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*Interviewer:* Today is October 17, 2001 and we're in the Rare Books Seminar Room in Biddle Library at the University of Pennsylvania Law School, and we're here to interview Professor Doug Frenkel of the University of Pennsylvania School of Law. My name is Megan Becher and the other interviewees will be Todd Grisct, Rasheena Harris, Crystal Fu, Katie Craven, Miranda Salomon, Maryanne Small, and Jay Rittberg.

*Interviewer:* Hi, Professor Frenkel, I'm Megan Becher and I'm going to ask you a few questions about your childhood and your college years.

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My first question is where were your parents born?

*Doug Frenkel:* My parents are both German, my father was born in Berlin and my mother was born in smaller city called Mannheim. I grew up in New York and as you can see I'm first generation.

*Interviewer:* What are your parents' names?

*Doug Frenkel:* My father's real name is Gunther or Gunter in German - it was changed to Gerald when he came here after World War II - and my mother's name is Carole.

*Interviewer:* What did they do for a living, what did they do in Germany before they came here, what did they do once they were here?

*Doug Frenkel:* They left Germany when they were very young. My father was being groomed to enter the family banking business started by my great-grandfather and worked in by my grandfather, and my father was stepping up to go into that business when the war came.

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And that really disrupted his work life. My mother was actually orphaned when she was 13 - never worked before she came to this country but worked a great deal after that.

*Interviewer:* You were born in New York; do you have any siblings?

*Doug Frenkel:* I'm an only child.

*Interviewer:* And what were you like as a child?

*Doug Frenkel:* Well, you should probably ask my mother. That's an interesting question. I was raised in the Upper West Side of Manhattan and a number of my friends were also only children. It was not such an unusual thing at that point, particularly families of war refugees. I was a very good student as a kid.

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I probably didn't know any better. I'm told I was pretty mischievous when I was in preschool, but I think I was a pretty straight arrow. I guess I didn't know another way.

*Interviewer:* Did you go to high school in Manhattan?

*Doug Frenkel:* I went to public school throughout. I went to the local elementary and junior high schools in my parents' neighborhood. The Upper West Side then wasn't a great neighborhood. Now it seems to be where everybody wants to live. I went to Stuyvesant High School - the old version of Stuyvesant High School, not the new version. That was a mistake; it was a very science-oriented place, and that really wasn't my strength, but my parents frowned on the alternative which for me was music and art.

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And I don't know how my life would have turned out if I would have taken that path.

*Interviewer:* How did you choose Wharton?

*Doug Frenkel:* I grew up in a pretty humble household and my parents were struggling to make a living. I grew up in Manhattan very impressed by some of the wealth I saw around me. New York also was a place that acculturated you and my family setting also acculturated you to thinking that people who succeed in business were the real people who succeed in this culture. And I somehow got a tape played in my head that business was what I would strive to succeed in. So when it came time to apply to college, that seemed like the place I wanted to go. I can't say I had given it a whole lot of thought other than I think at the time I wanted to climb out of what I perceived to be that aspect of my upbringing that I wanted to put behind me.

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*Interviewer:* Once you got there how did you like it?

*Doug Frenkel:* I didn't. I liked Penn, which may be fairly obvious now, but I didn't like the business school part of it particularly. In fact, I gave some thought to transferring, and in the end rather than deal with the requirements bureaucracy I choose a major that was really a liberal arts major within Wharton. I was an economics major and took what was essentially the minimum amount of Wharton stuff in order to get a Wharton degree.

*Interviewer:* Did you know then that you wanted to go to law school?

*Doug Frenkel:* I guess I figured out sometime during college that I wanted to go to law school but I'm not sure that I gave it much more

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serious thought that I had given my decision to go to Wharton for undergraduate work. But yeah, I decided that that would be the next thing that I would do.

*Interviewer:* While you were at Wharton what type of extra-curricular activities were you involved in?

*Doug Frenkel:* A couple that I recall pretty clearly, I got involved actually a fair bit in not so much student government as with the student reform effort that was underway in the mid '60s and a small group of people and I started something called Wharton's SCUE S-C-U-E [Student Committee on Undergraduate Education], which I'm told still exists today 35 years later, and which was a student-led organization that attempted to both have input and reform impact on the curriculum. I guess hearing myself say that it may have been a reflection of what I thought about the Wharton curriculum at the time.

