ADAPSO Reunion Workshop: Contract Reference Directory

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ADAPSO Reunion – Accounting Issues Workshop

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Abstract: Several members of ADAPSO who were involved with the Contracts Reference Directory met to discuss how the contracts directory project started and why it was important to produce the directory. They also talked about how they had to avoid the implication of collusion or anti-trust behavior in defining standard contracts. They spoke about how the Directory was used by the member companies and what was done when customers violated a contract. They identified the specific articles included in both the Program License Agreement and the Professional Services agreement and mentioned many of the other contracts that were produced. They ended by talking about the changes caused by the move to PC software and how the Directory was used to educate customers, lawyers and business people.

Participants:

Name	Former Affiliation
Jay Goldberg	Software Design Associates
Mary Jane Saunders	ADAPSO
Dick Thatcher	Atlantic Software

Introductions

Burton Grad: This is the session on the Contracts Reference Directories that were produced at ADAPSO starting in the late 1970s and continuing, I guess, for another five to seven years. One thing we'll talk about is the period of time covered. Each of you please identify yourself by name, what your affiliation was during the 1970s and 1980s, and what your affiliation is now.

Mary Jane Saunders: From January of 1983 till about March of 1989, I worked for ADAPSO and I helped put together two of the contracts that are in the directory—the Software Product Acquisition Agreement and the Software Product Maintenance Agreement.

Grad: Those were in the second of the two volumes.

Saunders: They were the first microcomputer software contracts.

Jay Goldberg: I was the founder and CEO of a company called Software Design Associates which I started in 1968 and ran through 1985. I was chairman of ADAPSO in 1987. I broke the professional services group away from the software products group into its own section and headed up the development of the contract for the professional services industry.

Grad: What are you doing today?

Goldberg: I'm the managing partner of a venture fund called Hudson Ventures. We invest in software companies.

John Gracza: I was on the staff at ADAPSO from, I believe, 1987 to 1992 or 1993. I began as Director of Statistics and Research and then became very active with the software group.

Dick Thatcher: I joined ADAPSO with the formation of the software section in 1970 in Denver, Colorado, and remained in ADAPSO through, I guess, the late 1980s. I was on the Software Division Board for many years and on the ADAPSO Board for a number of years. I got involved in the contracts project because Burt grabbed me and put me on the project.

Grad: What was your company affiliation?

Thatcher: Atlantic Management Systems, originally called Atlantic Software.

Grad: What happened to Atlantic Management Systems?

Thatcher: I sold it to AGS, Larry Schoenberg's company, one of many companies he bought including one of Jay's companies. Today I am in the investment banking business with Investec PMG Capital.

Grad: And you continued to stay active in ADAPSO when you were working with AGS?

Thatcher: Yes.

Phil Frana: I'm an historian at the Charles Babbage Institute. I run the National Science Foundation Software History Project there.

Grad: A very major project funded by a significant grant that they got from the National Science Foundation. I'm the moderator, Phil is the co-moderator and John is our rapporteur.

What we're going to try to do is develop a chronology: when the project got started, and how it developed. And then, I'd like to spend time on how these contracts were used, what value they had, what difficulties arose. There were a number of contracts done in different time periods. We're not going to go into depth on many of them, obviously, but if there were certain things that you think were particularly significant, let's bring them out and talk about a particular contract.

We've asked Phil—looking at it from a historian's perspective—what kinds of things would he think might be of interest. So he'll ask some questions or ask us to elaborate.

Starting the Contract Directory Project

The scope is anything to do with the directories or the use of these contracts over the entire time period. I don't remember when we first started to talk about producing a contracts directory. Does anybody remember?

Thatcher: I'm going to guess 1973 or 1974.

Grad: That early?

