in litigation right now. It's a case that supposedly is worth over $3 million. I don't know what the value is. I had to go back to Chicago a week ago and I sat through four days of depositions in Chicago because I didn't know what was going to come out of these depositions that might injure my client. And I found that after the three days we finally got to the fourth day and there was a witness that testified that had something to do with the product I was involved in. The other three days were a total waste of time. They were a total waste of my time, a total waste of my insurance carrier's money, but I had to do

it. I had no choice. I knew nothing about what these people were going to testify to. These are the kinds of things that I don't know what the solution is to them, but it added a substantial amount of cost to this one particular case right off the bat in one week. There are certain areas that we have made a concerted effort in conjunction with the insurance companies to cut costs down in the litigation of cases. Again, I say I don't know what every law firm is doing because we don't sit around and talk about these things. We don't sit around and say well, what are you doing about this type of thing. We used to take depositions of doctors in cases constantly and we'd get their bills for their deposition. The public doesn't know this, of course, but we got a bill for $250 because we sat down and took the doctor's deposition for an hour. I don't do that anymore unless it's an important complex case involving that testimony of that doctor specifically that's important. I will now subpoena the records for $23 and do the same job. One of my clients is the Auto Club. I've worked with the Auto Club on not ordering copies of depositions. We keep the costs down that way. There are a lot of areas that you can do this and try to hold the costs down which eventually we hope benefits the consumer. This is what we are looking to. I get very aggravated when I hear people like the trial lawyer this morning who got up here and said the insurance companies like to hold onto that money and they want to take their cases up on appeal because they can reinvest that money at a higher interest rate than 7%. No question about it. They probably can, except I have never yet in my 18½ years of practicing trial law had an insurance company say let's take this case up on

appeal because we want to save the money and get interest somewhere else. As a matter of fact, they are sitting there questioning you on why do you want to appeal this. Tell us a darn good reason because we don't want to appeal it and pay that interest.

CHAIRMAN KNOX: Senator Russell.

SENATOR RUSSELL: That particular point, I don't think the gentleman this morning said because they can make better interest. He said that they could save money by doing that.

MR. CHINELLO: Well,...

SENATOR RUSSELL: I think that's what the statement was.

MR. CHINELLO: Well, I'm going to have to disagree with you, Senator Russell, because what he said was they can reinvest and make more money by not paying it out yet and only paying 7% interest.

SENATOR RUSSELL: If that was the interest he made. But I think what he said that the insurance people have told him, he alleged, time and time again that if they take this up on appeal they can either make money or they can save money, one of the two. I think his words dealt with the interest factor. Now have you ever heard an insurance company either tell you or tell somebody else that let's go to appeal because we can either save money or make money, whatever the statement was? Anything like that?

MR. CHINELLO: I not only have never heard that, I've never even heard it inferred because they don't like to have that 7% running on their money. This is money that is set aside as a reserve. They don't have any control over it. The Insurance Commissioner sees to it that they have to put these reserves aside and they don't like to pay that interest.

CHAIRMAN KNOX: Well, he made another suggestion. That was that if it's appealed, there's additional motivation to perhaps settle for less. That it puts additional pressure...

SENATOR RUSSELL: That was that other I threw in because he was zeroing in on the interest factor but there are, are there not, some considerations in the insurance company that if they go to appeal they may wear the plaintiff or the attorney down? Holding the money in interest would be a factor he indicated...

MR. CHINELLO: Mr. Russell, there is nothing more secure than the plaintiff's attorney who has a judgment in hand regardless of what the insurance company or the trial lawyer on the defense wants to do. He is a very secure person. He knows he's going to get his money and he knows he's going to get it at 7%.

SENATOR RUSSELL: Even if it goes up to appeal?

MR. CHINELLO: Even if he has to wait awhile.

SENATOR RUSSELL: Even if it goes up to appeal?

MR. CHINELLO: Yes, sir. I mean if it's reversed, then he was wrong in the first place and why should he even expect the money in the first place? If it's a complete reversal. You see these things are two-edged swords and so many times these people don't want to look at them as two-edged swords. They want it one way but not the other. Our feeling in the Defense Association is that we want things to be equitable for everybody. We want things to work out properly for everyone and if somebody is injured and he's entitled to recovery, we want him to have his money. We don't want to have to have him sit around and wait. I've had many cases in my office for one day. I picked up the phone and called the

plaintiff's lawyer and said what's the matter, didn't you get along with the adjuster and he said no, I can't stand the guy. Well, how about settling the case before I incur any defense costs on it? Fine. We sit down and we talk about it and boom, we settle the case. I don't make any money on the case, but we settle it and we get it out of my inventory and out of the company's inventory and out of the plaintiff's lawyer's inventory. It's beautiful.

CHAIRMAN KNOX: How about the remarks that were made with respect to the cumbersome discovery process, the boiler plate interrogatories and so forth? Do you fellows engage in that kind of...

MR. CHINELLO: There is no question about it. There is a great deal of that. I think that is a matter of a control situation over a particular law firm. We don't have much of that and I'm from Fresno. We don't have much of that in Fresno. I'm quite sure they do a lot of it in Los Angeles. I don't know. I'm not criticizing the Los Angeles board. There are certain types of cases where it is very easy for one lawyer to say run out that 250 page set of interrogatories because I don't want to have to think about the case right now. I want someone else to do the work. And it's the shifting of the burden of work really that they are trying to do. They are trying to avoid it themselves and let someone else do it for them. Whether that is right or wrong, I don't know. I don't think it's completely right. I will say that.

CHAIRMAN KNOX: Pardon me, I interrupted Senator Russell when he... Mr. McVittie.

ASSEMBLYMAN McVITTIE: My practice goes into Los Angeles County and San Bernardino County and in terms of defense firms, I

think it would be accurate to say that at least 90% of the firms that I'm familiar with do have standard boiler plate interrogatories. Frankly, in terms of the delivery of services to their clients, they do have the interrogatories pre-prepared and depending on the nature of the case, they do have form interrogatories. I think it's rare to see personally prepared interrogatories today. I would think that it would be the exception to have interrogatories tailored to the specific instance of that case. It's 90% boiler plate at least.