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I remembered because my daughter recently found this rummaging through the house - we actually did a survey and issued a support suggesting how ways in which the Wharton curriculum could be changed, and my daughter found this and found out that I was actually chair of this committee. So that was one thing that I obviously was very much involved in. I remember sitting in front of the library reading the *New York Times* every day that it wasn't snowing. That was an activity. I've always kept very physically involved as a way to keep my sanity wherever I am. So I'm sure I spent a fair bit of time on the tennis courts and so forth.

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I also did some community service at the time, most of us did some of that. It wasn't as institutionalized as it is now, here at the Law School for example. And, I'm not sure whether it's as an undergraduate or in law school, I also began to spend some free time teaching in public schools as a substitute.

*Interviewer:* What is your fondest memory of your college years?

*Doug Frenkel:* My fondest memory of my college years? There were a lot of them. My appreciation for Penn grew as I was getting later on in my career and by the time I got to be a senior I really got hooked on the place. I would say that my fondest overall memory and image is literally sitting in front of the main library on the College Green reading the newspaper from cover to cover every day, a luxury that I don't think I've ever had since then,

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and having the world walk by me and shoot the breeze with me and it was just an idyllic time. I don't think I knew how good I had it at the time but every time I walk past that spot now, which they've had the nerve to actually change with some landscaping, I remember those days incredibly fondly and I miss them. I probably ought to go back and sit there somehow.

*Interviewer:* Thank you very much. Todd Griset is going to ask you some questions now on your law school and clerking.

*Interviewer:* Hi, professor. You said that you loved Penn and that you went to Penn Law School. How did you choose to go to Penn Law School?

*Doug Frenkel:* That's a very good question.

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I think I applied to two or three law schools, so I had to make a decision. I think one of the choices was between Philadelphia and New York, and for largely emotional reasons I couldn't go back to New York, I had to stay a certain distance away from New York, and so I choose Penn. But I was very happy here. I knew, I had mastered this place and I had already, on some intuitive level, this sense that I wasn't going back to New York to live, and that this was a place that I could see myself living long term. So it all

seemed to make sense. I also was out of school for a year between college and law school and spent part of that hanging out here. And so I got to feel like a grown up in Philadelphia for the first time. That sort of solidified the decision.

*Interviewer:* What else did you do that year between your graduation from Wharton and attending Penn Law?

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*Doug Frenkel:* I guess I shouldn't have a hard time remembering what I did - that was wartime. The Vietnam war was on. About half of that year was spent in fulfilling the basic training requirements of being in the army reserves. It was a very tough time for a lot of us and my way of avoiding greater risk was to enroll in a branch of the service that was very unlikely to be called up. And so six months of that was spent in a combination of basic training in Missouri and, as my wife puts it, guarding our Indiana border. I went to typing school in Indianapolis where I failed to learn how to type for about the third time, starting with my time in high school.

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That's something I greatly regret today with the advent of computers. But anyway, half of that year was spent in the military and the other half as I said hanging out here, being a substitute teacher, and getting ready for law school.

*Interviewer:* What was your experience like as a law student here?

*Doug Frenkel:* It was actually a very turbulent time. I don't know if any of you studied that period but my first year of law school was probably the height of the war. The 1969-1970 academic year was the year in which there was a Cambodian invasion under President Nixon, and especially for those of us who had this personally conflicted loyalty but for all those students it was a really, really very difficult time.

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Perhaps not terribly unlike some of us just experienced in September. I know for me we were torn in terms the relevance of sitting in a classroom when the world outside seemed to be falling apart. I was concerned about being called up and got involved in some anti-war activities and there was always a fine line to walk since I was committed to being part of the military for six years

and yet I was terribly against what we were doing as a matter of national policy. That was the first year - in fact that was the year when final exams in the first year were given as take-home and graded pass/fail, which is something I don't think has happened since then. The last two years were less intense on that score but nevertheless very turbulent.

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And it was also a period in which a lot of us were really trying to figure out which end was up for us personally. It was as though the world was changing very dramatically in terms of what mattered, in terms of who we were, in terms of making an impact on a world that seemed to cry out for a different of society, and many of us were grappling with this while we were in this very regimented, conventional form of graduate study that seemed so bound by the orderliness of society as we had known it. So it was a very hard period for a lot of us personally and a lot of us were certainly less than sure of where we were going and why we were here frankly. I don't know if that answers your question but it was a tough period.

*Interviewer:*

Thank you. What's one of your favorite memories from your period as a law student?