Thatcher: I know why the project got started but I can't tell you exactly when. In the early days clients just signed our standard license agreements without questioning them. But then they started to get their lawyers involved and so it was not uncommon for me to find myself, besides selling software and taking care of clients, negotiating with their attorneys. And that became an expensive and time-consuming process, besides the fact that it delayed the signing of contracts. We were dying. That was the most urgent motivation: to get deals done on a timely basis.   And, Burt, you and I had an early discussion about the possibility of facilitating this process to reduce its cost and expedite getting it done. At the time somebody—it was probably you, Burt—raised the analogy of the architects. How the AIA, the American Institute of Architects, had standard contracts that were used as a framework for their engagements and so the idea germinated from there.

Grad: Help me here. In the back of my mind there's a recollection that we started a committee that Larry Welke was active in but it didn't result in anything for a period of time. We didn't have a lawyer on the committee initially, to my knowledge. Esther Roditti got involved at a later point in time. [Ed. Note: Esther Roditti's name was Esther Schachter at the time under discussion.]

Goldberg: That was the late 1970s

Grad: It was late 1970s before I remember anything specific happening.

Goldberg: That's when Esther got active in trying to put together the first of the directories.

Grad: That's my recollection as well.

Thatcher: But it took a couple years to get to that point.

Grad: Yeah, because we tried to get it going for a period of time. I know Larry worked at it and it just didn't germinate. But there was a need. Who got Esther involved? Do any of you remember?

Thatcher: I thought you did.

Grad: I may have. I don't remember.

Thatcher: We decided that we needed a combination of industry expertise and legal expertise. And so special groups representing different sectors of the industry were formed and Esther was a part of each group. There was a team of IT services players—occasionally we met in Esther's apartment in New York, as you recall—and a software products group. Then there was a VAR group. Esther would draft the contracts and circulate them to those people.

Grad: Milt Wessel, who was ADAPSO's General Counsel at the time, was not involved in this process to my knowledge.

Thatcher: That is correct.

Goldberg: In fact, it was the opposite.

Grad: He was nervous about the project.

Saunders: He didn't like the idea.

Caution about Collusion and Anti-Trust

Goldberg: There was a great deal of caution on the part of the ADAPSO attorneys that we not do anything that would be perceived in any way as collusion or as violating antitrust laws.

They cautioned us on that in all these efforts. Every time we would try to do something, the association was concerned that it would appear as though the industry was getting together to force its terms on the market.

Grad:　　　　That's a very good point. The term we used to refer to these documents—which Esther probably came up with—was: "a form contract with alternative clauses."

Goldberg:　　That was the basis for the alternative clause format. Nobody wanted to have one contract that all of us as vendors were going to present to customers.

Grad:　　　　Companies might have ended up with the same contract but it was a matter of making choices among the alternative versions of the clauses. I'm recalling that Esther must have collected twenty-five or thirty contracts from different software companies. The first contract that was done, the Program License Agreement for an End User, was for a software product. An end user, of course, in this case is a company, not an individual.

We got twenty-five or thirty contracts as samples. I remember that we had a problem because the companies didn't want to give us their contracts. Their contracts were private and they didn't want others stealing them. They were willing to let Esther look at them and use them to create a new document but not copy them. We got IBM's contract. We must have had thirty of them. Do you remember some of the companies that contributed their contracts?

Goldberg:　　I don't know, but you would have to assume it was the usual suspects, which would be the people on the SIA board. So you would assume ADR, Informatics, TSI...

Thatcher:　　Pansophic. And we submitted ours, of course.

Grad:　　　　I wonder if Esther has any record of which companies contributed. That was a really tough thing. I remember we negotiated with each company. How could they be sure the other people wouldn't see their contract? You know, you have this concept of ADAPSO, this conflict between sharing and competing, and here is a wonderful example where it was to our general interest to share information, particularly for the smaller companies.

Frana:　　　　Do you remember who refused?

Saunders:　　Everyone.

Grad:　　　　There were some that never gave.

Thatcher: People were reluctant but I think that once the process got started and got institutionalized to a certain extent there was a lot more openness about it.