MR. CHINELLO: Let me talk about one example, Mr. McVittie, that I think is important. When you talk about boiler plate interrogatories that is unchanging that may or may not match a particular case, that's one thing. I do have a set of interrogatories that I use in cases that are very brief, very short. They go into three areas. They go into what are your medical expenses, what doctors have you seen, what is your past income history, what earnings have you lost and what injury did you sustain? I don't think they are fiften pages long and I don't mean each line. I mean there are spaces there to answer the question. I use those and if you want to call those boiler plate you're absolutely right. They are boiler plate. The reason is that we have a special problem. When it comes to investigating an accident, if we're representing an insurance company, we're right in there because we've got our claims man out there on the scene looking it over, taking pictures and everything else. When it comes to the injury, we know nothing about it. We don't know anything about it. Basically, if the man or woman has a lawyer right away, we find out nothing about it until the lawsuit is filed, so we are absolutely in the dark as to what we

are faced with as far as injury is concerned as a result of that. And this happens in most of the cases. As a result of that I do have this, what you call boiler plate interrogatory. I send it out and say please let me know what it is. I want to be able to evaluate the case. I want to be able to find out what that case is all about so then I can make my recommendations to my principal and then they can set reserves on it and then we can talk about a possible settlement at an early stage and those kinds of things, yes. But when I get a set of interrogatories in that don't even relate to the case -- it's a death case of a two-year old boy and it says how many times have you been married -- this is ridiculous. Obviously the lawyer didn't even look over the interrogatories. Those are what I call boiler plate and those I think are wrong.

ASSEMBLYMAN McVITTIE: What I usually do when I get the 100 page set of standard interrogatories is just re-type the first page, strike out the ones that are not applicable and send them back to either side so they have to go through the same kind of work.

MR. CHINELLO: One of the things that I wanted to make very clear that our Associations are in favor of and we believe in the jury system. We have always believed in the jury system and I think that the jury system is one of the most equitable systems that we'll find. We do believe in and have been deeply involved in the arbitration system. It was true as said this morning that the Los Angeles trial lawyers, plaintiff lawyers and the defense associations got together down there and set up their arbitration system which has really been the model for the state arbitration system. I think the arbitration system at whatever limit it's to be set at

is a viable system. I'm a little concerned about the fact that if you don't like the result, you can go to court because an awful lot of them in our county have gone to court or at least they have been rejected as far as the arbitration award is concerned. Now whether or not they have gone on to court I don't know. They may have settled in the interim period. It is a good settlement procedure basically. I think that once people get to that point where they present their cases, it's the first time they've really looked at it hard and fast and it's the first time they've analyzed it properly. When you get the two lawyers together I think that probably more settlements come out of the arbitrations even if they don't like the award. So I think it's a good system. I don't believe and I don't believe our Associations would take the position that the limitation on arbitration should go as high as $15,000. We feel that when you're getting into that area you're talking about an area of damages that should be determined by a trier of fact of the jurors. On the jury system itself, I'll make one comment about that, I have never yet and I get a lot of disagreement from my own people on this, but I have never yet found anything wrong with a six or eight man jury. Four weeks ago I tried one. It was an eight man jury and it ended up in a seven man jury because we lost one the first day who got sick, but there was no difference in the result.

CHAIRMAN KNOX: What vote was agreed to as being a verdict?

MR. CHINELLO: In that one we agreed to a five to seven, and that gives a little edge to the defendant in the case frankly. A six to four is no different than a nine to twelve. Let's face it, percentage wise. I see absolutely nothing wrong with the six man

jury system. We get the jury faster. They are able to decide the cases as well. I see absolutely no difference. I do agree with Mr. Hobart's statement this morning about where you go. Do you go down to three, then do you go down to two and then do you go down to one and that's just the judge anyway, so I don't agree on going any lower than six. I think that we need to have that kind of a cross section in the community, but I see no magic number between six and twelve. We know where the twelve came from. It came out of English history and there is no necessary requirement for twelve in my opinion. The sixes work, the eights work and I'll do it every day. It doesn't make a bit of difference to me because I haven't seen any different result and I think it's a savings in the long run, both on the jurors' time of sitting around all day long like the one gentleman testified to and I sympathize with him because that's an unfortunate thing and it sure as heck does not give great credence to the jury system per se for jurors who sit around for eight hours and then are told to go home. One of the comments I would like to make briefly is that we're looking not only at cost factors, but we're looking at a lot of delays and we don't know why and we're trying to figure out the reasons, and one of the major reasons in our opinion from our study and it's in our report is that we feel that the criminal cases really are creating a problem, a serious problem in our courts. We can't get to court. We're doing all right in Fresno, but a month ago I tried a case with a judge from Visalia, Tulare County, Fred Jacobus, and he said that that was the first civil case he had tried in a year. I think they have only gotten two civil cases out in Tulare County

in the last year because of the criminal load. As a matter of fact, last week he retired. He did not retire, he quit. He was 53 years old. He's been on the bench for about three years and he said to heck with it and he quit and went back into private law practice.

CHAIRMAN KNOX: Well, we're hoping that the determinate sentence with additional plea bargaining possibilities may make some difference, but we'll see. There's no way to know.

MR. CHINELLO: Well, basically the rest of my comments are in the Paper and if we could have the permission of the Commission, of course, we'd like to file a supplemental report with that very shortly.

CHAIRMAN KNOX: We would appreciate that very much and we'll be in touch with you. The staff will be in touch with you as well. Thanks very much. Appreciate your coming. Pardon me, Senator Beverly.

SENATOR BEVERLY: Is the issue of bifurcation of the trial damages and liability covered in this?

MR. CHINELLO: We commented on the fact that we believe that bifurcation should be mandatory.

SENATOR BEVERLY: Have you had any personal experience with it?

MR. CHINELLO: Yes.

SENATOR BEVERLY: Would you comment on it very briefly?

MR. CHINELLO: I tried a case last year that was bifurcated. It was a questionable case of liability. It would have required the testimony of I believe six doctors. We looked at the costs of bringing the six doctors in, having them stand by and testify, and

we looked at the fact that we felt we could try the liability part of the case in about two and a half days and we decided to try it and bifurcate it. We did and it all came out in my favor. It was a defense verdict, but it ended it right there.