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*Doug Frenkel:*

That time created some incredibly intense friendships out of a shared sense at least of some of us that we really didn't know of any kind of certainty where we were going, out of a sense of personal insecurity, out of sharing this experience, and also during a time when people began to travel in groups and packs, and groups began to spring up to talk about all of these issues. So one of the things I remember was some of the intensity of a social life with people who shared my sense of not being too sure of the future.

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There were other more conventional pleasures I can think of. We had a great law school squash tournament and I took that sport up while I was here and that was always important to me. And I can even remember, which fits in with what I just talked about, how our graduation involved a student speaker essentially giving a protest speech concerning the war and the law school and the like. Something I don't think you would very likely hear today.

*Interviewer:* I have your yearbook from 1972 here.

*Doug Frenkel:* Am I in this?

*Interviewer:* Yes, you are, in the upper right-hand corner. Does that provoke any memories looking back at those pictures?

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*Doug Frenkel:* Yeah, I remember the hair that I used to have. If I look at the other pictures, this is a pretty good cross section of who was in law school at the time. You've got people who went in a lot of very interesting directions. And looking at these eight pictures I would have to say this was a pretty good depiction of who I was,. somebody who looked sort of half an Ivy League straight-arrow button-down person and half a rebellious person who wasn't sure which half was going to ultimately prevail.

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And some of these other people look a little clearer about the direction, based at least on what they look like. That was a different time.

*Interviewer:* I would like to talk now about your clerkship. How did you choose to apply for the clerkship?

*Doug Frenkel:* That's an interesting story and typical of my lack of direction at the time. I didn't have a job near the end of my third year in law school. In fact I had a fantasy of running off with a woman friend of mine from Germany and following her goal of raising horses somewhere in the country. That was about as realistic for me as becoming a professional football player, but at the time it felt good. And when I realized that relationship wasn't going anywhere I began to look on the placement bulletin board and lo and behold, someone who had accepted an appellate clerkship had dropped out. I said I can do that.

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So I wrote to the judge and he was looking for someone on short notice, and I guess I was in the right place at the right time and I got the clerkship and it didn't require my leaving Philadelphia. The judge's chambers were here so it didn't involve anything more than that. And a clerkship seemed like an extension of school. I didn't

have to commit to any particular direction for at least another year. So that seemed pretty good at that time.

*Interviewer:* Thank you, and now Rasheena has some questions for you about Community Legal Services.

*Interviewer:* Hi, Professor Frenkel, I'm Rasheena. I want to ask you about your tenure at Community Legal Services. Currently CLS is divided into several divisions.

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How was CLS structured at the time when you were there?

*Doug Frenkel:* The time I was at CLS was from '73 to '78 as I recall. That was actually its heyday. We had a central office downtown in Center City Philadelphia that housed most of the impact or law reform activities, the specialist offices as it were. And then we had five or maybe even six neighborhood offices around the city that handled primarily client service matters. Not exclusively, but they existed to be able to service the clients in the neighborhoods where they lived. There were a few specialized units that were located in the neighborhood offices, but by and large that was the structure.

*Interviewer:* Were you staffed in a particular division?

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*Doug Frenkel:* I was. My first assignment was in the housing unit which happened to be located here in West Philadelphia - I didn't have to travel terribly far from the law school even - 40th and Market. And that unit was composed of initially me and about four or five paralegals who handled the bulk of the client contact.

*Interviewer:* You had just graduated in 1972 and began as staff managing attorney. How did you ascend to that position?

*Doug Frenkel:* It's amazing. In those days, I don't know how different it is now, but if you'd done something once you were immediately anointed an expert. One of the wonderful things about legal services, and it cuts both ways, is how quickly you get a tremendous amount of responsibility in almost any position in an organization like that.

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The other side of course is it's somewhat scary because you're often having to teach yourself a great deal on your own without a whole lot of supervisory resources. Things have changed, but that was certainly the case then. And I came from an appellate clerkship and so it was assumed that I was the automatic organizational expert on appeals in the state courts. And I knew something but I certainly didn't know about being an appellate lawyer. Since I had been an appellate clerk I had been on the receiving or the passive end of appeals, not the active end. And how does one become a manager or a supervisor so quickly? You do something once and if you do it well the sky is the limit. So they asked me to do this and I said sure. I did have a supervisor, an excellent supervisor.

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But the prevailing ethic there at the time was people were responsible for their own thing and had to learn a lot without a whole lot of supervision.