Grad: I think later on, after the first three or four got done, it was easier.

Saunders: I disagree. It continued to be a problem to get people to give us contracts. We spent a tremendous amount of time begging people and promising that we wouldn't use them wholesale, that when the contract agreement came out they would not be able to recognize their contract as a whole. And the problem with following through on that promise was that there were some contracts that were excellent. The IBM contracts, in particular, tended to be very favorable to the software company, which is what we were trying to accomplish. So we had to actually build in clauses that were less effective in order to follow through on the promise.

Grad: The point I think we're picking up here is that there were a number of different reasons why this seemed to be a good project during that time period. What was happening at the end of the 1970s that made this project particularly valuable? Can any of you remember?

Reasons for Developing the Directory

Goldberg: Well, I remember one of the discussions. There was a pretty significant focus on providing benefits to members so there was a lot of discussion about what SIA could do that would have value to its members. The members were paying a lot of money in legal fees and so there was a sense that we could reduce legal fees for software companies, particularly the young ones, by providing something they could take to an attorney and say, "I've got these alternative contract clauses. What would you recommend?" And there would be a reduction in the legal fees. So one of the motivations was clearly economic.

Grad: I'd forgotten that completely.

Thatcher: It's true.

Grad: Yes, I remember now that we were talking about insurance policies and all kinds of things that would have financial value and benefit the smaller companies.

Goldberg: Because they had no money. These were companies that were struggling because the industry was just in formation. There were some big companies that were doing well but the little companies were all struggling and couldn't afford first class legal fees.

Grad: I'm assuming that we must have started this project in the 1977-1978 time period.

Goldberg: I got interested in ADAPSO in 1976. That was when I became a member and this had not started then.

Grad: That's a little later time period than we discussed earlier so something triggered getting it started. The buyers were getting more sophisticated, more powerful, and we were starting to see some very unfriendly contracts that didn't give us any protection.

Saunders: This was one of the things that Milt Wessel was most concerned about. We were drafting these documents with the idea that you would use them with lawyers, but we were doing such a comprehensive job by providing the alternative clauses that Milt was concerned—correctly, I think—that people would just take these forms and put together their own contracts without consulting with lawyers. And they would end up in a worse position than otherwise because they wouldn't know what they had actually proposed and agreed to.

The Concept of Alternative Clauses

Grad: The way the alternative clauses were done, which was Esther's idea, I think, is that she gave the reasoning as to why you would use or not use each clause. Or if you were faced with such a clause by one of your users, you would understand what the implications were.

Goldberg: Why that was so important was because most of the people in the software industry, particularly in the small companies, didn't really understand the significance of a lot of the clauses. They just didn't understand it. And so one of the purposes that this served was to educate software entrepreneurs about why tax treatment was important or why intellectual property was important because in those days there was just a naiveté about the business.

Thatcher: I'll tell you how you can figure out when it got started. Our first committee meetings were held at the conferences. Dave Sturtevant reminded me of that and handed me a flyer from a 1979 ADAPSO conference where I was chairing a meeting of the Contracts Committee. At one point the Contracts Committee meetings were featured events at the conferences. If you go back through the ADAPSO press releases about the conferences you'll find the first one where they announced the committee.

Grad: Unfortunately, that kind of material wasn't saved in the ITAA files. I have in my records some minutes of meetings from 1975 through 1977. I'm going to look back through those and see I can find anything. I think we're talking about the 1977-1978 time period for starting this project. This first volume shows June 25, 1979 as the publishing date and I assume that that's the original date, that this isn't a later version. Do you remember, Mary Jane?

Saunders: I started with ADAPSO in January of 1983 and this is what I remember being told at the time. This Directory was something designed to provide a benefit to members. We had remarkably few tangible benefits we could hand members and when people signed up for membership they always wanted to know what they were going to get. It was a major selling tool during the early to mid-1980s.