SENATOR BEVERLY: Was it an auto accident?

MR. CHINELLO: Auto accident, yes.

CHAIRMAN KNOX: The plaintiff went along with that obviously.

MR. CHINELLO: Yes. We had to agree to it and we did agree to it and the plaintiff's attorney felt the same way as I did about it that we don't want to have to pay for all these people coming in here if we're not going to need them. It was a case that was very difficult for either side to evaluate the liability. It was just a strange question.

CHAIRMAN KNOX: An old time traveler told me once that you've got to have in a case either great liability or great damages, preferably both obviously. But you've got to have one of those. And if you have great damages but weak liability, maybe you want to try the damages from the plaintiff's point of view.

MR. CHINELLO: That's right because if they have a horrible quadraplegic case with slim liability, they aren't going to want to bifurcate it, but those are the classic cases that ought to be bifurcated because the issue ought to be determined on liability without all the sympathetic aspect of it.

SENATOR BEVERLY: Have you had any significant experience with cases where you went for bifurcation and the liability was ruled against you, then you went on to the damages?

MR. CHINELLO: I had one about three years ago. If I remember correctly we didn't try the second half. I think we settled it. And that's a comment that was made earlier too and I think that's probably true that this will most likely in many instances bring about a settlement of the case if the liability is established. If it's there, you know it's there and then you're going to look a little differently about it because you're going to think in terms of holding those damages down and keeping the numbers down as far as possible by showing the questionable liability aspect of it. Once that's determined, you know that's not going to work. Then you end up settling it.

CHAIRMAN KNOX: Thank you very much, Counselor. We appreciate your being here. Honorable John Loomis, Judge of the Superior Court of Los Angeles. Judge Loomis is Chairman of the Arbitration Administrative Committee of Los Angeles County. Judge, we appreciate your being here.

JUDGE JOHN A. LOOMIS: Mr. Chairman, ladies and gentlemen. I might state that ten or eleven years ago I was President of the Southern California Defense Association so I know something about what the last witness has been talking about. But I've been asked today to make some remarks about arbitration. As you all know, we have a system that is authorized by legislation and is carried out pursuant to rules of the Judicial Council which have been enacted pursuant to that legislation. It has now been in effect for sixteen months and we note that the Citizens' Commission has recommended that arbitration be made mandatory in personal injury cases up to $10,000. We, as has been indicated, haven't had any trouble

in selling the concept of litigation in Los Angeles County and as I understand you were told this morning we did have a voluntary program there which served as a partial basis for the legislation and the rules which have now been enacted. The voluntary program was set up pursuant to some very energetic lawyers on both the plaintiffs and the defense side in Los Angeles. It was carried out with the cooperation of the court and of the civil coordinator and there were about 2,000 cases processed in the four years that it was in existence. It was a voluntary program. There had to be a stipulation. The limit was $7,500 unless the party stipulated to a higher amount. The arbitrators were all voluntary. They were not compensated. There were 50 defense attorneys chosen by the plaintiff's side. There were 50 plaintiff's attorneys chosen by the defense side. There was no right of appeal excepting that there was what was called a grievance procedure. Out of the 2,000 cases, there were about 20 cases that were presented to a three man committee to determine whether something grievous had gone wrong with the case. The present plan differs in that although the parties may stipulate, the plaintiff may elect to go into arbitration without the consent of the defendant. The limit is $7,500. There is a provision for a trial de novo as you know in the event that either party is dissatisfied and files a request within 20 days of the award. The arbitrators are paid $150 for the ordinary case. Under the old system, the voluntary system, there was a name drawn out of the fish bowl and that was the arbitrator. Under the present system, there are three names submitted and either side may cross out one. I think the reason we haven't had any trouble selling

the concept in Los Angeles County is because arbitration makes sense. The Citizens' Commission Report indicates that 73% of all awards in the past six years were under $10,000. If you look at a small case, it may not be small to the parties, but comparatively it's small if it's under $10,000, you can readily determine that it's not economical either to the public, the taxpayer or to the parties. For example, it has been estimated that the cost of a courtroom is $750 to $1,000 a day to the taxpayer including all the personnel and all the support that is required. Even the small case takes three to four days to try with a jury, so you have an expenditure there of $3,000 to $4,000 as a basic cost. A jury costs approximately $90 a day now, so you have an additional $300 to $400. A doctor who appears as a witness in court these days charges anywhere from $500 to $1,000 -- there are very few that work for any less than that these days -- so if you have one doctor on each side, you have an expenditure of $1,000 to perhaps $1,500. You can figure that for the policeman and other witnesses that conservatively an additional $500 would be required on both sides.

CHAIRMAN KNOX: These witnesses charge the same amount don't they to appear before an arbitrator or they do not?

JUDGE LOOMIS: Well, you don't have very many witnesses before an arbitrator.

CHAIRMAN KNOX: Well, he has to hear the doctor doesn't he?

JUDGE LOOMIS: No, the rules provide that it's decided on the hospital report, the doctor's report, the police report. The requirement is that at least 20 days before the hearing, the side that plans to use the report submit them to the other side.

CHAIRMAN KNOX: I see.

JUDGE LOOMIS: If the other side wishes, they may then request or subpoena the particular witness whose report is to be used, but in the great majority of the cases that is not done. It's decided on the report. Ordinarily you have to put up a deposit of $75 to insure that a policeman will come to court. If it's decided on the police report and the police statements, that's not necessary. So you save about all of these expenses. Adding up the ones I've related and adding in say $1,000 for the cost of the attorney's time, you have $6,000 of expense to decide cases where the verdict is going to be under $10,000. Many of them will be under $6,000. You compare that to an arbitration. The courtrooms are used at night at least in our county. We set the arbitrations for 6 o'clock. We have them in the courtroom so that the parties will feel that they are surrounded by a judicial atmosphere. The arbitrator gets $150 and the witnesses whoever are called may cost another $100 or so, so without the attorney's time you've got an expenditure of approximately $250 as compared to several thousand if you try the case before a jury. And it's by reason of this type of analysis that I think that a large majority of the attorneys at least in Los Angeles County are convinced that this is a solution for court congestion for the small case and in addition they are pleased by the fact that they can get a hearing within a period of several months rather than waiting the 39 months that is the waiting time now in Los Angeles County for a civil case. I thought you might be interested in what the experience has been in Los Angeles County in view of the fact that there is a trial