*Interviewer:*

Can you give an example of maybe a mistake that you may have made, being the staff managing attorney, just being thrown into that position?

*Doug Frenkel:*

This goes back more than a quarter of a century. I'm sure I've made and learned from countless mistakes at the time. I'm not sure which ones come to mind right now.

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That's a tough one. I think it's a natural human reaction to block out the things you don't want to remember and I'm sure there's a lot of that. I think you tend to choose the things that you're proud of and want to recall. But I recall as a young lawyer, for example, losing tremendous amounts of sleep every time I knew I would have to even telephone, negotiate, much less appear in court against a lawyer who I thought was more experienced than I was. I'm not sure that that was necessarily a mistake. I probably made up for what I didn't know with a lot of thoroughness and sweat, but on the other hand it probably also contributed to the relatively short period of time in which I was an active litigator. And had I had a lot more grounding being able to learn at somebody else's feet, I think I would have felt more solid.

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I don't know if I would call that a mistake but it certainly was a phenomenon that I experienced.

*Interviewer:* Can you give me an example of your best memory at CLS?

*Doug Frenkel:* Oh, there were a tremendous number of highs. I can recall case highs in the sense of cases that we won, a case in the federal court that was a class action on behalf of all of the families of servicemen - at the time I don't even think there were women in the service - dependents of servicemen whose rents were being calculated as though the provider were in the house when in reality the provider wasn't in the house and in many cases wasn't providing any support. That saved a lot of families from eviction.

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I recall obviously cases in which we were successful in keeping families together. I recall cases in which I felt very good about supervising somebody on my staff, watching them grow. And the other thing I have to say overall about that is it was a very intense and collective kind of practice. I remember all kinds of night hours and weekend hours with other people who are there seemingly because we just loved the camaraderie about it. It was more than just a job. We would read each other's work.

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We would strategize together. Those are a little less indirect in terms of outcomes but it's hard to find that kind of jobs these days.

*Interviewer:* Thank you. Crystal will discuss your work as the director of the clinical program of Penn.

*Interviewer:* Hi, Professor Frenkel. What motivated you to make the transition from Community Legal Services to clinical supervisor, lecturer and director at the clinical program at Penn Law?

*Doug Frenkel:* I actually didn't come here to be the director, that came later. I was originally hired to be a clinical instructor here. What motivated me - well, there were a couple of things. By 1978 I had sort of risen through the ranks and become the managing attorney of one of the five neighborhood offices of Community Legal Services.

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I had a staff of about 30. And I was finding the managerial work to be very frustrating by that point. The organization had over 100 lawyers. It had become rather bureaucratized and I found a lot of frustration in that work. Specifically I found frustration in the inability to implement any serious monitoring, control or even discipline over lawyers who weren't performing at what I thought was an acceptable level for our clients. And I was having a particularly difficult time with a particular lawyer, who was I thought a real problem for the organization but who I was told for reasons that I didn't particularly respect wasn't touchable, wasn't moveable.

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And I tell you that only because just at the time when I was tearing my hair out about that I got a call from Penn. Almost the day that I was fighting that battle, I got a call from Penn asking if I would be interested in possibly coming here to teach. And the more positive answer to the question is I've always been interested, I always thought I would like teaching both because I had realized that I was a much more contemplative and analytic person, liking to think about things, both sides of things, argue and debate things than I was necessarily about taking a position and stance as I had increasingly had to do obviously as a litigator at CLS. And so it was a chance to teach and I jumped at it. It took me about five minutes to decide to make that leap. I had always thought I would like to try it.

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The director part came a couple years later. The person who was my predecessor as the clinical director here was denied tenure and left. And the dean at the time asked if I would be willing to take over as the administrator of the program. By then I had been here a relatively short period, but I had already grown to love this work and I said yes in 1980, and on some level the rest is history.

*Interviewer:*

How has the clinical program changed under your direction?

*Doug Frenkel:*

When I came here in 1978 I was one of four clinical teachers.