We decided which contracts would be done in response to the way the industry or, at least, the membership of the association, was evolving. I was most directly involved in what were then called microcomputer software contracts. There was a marked difference in the contracts we were putting together for that group compared to what we had done previously for the professional services and software products companies. I suspect that Ron Palenski knows the most about the early days of the Contracts Reference Directory because he and Mike Nugent preceded me on the ADAPSO staff by a couple of years.

Grad: I know that Ron eventually took over drafting the contracts in the directory. At some point, we decided not to continue to pay outside counsel and Ron picked up that responsibility.

Saunders: It was for financial reasons.

Goldberg: I think it was a lot later, though.

Grad: It was about 1983, 1984. I remember having a discussion with Esther in which I told her that Ron was really capable of doing it. She was a very, very good drafter—still is, I'm sure—but there was a point in time that we wanted to shift it over to Ron for financial reasons. She was not very happy with that, if I remember.

Saunders: Milt also wanted that. Milt was very good at teaching us how to be lawyers. And one of the things he wanted was to take over this process and move it in-house so that the lawyers who were working on staff at ADAPSO could learn more about how the industry operated.

Goldberg: Kind of a countercultural move for an attorney.

Saunders: It was, but he was very countercultural. I think from the early to the mid-1980s on, all the contracts were drafted by the lawyers in house. And we *all* did it because Milt insisted that we all do it so that we would learn this process.

Grad: One of the things that maybe Jay and Dick might talk to is whether this was something that was reasonable for an association to do. I guess we all thought so at the time,

but did the lawyers for the software companies get upset about having this kind of a document produced by the association? Does anybody have any idea? Did your lawyers object, Dick?

Thatcher: Well, we didn't have any permanent counsel. We used outside counsel as little as necessary because it was expensive. When we started the company, we had very good counsel who knew something about intellectual property, unlike many of the companies. But it was *very* expensive. So we took whatever would work and was cheap.

Use of the Contracts Reference Directory

Grad: Be specific. The first contract was a program license agreement. You were licensing products. Did you use this Contracts Reference Directory or did you continue to use your own contracts?

Thatcher: Oh, we used that. Not only did we use it, when we sent the contract out, we actually let the prospect know that this had the imprimatur of ADAPSO. And I felt, frankly, that that helped reduce the amount of pushback that I would get from the client or his attorneys because he wasn't just dealing with a little software company, he was now dealing with something that had the imprimatur of a national organization.

Grad: You were selling to fairly large companies and you were a very small company still in that time period.

Thatcher: Correct.

Grad: How about you, Jay?

Goldberg: We did the same thing because we had a products group and we had a professional services group and both groups used the contracts. But I think you might want to put it in the context of the buyers' perspective in that era. Because the buyers of software had no knowledge and their attorneys had no knowledge, so it wasn't simply educating the vendor as to what these clauses were about, it was also educating the customer. They were used to signing contracts from IBM, but in those days IBM didn't have separate software license agreements.

Grad: That's not a correct statement. They did have a separate software license agreement.

Goldberg: But customers just signed it. They would never go to their counsel to argue about IP or to argue about tax, they just signed the contract. So when you would try to sell software to a large company, their legal department had really no understanding of the issues.

Grad: You didn't show the Contracts Reference Directory to your customer, did you?

Goldberg: No, but what we would say was that this grew out of an industry association. We did the same thing that Dick did. If they were interested, we would refer them to ADAPSO's counsel to discuss the wording of the clauses. But they never actually did. More often than not, they would just accept the clauses.

Grad: Interestingly enough, I think that if they had read some of the pros and cons on these things, it would have made them a much too well-educated buyer.

Goldberg: Right.

Thatcher: What went out on our letterhead was our contract but we let them know what it was based on.

Goldberg: But on any of these issues like acceptance periods, license, who owns the software, etc., the in-house counsel in these big companies was completely naïve. They understood how to buy hardware but none of them really understood how to buy software. So this really served a dual purpose although we didn't intend it that way. I think it actually educated the buyers about what the issues were.