de novo, if they are going to be 50% of those requested, it may not be such a good system, but our experience has been to the contrary. First, I think that 2/3 of the total filings for arbitration in the state have been in Los Angeles County. For example, the first year Los Angeles had 2,493 and the nearest one was San Francisco with 327, so a large part of the experience is in Los Angeles County. For the first sixteen months we had 3,187 filings and of these about 80% were election by the plaintiff. Only 20% were by stipulation. Of these total that have been filed, 1,563 have been disposed of and of that total only 607 were actually heard, 39%. The rest of them were settled without the necessity of having the arbitration hearing. It is a procedure by which long before the ordinary case would have a settlement conference the parties can get together and try to settle it. They are required to do so because they are preparing for the arbitration. Out of the total number that were disposed of, 1,563, there have been requests for trials filed in 90. Now that's about 6% of the total dispositions, but if you look only at the cases where arbitrators' awards were made, that's 607, 90 amounts to about 15% of that, so our experience has been that of those decided, 15% will ask for a trial and of course if they ask for a trial they are put back in the same position they would have been if they had not gone to arbitration and they are entitled to the same jury trial. We haven't had enough experience to know how many of those 90 will actually go to trial and how many will settle before the trial actually takes place. There were 361 awards for the plaintiff and 68 for the defendant -- that's a six month period -- so you've got 84% of the

awards for plaintiffs and 16% for defendants. The highest award was $15,000 and that was because we have numerous cases where the parties stipulate to $15,000 rather than the $7,500 statutory limit. We have one company, the Auto Club of Southern California, which is very earnest about this program. They attempt to get stipulations that agree to a $15,000 limit and they also attempt to get stipulations that waivethe right to a new trial so that if they are successful, then that award is final and there is no further problem about going to trial. With respect to the possible recommendations for changes in the system -- these are my own personal ideas and they don't necessarily reflect the views of the Los Angeles County Superior Court although they may -- I would recommend raising the limit to $15,000 with a provision that by stipulation the parties could agree to a higher limit, any limit that they wanted to. I think that the rules should also expressly provide that the Committee shall not participate in any arbitration. It isn't in accordance with the rules and it doesn't expressly say that now, so the question has been raised whether or not parties could stipulate to eliminate the trial. I don't see any reason why they can't. I think that consideration should be given to either making arbitration mandatory or giving the defendant also the election to seek arbitration. One problem with that is that where the limit is $7,500 or $15,000, a defendant can elect arbitration in a $100,000 case, so what are you going to do about that? There has to be some way of having a declaration filed that says it's within the limits or something of that sort. I think that is something that could be worked out, but I think that when we get our

backlog caught up here and our promoting the program that it would be an advantage to have the defendants have the right to make that election also, to get some more cases into the system. And the question of mandatory arbitration for cases under $10,000 or under $15,000, we have an arbitration committee in Los Angeles County of ten attorneys, five from the plaintiff's side and five from the defendant's side, and I believe that a majority of them would favor mandatory arbitration, but we do run into some problems, I believe. One of them is that we presently have 350 arbitrators, half from the plaintiff's side and half from the defendant's side. We are in the process of having selected another 150 which will give us 500, but if we had every case go into mandatory arbitration, we would run out of arbitrators, and I think we have about skimmed off those who are capable and in whom the other side would have confidence. So I think we would have that problem if it were mandatory unless some way there could be, at the time or shortly after that issue memorandum was filed, sort of a conference at that point to try to settle cases before they actually went into arbitration. But I think those are questions that would have to be considered in determining whether or not it should be made mandatory to all cases. Also, we have a backlog of over 50,000 cases now. All of those are not personal injury cases, but there would have to be some determination made as to whether this would be retroactive and if so, how we would handle with arbitrators that flood of cases. But I think in principle that if we could work out all of those problems that it certainly would be to everyone's advantage to, in view of the economics that I have set out, have mandatory arbitration.

CHAIRMAN KNOX: Ms. Gorman, Staff Counsel, wants to ask you a question.

MS. MARTHA GORMAN: How about using judges as arbitrators?

JUDGE LOOMIS: Well, the way the statute reads now, retired judges may serve or anybody in the Bar. I think the problem of using judges as arbitrators is that we have had the system for some time at least in Los Angeles County. We call it the short cause calendar where the parties could stipulate to substantially the same thing that they get in arbitration, and that hasn't been a very popular program. I don't know whether they don't trust the judges as much as the lawyers or whether they just -- I just think it is something that they didn't get around to doing, but with the number that would be involved, I think the judges would be better spending their time on settlement conferences and trials. I don't think that there are enough judges available for this type of work on the civil side that it would make that big a dent.

MR. GORMAN: I was just wondering if there is a shortage of arbitrators and with more cases going into arbitration if that would be possible.

JUDGE LOOMIS: The problem is that the arbitrator does have to be current on what cases are worth, what the juries are doing, and so we are limited in the number of people that have that experience. We have lots of applications for arbitrators, but a lot of them would just be guessing, worse than some jurors guess.

CHAIRMAN KNOX: Is there some indication you would get into the professional arbitrator where somebody really does that as his primary job?

JUDGE LOOMIS: Well, that is a possibility, but I think you run into opposition from -- I think a lot of attorneys feel that this is part of the public service and they are glad to participate, and I am not sure they would have the same feeling with professional arbitrators. One other thing. If a new trial is requested and the result is not as favorable as it was in the arbitration, it seems to me that there should be some additional penalties of some sort over those that are now provided. The only thing that happens now is that the cost of any expert witness can be assessed as costs against the party who asked for...

CHAIRMAN KNOX: Somebody said it was only the cost of the expert witness in the preparation but not in actual testimony.

JUDGE LOOMIS: I think that -- I'll be glad to have your questions to answer them.

CHAIRMAN KNOX: Judge, is this your primary judicial assignment now to oversee this operation?

JUDGE LOOMIS: This I do in my spare time.

CHAIRMAN KNOX: In your spare time? You are taking your regular caseload as well as watching out for this program?