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And the only thing we did was teach litigation and run a litigation law office using a combination of student and faculty teams. In many ways what the program did then mirrored the curriculum,

which was very heavily litigation oriented. You might have thought both clinically and in the regular curriculum that the only thing lawyers did was go to court. And of course we know now and we knew then that wasn't true. So the first thing I did when I came into the director's position in 1980 was to examine the major roles that lawyers played and the major roles that our graduates played on graduation. And it was pretty clear as a first matter that we weren't paying any attention clinically to the great number of lawyers who were transaction lawyers -

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who never saw a courtroom and in fact were spending their time doing deals, or as we say now planning with clients for business, tax, estate, and other matters. And it seemed to me important that our clinical curriculum reflect and be able to teach about that kind of lawyering as well as courtroom lawyering. So I proposed together with the Wharton School a program in transactional lawyering. We were the first in the country to have such a program, which we call the Small Business Clinic, and that began as I recall about 1981. We had a small outside grant of seed money to be able to do that. And that program has not only survived but it's grown and thrived and it is now, in terms of enrollment, our most popular course here, and it's been copied at about thirty or more law schools around the country.

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So that's something we feel proud of here, having been the first in terms of a real-case course like that. Several years later the world of alternative dispute resolution was beginning to surface and I became personally very interested in that because it spoke to me. I got tired of conflict and of the world of litigation when I was at Legal Services and in my first years of teaching here. It was not something that was a very good fit with my personality. And the subject of mediation, which was just beginning to be noticed in the world of practice and of academia, was something that I pursued vigorously. In 1985 or '86 I started the next addition to the clinical program which was a clinical course in mediation. And we've had several other courses added in the years since then. We started a legislative clinical course in the early '90s.

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And along the way we had other experiments. We experimented with a multi-disciplinary course in child advocacy in the '80s and

it's something we're bringing back again this year. We have a new course in public policy advocacy by lawyers now. So the program which started as litigation-only when I came in in 1980 with four faculty is now almost double in size and has a whole range of course offerings that offers students a chance to study virtually every major lawyer role and as a result we get a much broader cross-section of students than we did back then as well.

*Interviewer:* Wow, it sounds like the clinic has changed a lot under your guidance. Unfortunately we're out of time. Next Katie Craven is going to ask you questions about your experiences with continuing legal education.

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*Interviewer:* During your time as a student at Penn Law, did the curriculum contain courses on professional responsibility and legal ethics?

*Doug Frenkel:* There was no required course in that area. There were, as I recall, lectures in that area and not very much else - perhaps an occasional elective offering - but the requirement that all students study that didn't come into effect till after the Watergate period around 1975, so that was after I was a law student.

*Interviewer:* What do you think has changed in the legal profession over the past three decades that has required a stronger emphasis on professional responsibility and legal ethics?

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*Doug Frenkel:* Well, what I had just adverted to was at the time perceived to be a change - that is, in the Watergate scandal with the Nixon administration, with lots of lawyers appearing to have very little sense of the boundaries of responsible conduct, the requirement came in. The subject has become one of dramatic importance to the profession and as an academic matter, regardless of how it came in and the reasons it came in. The profession has changed in huge ways and they include things like the advent of women becoming half of every graduating class; alternative dispute resolution becoming a major factor;

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lawyers engaged in this technology era in multi-jurisdictional practices - it's very uncommon to find law firms that operate in only one state, for example, unlike in the old days; lawyers

working in teams with non-lawyers in ways that didn't exist before; the advent of the huge law firm itself as an organizational phenomenon. All of these things have produced enormous change in the profession and as a result have brought about a tremendous increase in scholarship in the area, changes in the regulation of the profession, an increased amount of activity in the culture, in journalism, in the courts in terms of litigation involving lawyer conduct and so forth. It's really been a growth field since I was a student.

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*Interviewer:* Do you think your time in law school, what you went through, the time period you were in law school, and then living through the Watergate time influenced your decision to get involved in this area?

*Doug Frenkel:* I do. I think many of us became fascinated with questions of how people could go up so close to or cross over the line in such public ways. For me I've always been interested in the motivations, the pressures, the fears, the drives, the institutional settings that cause people to behave the way they do. I'm very much interested in the psychological take on the subject. So for me anyway, those kind of big stories and little stories about lawyers either getting into trouble or coming close have been what I found compelling about the field.

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*Interviewer:* Do you think that the law school classes today as well as the CLE classes adequately address the issues of professional responsibility that young lawyers face today?

*Doug Frenkel:* Well, there are limitations on what you can do in a regular law school classroom. My own approach to teaching the subject, which comes from my take on it, from my interest in it, is to try to replicate the stakes that are involved as much as possible in looking at ethical dilemmas, at decisions that lawyers have to actually make in practice. There's a limit to how much in a classroom you can recreate that. Videotape, something I've been involved in a lot, can do that and can engage students emotionally. But in terms of richness there's probably nothing like real cases to bring these issues out on all of their levels, not just the intellectual level but the affective or emotional level as well.