JUDGE LOOMIS: I have a settlement conference every morning at 8:30 or 9, sometimes two, and then a trial. We have our committee meetings after court and then in the evenings.

CHAIRMAN KNOX: Do they schedule the arbitrations in the evenings and use the courtrooms as the Sacramento fellow...

JUDGE LOOMIS: Yes, they are scheduled in the courtrooms. We do have a civil coordinator who is really in charge of the mechanics of the arbitration program, and we have one girl who

spends full time sending out the notices and that sort of thing. If we had one more, we could get them out faster, but apparently the budget doesn't permit that. But we hope to be caught up. We are about six months behind now and we hope to get it up to 120 days.

CHAIRMAN KNOX: Well, we are very interested in that program and perhaps we can help with some therapeutic legislation. We shall see.

JUDGE LOOMIS: I certainly hope so.

CHAIRMAN KNOX: Thank you very much, sir.

JUDGE LOOMIS: I think it is a big help though. It's one way that people can get some money without waiting for 39 months.

CHAIRMAN KNOX: That is good. Thank you for coming. Our next witness is Mr. Thomas Waterhouse. He is the Counsel for Ross Loos and an arbitrator for the Kaiser Foundation, is that right?

MR. THOMAS WATERHOUSE: That's true. Thank you for inviting me up here. I appreciate the time to talk to you. I have listened attentively to the other matters and I will try to be very brief because it has been a long day for all of you. Basically, Ross Loos started arbitration on its own in 1929, and my firm, prior to me, of course, did the work. We have a system of private arbitration which I am sure you understand but which I just might outline briefly. It is different than what we have been talking about from the standpoint of the L. A. Court pilot program, if you still call it a pilot. It involves contractual arbitration which was put in by Kaiser about three years ago, put in by Ross Loos 40

years ago. It involves the selection of a retired judge as the neutral arbitrator. The appointment of an arbitrator, which we call very openly a partial arbitrator, by the plaintiff and by the defendant. It is compulsory, it's binding, and it's nonappealable except showing a fraud under the code or duress. It has never happened. It was approved by the Supreme Court in August of 1975, in Kaiser vs. Madden. It was approved in our own case in 1962 in Doyle vs. Ross Loos. And we have been to the Supreme Court four times seeking approval of our private arbitration. I guess if I were to address myself here to one important point, please don't, whatever you do, do anything to upset private contractual arbitration in medical malpractice matters. It has worked and the plaintiffs like it. Even some of the big shots in the plaintiffs' bar have now come around, such as Edgar Simon, saying we like it, we think it is great. We bifurcate our hearings to the convenience of the doctors because these are sometimes half a million dollar cases, so you have to have your medical testimony usually. We spread them out. We appoint a retired judge and the retired judges love it because they are paid. They actually seek to become arbitrators in Los Angeles County. We have a list of 15 of them now, the most recent addition being Judge Gunford who retired or left the bench recently, and he, I think, now has 16 assigned cases and probably of those 10 will go on to hearing. Two of them are Ross Loos cases, 8 of them are Kaiser cases in which I will serve as an arbitrator for Kaiser, and in the Ross Loos cases I will be the Counsel. It doesn't cost the taxpayers a nickel. It is done in the law office. The plaintiff doesn't have to stand around the courthouse trailing for a week. I don't have to stand around the

courthouse trailing. You can arbitrate what normally would be a 31-day case privately. I have never had one go over six days, and that was a very complicated brain surgery case which even the sophisticated judge had to learn his medicine about. A normal case, even a case in excess of $100,000, can be arbitrated in four days. Sure, maybe it is bifurcated. Maybe we do two days this week and two days next week, but it is done in that time. An award is rendered and the award is then confirmed and it will go to civil procedure, which has been in existence since about 1930, before the Superior Court and has the force and effect of a judgment. The tremendous cost-saving to not only the taxpayers, but to the litigants, to the attorneys' fees, the cost of defense counsel, as distinguished from a 30-day jury trial is great, and it is not unfair. I wouldn't hesitate to tell you that it probably does knock out some of these very great sympathy million dollar verdicts where a poor little child is wheeled in, a quadriplegic. The retired judge normally does not express the same sympathy as a 12-man jury might in such a case, but other than that, in the routine medical goof or mistake, the guy has a fair shake.

CHAIRMAN KNOX: Do you hold these proceedings in a law office?

MR. WATERHOUSE: Well, take the Kaiser proceedings. Where it is held, Mr. Chairman...

CHAIRMAN KNOX: The reason I mentioned that is that one of the judges mentioned that they hold them in the courtroom and that seems to give the litigants the feeling that they are surrounded by the panoply of judicial effect and that is somehow related to the law or something.

MR. WATERHOUSE: We do almost that in the same way by having a retired judge which is made known to the litigant.

CHAIRMAN KNOX: He doesn't wear a robe though?

MR. WATERHOUSE: No, but he does swear the witnesses.

CHAIRMAN KNOX: He swears in witnesses?

MR. WATERHOUSE: Yes.

CHAIRMAN KNOX: It is the same kind of a deposition oath, I suppose, isn't it?

MR. WATERHOUSE: Yes. You swear to tell the truth, the whole truth, before this arbitration panel, that sort of thing.

CHAIRMAN KNOX: Can you be prosecuted for perjury if you lie?

MR. WATERHOUSE: Well, we've never tried it. I don't know.

CHAIRMAN KNOX: I mean I don't know. I was just curious.

MR. WATERHOUSE: One thing we do, we economize in a great many ways. We don't have a court reporter. That saves about $120 a day. We don't have a bailiff. The judge swears the witness. We try to make it, and it is not a farce, but we do relax some of the rules of the evidence. We take in copies of the medical records. There is no requirement of the foundation for them. They are subject to cross-examination and challenge. We take in medical reports, but when you are talking about a $50,000 case, you usually have the doctors come in and testify in addition to their report. The only area which is grey and there are no rules because we make the rules case by case is, for example, can you introduce a medical book in toto? The uniform answer by Judge Kincaid and our older arbitrators is no. You can point to sections of it that the doctor relied on

in making his professional opinion in which you can't throw the whole book.