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CLE courses are a whole other experience. On the one hand lawyers view them as a form of compulsory chapel. They're there because they have to be there. On the other hand, once they're there, practicing lawyers who have a lot of experience under their belt become very engaged because they have the experience it takes to be able to talk about these issues at a deep level. So there's a real trade-off and there's pluses to both settings.

*Interviewer:* Do you have a preference?

*Doug Frenkel:* I very much prefer teaching students. I like thinking not so much that I provide them with answers but that I provide them with the beginning of a way of thinking about how they will make judgments later on once they gain more experience.

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*Interviewer:* A number of articles including yours have argued that environmental factors within law firms contribute to the attitude of individual lawyers towards legal ethics and professional responsibility. The factors included firm size and degree of aggressiveness perceived by the legal community. Do you believe that similar factors within the law school contribute to the attitudes that their students eventually assume?

*Doug Frenkel:* That's an interesting question. I do think, and I'm not the first to say this, I do think the most formative experience for many law students is the domineering Socratic classroom with a lawyer - who happens to be a teacher - but a lawyer who is in front of ninety or a hundred or so students, who is very smart, and whose greatest skill in the classroom is in effect to be able to convince everybody that you can argue anything,

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that the highest compliment that you can pay a student or a lawyer is the ability to analyze a problem so you can see every possible perspective and make an argument on any possible side or answer every question with an even better question. I think to some extent that way of thinking leads to a collective sense that on some level all we have to be able to do is argue or game around any question and that we "know nothing," nothing is a given, nothing is sure, and I think that in some cases that can lead to a certain amount of denial on the part of lawyers who come up against, say, a moral dilemma in their practice because they can resort to or revert to

their cleverness in being able to come up with a clever argument to in effect talk their way out or convince themselves that there isn't a moral content or quality to the dilemma that they're facing.

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So I do think that there are institutional aspects to it even in the law school. On the other hand I have to say this school seems to be one of the friendlier law schools around. To the extent that we're not modeling cutthroat competition the way that some other schools perhaps do, we probably do a better job than other schools at that.

*Interviewer:* Thank you. Miranda Solomon and Maryanne Small are now going to ask you some questions about mediation and dispute resolution.

*Interviewer:* Hi, I'm Miranda Solomon. I'm going to go first. My first question is very general. I was hoping you could explain what alternative dispute resolution is and how it differs from more traditional models of dispute resolution.

*Doug Frenkel:* I'll try to do that very briefly.

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Alternative dispute resolution, which itself might be somewhat of a misnomer, describes those processes that exist as alternatives to the traditional courtroom or formal litigation method of resolving disputes. They include processes that we've known about for centuries - negotiation, for example. But they brought to the fore an interest in development of sophisticated forms of mediation, for example, which includes introducing a neutral third person into the negotiation of other people who have not been able to succeed at their own negotiations. So it really is a description largely of a group of processes designed to produce resolutions to conflict that in least in theory are lower-cost and higher-quality substantively than the court system can provide. Since the field has grown, however, it has come to mean a lot more than that.

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*Interviewer:* How did you first become interested in the field?

*Doug Frenkel:* As I said a little while ago, I've always thought of myself as somebody who was much more interested in solving a problem than winning a fight. I've always been a person who had a large problem with direct interpersonal conflict, and a lot of problem, I

learned as a litigator, with the formalized, ritualized, costly, wasteful way in which litigation is carried on in our society anyway. So when I heard about something new called mediation that allowed someone to help resolve conflict without being in the conflict and which stressed creativity as opposed to fighting I wanted to know where to sign up, and there weren't many places to sign up so I had to create my own world.

*Interviewer:* How did your time as a law clerk for Judge [Theodore] Spaulding affect your view of the courts and alternative dispute resolution?

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*Doug Frenkel:* Well, at the appellate level there wasn't very much of an opportunity to think about anything other than processing appeals. Reading briefs, which is what a clerk does all day and all night, there were lots of cases where you would say to yourself "how did this dispute ever get this far, why was there even a trial here, why couldn't these people work this out?" I remember asking myself that question in lots of especially civil cases. So I think it wasn't so much that the clerkship impacted me as I already had that orientation coming out of law school, that there had to be a better way than taking up all this paper and all this lawyer time so that somebody can lose.

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*Interviewer:* How has the field changed since you first became aware of it?

*Doug Frenkel:* Well, it's interesting. When we first began with it here at Penn in the early '80s, it was largely thought of as a field that was limited to poor or "real" people's disputes, small disputes, family disputes perhaps, or maybe labor disputes where the parties were going to have to deal with each other again, but that it wasn't particularly well suited to other worlds like commercial matters, criminal matters and so forth. Since then something that started as a largely grassroots movement or movement by the court system to rid itself of what it thought were annoying, docket-clogging small cases has become a very big business and a very sophisticated practice. And in fact it's in some ways been coopted by the large commercial interests. There are now highly successful commercial mediation practices,

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private practitioners, large law firms have developed dispute resolution departments because their big corporate clients are demanding this, and so forth. So the field has really - I don't want to say grown up, that sounds value-laden - but it has really evolved and, some would argue, have been coopted by the commercial side of the field.

*Interviewer:* Thanks. Now Maryanne Small is going to continue questioning you about alternative dispute resolution.

*Interviewer:* During law school you completed a fellowship in law and psychiatry. Psychiatry deals with people's thoughts and emotions and so it would seem to play a large role in mediation. Do you think the fellowship was an impetus for your later involvement in the practice of mediation and was that fellowship valuable for that later practice?

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*Doug Frenkel:* I'm glad you asked me that. As you can see there's a certain theme or thread running through the evolution of my interests. And yes, I think looking back at it that summer experience was incredibly valuable. In a sentence or two, it introduced me to psychoanalytic thought by basically trailing or tagging along with psychiatric residents for a summer. And that convinced me of how important a component in, for example, the world of disputing the interpersonal and psychological was, and I found that at least as interesting and frankly a lot more interesting than the law stuff. So I think it's had a pretty profound impact on both what I pursued and my take on the subject that I pursued, whether it's professional responsibility or, as you say, conflict resolution or mediation.

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*Interviewer:* You had mentioned earlier that you enjoy solving problems creatively. What other aspects of your personality do you feel make you a strong mediator?

*Doug Frenkel:* Well that's interesting. Notwithstanding the fact that I like to do lots of things at the same time and like action, a lawyer I recently mediated a case with said that my greatest trait was having the hardest ass in Philadelphia, and by that she meant I was able to sit and listen to a lot of stuff that nobody else would have had the patience to listen to. So it's a sense that I am a patient listener, that I am a good listener in the sense of being able to listen to not only what's being said but, again harking back to the psychology of it,

what is really being said and what isn't being said but being conveyed.

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And the other is that I think I'm actually a very good, a very persuasive person. I think people find me trustworthy and credible. And I don't know whether it's me or my institutional affiliation or some combination of both but it seems to work. People seem to be willing to listen when I talk, and more importantly they're willing to talk when I listen.

*Interviewer:* When you're mediating between two parties what personality traits do you feel make a successful resolution the most difficult?

*Doug Frenkel:* That's a very good question. I think that first of all, if there is a lot of unresolved anger, the chances are that that conflict is going to be very hard to resolve, will be unresolvable, or any agreement that will be reached will not have much vitality after the fact.

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That's not so much a personality trait as a structural factor. If one finds parties that are unable to negotiate on their own because they lack the resources to negotiate with, or as a matter of understanding the problem, or because they're so irrationally attached to some aspect of the problem and not letting go of it, that can be extremely difficult. There are a whole range of factors that can make things extremely problematic in terms of the personalities of the disputants.

*Interviewer:* In 1996 in Africa you presented a workshop on mediation. Do cultural differences affect your approach to the mediation process?

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*Doug Frenkel:* Cultural differences, we're beginning to learn, are an enormously important factor in the way people behave when they're in conflict, in the way people receive and perceive information. And I would add to that as well the role of gender in addition to issues of culture stemming from nationality for example. And even on a level as simple as vocabulary, people can mean different things with the same language depending on where they come from. I don't hold myself out as an expert in this. There's a lot of people beginning to write in this area, much of it very stereotypic and problematic, but there's some very good new writing on this and it's certainly made

me sensitive for example to situations in which I don't want to be mediating by myself -

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because it's important to be able to bring into the mediation role some reflection of the cultural variables that may be at work in a particular dispute.

*Interviewer:* Thank you very much, professor. Now Jay Rittberg has some questions for you about your published works.