CHAIRMAN KNOX: Ms. Gorman has a question.

MS. GORMAN: I understand that both Kaiser doctors and to a greater extent Ross Loos doctors treat patients that are non-plan members. Do they seek to obtain arbitration agreements from those patients or do they carry professional liability insurance for those patients?

MR. WATERHOUSE: Now that is a double question. Let me see if I can answer them both. Ross Loos historically will not treat anybody unless they sign up for compulsory arbitration. They never have and I don't think they ever will unless the law changes. Kaiser has about 80% of its 1.3 million patients in the south signed up, and the only people who seem to be opposing it are the Teamsters Union which is 20% of their patients. They have come around. Ross Loos has a small segment of that Union and they have agreed to arbitration and I think it is just a matter of a year or so until Kaiser is 100% arbitration. Our private patients? Yes, they sign an agreement to arbitrate. Now they sign our old agreement, the one we have Supreme Court approval on, not the AB 1XX or Senate Bill 24 agreement. I may be wrong in that. We are going to test that in court, but if necessary we will go to an AB 1XX agreement with the red lettering and all that stuff. What we don't like about it is not the red lettering, we don't like the 30-day out clause which we think is outrageous in view of Kaiser vs. Madden which says it is not a contract but an adhesion. So that is my gist, of course, of why I am here and to tell you that there is a private

thing that I want you all to consider. It's worked, it saves taxpayers money and it is not unfair. I have one comment about something that was said earlier about interrogatories. Up until two years ago, we didn't even have to answer interrogatories in arbitration. We told them to drop dead, but we did it anyway. But it is not only just the first setof interrogatories that I would like you to address yourselves to, it is this thing of 20 interrogatories and the continuing paper deluge. I think a very fair limit would be to say to the plaintiff's counsel or the defendant's counsel, look, you can answer your questions once, then maybe as you are nearing trial, you can say, now have you got anything new for us? But not this 10 and 12 filings that they do which runs up all your legal fees and all your costs, and it is done in a great many cases just to harrass. But I really want you to consider our private arbitration system.

CHAIRMAN KNOX: We shall. Thank you very much. Any questions?

SENATOR BEVERLY: I am not clear on how the arbitrators are selected.

MR. WATERHOUSE: Let me take a typical Ross Loos case. In the contract it says I have the right to select one and the plaintiff has the right to select one. Those two are supposed to get together and select a neutral, so in the typical Ross Loos case, if I think it is a serious case, I will select Dr. David Rubsaman up here in Oakland and fly him down for it. He has a bright, super-professional liability newsletter and he is a doctor-lawyer. If it is Sam Shore that is the plaintiff, who is the former

President of the California Trial Lawyers Association and handles a lot of malpractice cases, he selects Leo Gulfein, who is a doctor-lawyer. And Sam and Leo get together and say, how about George Kincaid or how about Judge Walter Evans, or how about Judge Wickham, or you name it. Once in a while they won't accept a retired judge, and then they go to the Bar and try to pick a senior attorney that has had both plaintiff and defendant experience. Thank you.

CHAIRMAN KNOX: Thanks very much. We appreciate your being here. Our last witness this afternoon is Mr. Thomas Conneely of the Alliance of American Insurers, and Marialee Neighbors.

MR. THOMAS CONNEELY: Mr. Chairman and members of the Committee, thank you for inviting us here today to give a comment at least of one segment of the insurance industry on some of the proposals. When we were asked to come, it was pointed out that there were no other insurance industry witnesses, and I was initially a little reluctant because, as you know, we represent an association of insurers and take our directions from our constituency, and our own Board has not considered indepth a lot of the proposals and, therefore, hasn't given us some of the guidance that we need to accurately represent our constituency. But what we tell you, there are some things that they have discussed some opinions on and others that we have discussed among the staff members in Chicago and we think will give you an accurate view of what we think. We must emphasize, of course, that we don't represent the views of the insurance industry, since we represent only a part of it, and we offer our suggestions as comments, as part of the discussion and not really as part of the debate. We sort of like the discussion atmosphere. As a preface, I would like to comment a little bit

about some personal experiences that may be relevant here. Before I came to California, I practiced law for about seven years in Chicago, and many of the suggestions that have been made here today and that are made in the California Citizens' Commission Report in terms of procedural matters are things that I recognize as having done when I was practicing law. And I might suggest that a look at the Illinois Civil Practice Act and the Supreme Court Rules in Illinois, and at some of the practices in the Circuit Court of Cook County be looked at because many of these things are done there. I happened to think when the last witness commented about the interrogatories, my recollection is that not long ago there was adopted a procedure in the Circuit Court of Cook County at least where you could update interrogatories simply by writing a letter to the opposing counsel and saying, is there any other information that has occurred that would cause any of these answers that were submitted two years ago to change, and that answer is taken to be the answer of the plaintiff, or perhaps it is actually submitted to the plaintiff without going through the whole rediscovery process. And, of course, there they are facing backlogs, or at least for years of six and seven years in trying a case. When people around here talk about two years we think that is really Heaven. I practiced under a system where six and seven years from filing to trial, which meant eight to nine years from accident to trial was the ordinary case. But at any rate, I think in that Practice Act and in those Rules there may be some things that can be adapted. We are going to try to split the duties here today. I would first like to say that with reference to the California Citizens' Commission

Report, and this is the first occasion we have had to address this Committee since it came out, we very strongly endorse the concept of the Legislature making conscious policy in this field. And I would hope personally and I think I would speak for the Alliance here that your Committee continue beyond just addressing what happens to be confronting us now or in the next six months, that this be almost an ongoing kind of thing because I think that a lot of the activity that results may be not specific legislative enactments, but the fact that there is always a forum open for discussion of issues like this. I think that to the extent that we seek certainty in any kind of a process like the judicial process is really not realistic thinking, and that maybe what we need is a continuing forum somewhat like this one, so that those of us from various disciplines can continue to express our own viewpoints and have them discussed, and then in discussing them maybe discover some common ground that we can agree on.

I think that Marialee is going to comment on the first couple of the points.