*Interviewer:* Your published conclusions from the discussion group that you helped organize on "Ethics: Beyond the Rules" point to a declining impact of law firms on how its lawyers conduct themselves. Have you been able to work with any law firms to improve supervision of attorneys to ensure that moral and ethical decisions are made despite pressures to constantly bill and act as an adversary?

*Doug Frenkel:* That's a good question. I had done some work with law firms in terms of ethics training,

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in which in part we talk about issues about supervision and the responsibilities of both subordinate and supervising lawyers and the like. But that doesn't really get at your question. The most direct experience I've had with a major law firm was in a situation here in Philadelphia where the firm asked me to come in for about five weeks one summer and play the role literally of a junior associate taking assignments in areas that I knew nothing about and then to give them feedback on the kind of supervision I got. I did that, and at the end of that experience I can only tell you that the person who retained me to do this was too busy to get my report on the supervision process. That ought to tell you something about my conclusions.

*Interviewer:* Your writings also discuss the discovery system, and according to you it's created "a prisoner's dilemma" of "mutually destructive aggression" between counsel.

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And I'm wondering what changes in the litigation process do you advocate and are these changes likely in the future?

*Doug Frenkel:* Well, I can answer the second question - no. That's even without the culture of competitive approaches to the discovery process, which itself may be somewhat of a misnomer. A non-lawyer friend of mine referred to it as the concealment process. That culture is very, very much engrained, at least in practices, in areas where the stakes are high and the lawyers are not likely to engage in repeat business with each other and where the courts are known to be inept or under-resourced to be able to police the discovery abuses or excesses.

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What changes might come into effect to ameliorate that situation?. Well, of course the courts have been debating changing the discovery rules and have actually, in the federal courts, proposed and in some districts had elected to place more of the burden of disclosure on parties, with results that are being studied. But most litigators are skeptical about the efficacy of those changes. Some of the more possibly hoped-for changes might have to do with changing the ways courts approach these problems, but that of course raises questions about resources and in the state systems questions about the election of judges, which might have an impact on this. Other possible reforms would have to do with the way law practices are organized

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and ways in which we might increase the likelihood that lawyers will have to deal with each other on a frequent and recurring basis, so that some of the relationship factors that can be somewhat mitigating of these excesses might come into play but that's a longer topic than we have time for, I'm sure.

*Interviewer:* Can you talk about the toughest challenges that face attorneys looking to balance their work and family lives?

*Doug Frenkel:* That's a topic that I've given a fair bit of thought to. One of the tough challenges in that is not having unrealistic expectations. If you choose to go into an area like litigation, the chances are that you will have fewer options in terms of being able to control your life at certain points than you might like, and fewer options for controlling your life than, say, someone who chose to be an estate planning practitioner,

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although obviously they are too - there can be moments when you can't control it. When students ask me this question, I often talk to them not so much about the job side of things but also about being careful to analyze their need for things like money, because unless you're aware of what you're bringing to the problem you may not be free to make the kinds of choices that you'd like to make. And so I think that very often these problems can be best dealt with not only by trying to negotiate your work situation and your job situation and picking the best kind of practice and the best kind of employer,

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but also negotiating with your partner at home to map out a joint career pattern that can accommodate everyone's needs, because being a lawyer at the end of the day for most people involves selling hours.

*Interviewer:*

What new regulations would you encourage the ABA to enact to deal with the changing world for lawyers and to promote the ideal of law as a highly moral and ethical profession?

*Doug Frenkel:*

That's a question that we could sit here for a whole semester, in fact. There's a course that I teach talking about it. What single proposal or proposals might move the profession toward its ideal?

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I'm not sure I know how to answer that. One however might be a requirement, which is now not a requirement but rather a hortatory or aspirational norm in most states, that all lawyers devote a portion of their professional time to some kind of unpaid civic or other public-spirited activity. I say that not only because there's a huge unmet need for that, but also because there's a decent chance that for at least some of them they might catch the bug and find satisfaction which would spill over into their more traditional hours and cause them to be a little bit more reflective about the choices they're making and the kind of lawyer they're being. But beyond that it's a huge topic that nobody has been able to solve in a simple way.

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*Interviewer:*

Thank you very much. And on behalf of all the interviewers and Professor Greenlee and myself, I want to thank you for being part

of the oral legal history project and taking the time to speak with us today.

*Doug Frenkel:* Thank you. Thank you all. Thanks very much.

*[End of Audio]*