MS. MARIALEE NEIGHBORS: All right. I am Marialee Neighbors and I am employed by the Alliance as a Government Affairs Representative in the Pacific Coast Office. Let me just very quickly go through some of the recommendations of the California Citizens' Commission Report that concern us. Arbitration. We favor the general concept of arbitration. We would like to see evidence that the increased use of arbitration will actually affect a cost savings. We are concerned that the right of either party to reject the arbitration decision will perhaps delay the resolution of claims and thus add an additional burden on the court system. We support the concept that

there should be notification to defendants that they are being sued. However, we feel that this recommendation really isn't going to have significant impact on periodic payments. We are not opposed to...

CHAIRMAN KNOX: Before you leave that notification thing, something occurred to me. Under most insurance policies you are required in order to get protection that you notify your insurer of a claim. Now does that duty occur if you get this notification as proposed or does it occur only if you get served with summons and complaint?

MS. NEIGHBORS: I am not really sure...

MR. CONNEELY: The duty under the insurance policy ordinarily arises the minute you know of the claim and it is subject to some reasonable interpretation. If you, as the insured, didn't know that there was a specific claim pending, and then you don't have the obligation to notify until you have the knowledge. Once you get the knowledge...

CHAIRMAN KNOX: Regardless of how it comes to you?

MR. CONNEELY: Yes, that's right. I think our concern, not concern, but in terms of the recommendation of notifying defendants, you know, that doesn't bother us. It is just that we wonder whether that will really have any kind of a significant cost impact. It is certainly nothing that bothers our...

CHAIRMAN KNOX: Okay. Excuse me for interrupting. Go ahead.

MS. NEIGHBORS: As far as periodic payments, as I was saying, we are not opposed to the concept, but we are opposed to the mandatory nature of this particular provision. We feel that we prefer

the voluntary approach where the parties can enter into these agreements voluntarily, but that they are not coerced to enter into periodic payments.

CHAIRMAN KNOX: For example, let's say there is a minor and the minor is going to have a substantial amount of money that the judge figures is in the minor's interest that it should be periodic payments and not feel that it should be mandated unless you agree.

MS. NEIGHBORS: Well, I think that we would like to leave it open so that when there are cases where, for example, in the minor situation where it is in the best interest of the minor that there be a periodic payment scheduled that perhaps in that situation it would be advisable to go to periodic payment award, but there may be other situations where you have an individual who has been seriously hurt. He wants a lump sum payment because he is going to start a business or he has other reasons, individual reasons, for wanting the lump sum award. We feel that you should allow flexibility in the system. The next issue that we are interested in is the establishment of standards for pain and suffering. We think that this is a good idea and we feel there should be some uniform mechanisms in making awards. We are interested in, and we think it advisable that the juries itemize their awards so you know you can collect at about special and general damages. The last point I would like to make is regarding shifting costs on post trial motion. We don't think that this recommendation is really going to be effective. We don't really think that the Judiciary is going to utilize this kind of approach. We feel that there are summary

proceedings that are already available, and they probably are not being used as much as they could be. So therefore, we don't really think that this is going to have significant impact.

CHAIRMAN KNOX: Well, the story of summary proceedings in California is not very full. You don't find very many courageous judges that will grant a summary judgment motion or sustain a demurrer without leave to amend or something. So I don't know if you can argue that the present summary procedures are sufficiently therapeutic...

MR. CONNEERLY: Well, we are not trying to approach it in a doctrinaire fashion. Our concern is that by giving judges more power, we are not so sure they would use it and I agree with your observation. It is not just California. Observation from my own experiences is that judges are very reluctant to grant a summary judgment or a directed verdict wherever there is an arguable issue. Those are the kinds of...

CHAIRMAN KNOX: Well, the law is very clear. It can be a scintilla of an argument, and they have to deny it. Of course, I say new rules that are about four years old now on partial summaries I thought would have a greater effect, but I don't see it used in casualty cases that much.

MR. CONNEELY: We didn't say that we were really opposed to the concept. It's that we really questioned whether it would be really used very much, I think, whether there would be any really long term or even short term effect. In all of these, Mr. Chairman and Committee members, we are attempting to provide some observations without really being doctrinaire. I have a couple of things

that I have to be doctrinaire on because that is what the Board of Directors has told us to be, so I will be heavy, I guess. But these are, again, initial reactions and we have asked, and there is currently a review being made by member committees of the Alliance and we hope to have something more definitive. But again, we are not really locked into any of these things. One of the recommendations that the Citizens' Commission made was that there ought to be a statutory right provided to defendants to join parties to a suit. That doesn't strike us as being bad, and again, from my experience from Illinois, that was done all the time, even where the statute of limitations had run as to the plaintiff's ability to join that party to the suit. And that was frequently a very useful kind of thing. It got everybody into the lawsuit that belonged there and allowed all of the defendants to work their fights out. In the given lawsuit it was very expensive, but it prohibited subsequent lawsuits for contribution and those kinds of things. We would urge though that if that is done that it be connected with some of the other recommendations on allocation of fault and responsibility, and that there be some consideration giving the jury the power to decide which defendant if when there are multiple defendants what the allocable share of responsibility ought to be and that the defendants having been lined up and given a particular share ought to pay their share and that's it. Again, that's a gut kind of feeling that we have about the recommendations. We certainly would go along with what seems to be the prevailing practice and that is that everybody that belongs in the lawsuit at the beginning ought to be in there, rather than have it strung out

all over the map. The recommendation about the early judicial review to cull out frivolous or delaying actions really strikes us as not offering much hope for any kind of improvement and I think that I would share the comment of my brethren from the plaintiff's bar that you might. Well, number one, you are going to run into reluctant judges and a judge, it seems to me, is going to be very reluctant after 90 days to make some kind of a decision that will eliminate some party's right to have a hearing, unless it is so blatant that the case may not have been filed in the first place or perhaps it is a proper subject for a summary judgment or a directed verdict kind of motion. So our thought is that giving judges this kind of power may not serve justice and practically may not be used at all, and we don't have very positive feelings about it. The bifurcation is a kind of interesting development in the Alliance in that respect. Back when the medical malpractice crisis began, and then as we got into the product liability difficulty, the initial reaction from the member companies was that it was a good idea that the opportunity, not mandatory, but that the opportunity to have bifurcation, something in the statute that put a little heavier onus on the trial judge to decide when it would be appropriate. And that decision, that initial reaction, is now reversed and the decision is that it really does not result in all that great a saving, and I would have to defer then to the comments that were made by Mr. Chinello here today saying that it does. The views I am giving you are basically those views of people involved in the claims aspect of this. They are claims people, the people who write the drafts that pay these bills, and their thought is that

on a general basis and a mandatory basis at any rate the bifurcation would not result in an economic benefit to the system and so currently we're not enamored with the idea, but the other testimony you've heard here is that in practice it sometimes does work so maybe it ought to stay as a matter of choice with something in the statute that put the onus on the trial judge to make a decision, to take a more active part in managing the litigation itself. One other witness made that comment, and I personally think that that's a good one and the Alliance would support, that the trial judge really ought to become the manager of the litigation that's before him. Frequently, I think today you see trial judges that are not willing to be strong. They simply sit there and say well, I'm just here to make the decision, but they really don't impose the burden on each side to really get it's case in shape quickly and to do the work that each side is supposed to do with his help. The one that remains here is the one about the punitive damages and this is one of our doctrinaire...The Alliance has adopted a position opposing the concept of punitive damages and that's kind of heavy. I think...

CHAIRMAN KNOX: You don't think that the plaintiff should be allowed to pray for punitive damages at all?

MR. CONNEELY: I don't think there should be such a thing as punitive damages period.

CHAIRMAN KNOX: I see. Well, I can understand that.

MR. CONNEELY: Now I think that that would be tempered if, number one, they were not insurable because after all the purpose of punitive damages is to in fact punish, is to take the person, the party, the entity that acted very badly and somehow hold that party

up as an example not only so he won't do it again, but that other people won't either. If that's an insurable kind of exposure, you don't really punish the party at all. He pays the premium.

CHAIRMAN KNOX: You punish the insurance company. They shouldn't have taken the fellow in the first place.

MR. CONNEELY: Well, that's the root of our policy that we've been told to talk up.

CHAIRMAN KNOX: Mr. McAlister.

ASSEMBLYMAN McALISTER: I thought somewhere in the law there was some kind of public policy against insuring...

CHAIRMAN KNOX: I didn't think you could insure that.

MR. CONNEELY: Well, you cannot in some states and I frankly had the impression that there is some impediment to that in California.

CHAIRMAN KNOX: Isn't that like insuring against an intentional tort?

MR. CONNEELY: Except that in many states though the carrier gets the responsibility in two ways. Number one, it defends the case itself and it defends and even has to pay the defense fees for that portion of the case that is attributable to the punitive question, so that there is no cost to the defendant per se for defending against the allegation that there ought to be punitive damages; and then secondly, in many states that's part of the award. The insurance company pays it. The defendant does not.

SENATOR BEVERLY: Mr. McAlister is thinking in the municipal field. You cannot get punitive damages brought against the entity. You can against the officer. Isn't that right?

ASSEMBLYMAN McALISTER: Yes, but it seems to me that somewhere there is law that you can't even insure for...

SENATOR BEVERLY: I don't see how you could. It's an aleatory contract.

ASSEMBLYMAN McALISTER: You're insuring against somebody's wilful malevolent misdeed?

CHAIRMAN KNOX: That's right.

ASSEMBLYMAN McALISTER: However, recently some insurance agent sent me a thing from one of his companies that said they were no longer going to insure against punitive damages so they must have been insuring against them.

MS. NEIGHBORS: There are cases and I can't say those are California cases, but there have been cases coming down where the insurer has been held liable and that was in fact one of the issues.

ASSEMBLYMAN McALISTER: I think there is something in the Civil Code about this and I'll have to look it up.

CHAIRMAN KNOX: We'll check it out. There are some issues that concern this Committee with respect to the punitive damage question but I -- could I ask you one question which is not directly related to your testimony but came up today? The Legislature or members of the Legislature including several of us sitting here have filed a writ with respect to AB 1XX, the medical malpractice bill. Now let's say that the court validates, one decides to decide the question which isn't for sure something they have agreed to do, but assuming that they validate AB 1XX, will the casualty underwriters pay any attention to that?

MR. CONNEELY: Well, I think some will. I have to in all

fairness say that none of the companies that we represent are writing that line in this state. And as a matter of fact, of the 105 plus members that we have, I think only about four of them write it anywhere in the United States. Some of our companies have never written medical malpractice. Yes, I would have to tell you from my own experience in the insurance industry, sure that will be taken into consideration once there is a ruling, once there is a validation. But to cause an underwriter to take it into consideration before that ruling, he's in a bit of a crap shoot as it is. He has to decide what to charge today to pay the damages that are going to arise down the line and if one of the uncertainties is which law applies and to what extent he's going to resolve that uncertainty in favor of assuming that the law doesn't if there is a question. But I would think that if there is a ruling that the underwriters who are actively engaged in that line of business are certainly going to take notice of it. And I suppose they will disagree as to how much notice ought to be taken.

CHAIRMAN KNOX: I'm a little cynical about it. That's why when you said that casualty underwriting, and I'm misquoting you a little bit, is a crap shoot, it certainly is. I mean that's just...

MR. CONNEELY: Well, it really is. I don't object to your characterization of it. What insurance carriers have to do is to price a product and they don't know what the cost is until after they have collected the price and long before things happen, and to the extent that there are uncertainties in that process, that increases the crap shoot part of it. It was relatively safe when

inflation went along at a very predictable sort of thing you could map out on a graph and when the amounts of awards were increasing at a predictable amount where you have any kind of a geometric progression in any one of those things that you see afterwards. After you've already priced it and collected your price, that's what causes the big problem.

CHAIRMAN KNOX: Well, that's something that we have to spend a great deal of time worrying about.

MR. CONNEELY: Mr. Chairman, I hope the comments that we've made are somewhat helpful and I want to emphasize again that what we are hoping to contribute to is the discussion and that we're willing to come back and discuss ad infinitum for that matter. We really don't take the view that we've got not all the answers but maybe not even some of them, but at least we've made our viewpoint known and thank you for the opportunity.

CHAIRMAN KNOX: We appreciate very much your being here. Thank you very kindly. The meeting is adjourned.