Grad: I've heard the point of view that the contracts that are used today by software companies or services companies are incredibly one-sided. That they are biased toward the vendor. Do you think this Directory may have contributed to that in some way?

Goldberg: Absolutely.

Grad: You think it did?

Goldberg: Absolutely, because I think it gave companies a feeling that what they were doing had some grounding and had an association behind it. I had a small software company and when I was going to sell software to New York Telephone which had a whole raft of attorneys, I could actually say that the reason that clause is in there is because this big trade association debated the issues, consulted with lawyers, and this was the result.

Grad: I left IBM in 1978 so I must have left about when ADAPSO started working on this. The first IBM software contracts had to be in 1969-1970 when they started delivering software for the first time at a price. I know I worked on a software contract at IBM. But that isn't what triggered ADAPSO's doing this. Competing with IBM was not a factor. This had to do with dealing with our customers.

Thatcher: I'll go back to a point I made originally. For us, the motivation was to get the deal done. And, Jay, you were right about the other side not understanding things and, as a result, just dragging the contract negotiations out. In those days, we were trying to get traction. Of course, 1970-71 was a horrible time but, even in the mid-1970s, we were trying to get traction and it was not unusual that we were really screaming for somebody to sign a deal so we could bill on it—we always billed 50% up-front—and get the cash so we could make the payroll. So when I ended up dealing with a lawyer who was dragging things out for thirty or forty-five days, it was real serious.

Grad: Did you have that same experience in the services area, Jay? Was there a delay in getting contracts signed caused by the lawyers or was that not a problem?

Goldberg: It was the same issue. Although the issues were a little more straightforward and easy to understand than they were on the products side, it was an era when big companies hired consulting firms and they didn't have master agreements. Today it's all boilerplate. In those days we would present them with our agreement, they would send it to their legal department, and it would take a long time to get their approval. The difference was we very often began the work before we had the signed contract which was harder to do in the software products business. We would operate more on faith. If we had a purchase order, we'd go in and start doing the development.

Grad: You could bill against the purchase order.

Goldberg: That's right.

Violation of Contracts

Frana: Were the contracts often violated?

Goldberg: All the time, regularly.

Grad: Are you talking about services or software?

Goldberg: Services and, I suspect, in products as well. But certainly in services. Violated by the customer, absolutely.

Grad: Do you remember that in the products area, Dick?

Thatcher: The big concern that we had initially was, of course, unauthorized copying of the software. But for us, it turned out, that rarely proved to be a problem. Once or twice we discovered that it had happened. Once was with the Washington Post. I ended up calling Katherine Graham's office and getting referred to one of her top officers. We had found out that the head of IT had taken a copy of our product and was using it in another location. I think it was a subsidiary. We confronted him about it and asked him to pay for a second license. We told him he could use it but he had to send us another ten grand. He denied it but we had very sound proof. I had a phone conversation with one of the top officers and told him we had solid evidence that the guy had violated the contract. It was settled very quickly and we got a second license. But that was very rare. It really wasn't much of an issue for us. Remember, this was not PC software where theft is a significant issue. This was all mainframe and mid-range stuff.

Grad: At that time, using the software on multiple computers under a single license was a greater concern than piracy.

Thatcher: The other big issue for us was payment terms because, for us, cash flow was always important. But we could track violations on that very easily.

Grad: Jay, on the professional services side, what kind of violations occurred?

Goldberg: Well, the one that was most commonly violated was the non-hiring clause. Every professional services company had a clause in its contract that said that the client couldn't hire an employee of ours for a period of time after the contract ended. When there was a dispute, it was always about hiring. The one other problem area had to do with fixed-price contracts.

Grad: Let's deal with both of those because they were both interesting. On the hiring issues, the professional services companies were—I hate to use the pejorative term "body shop"—putting people on site either under time-and-materials or fixed-price contracts.

Goldberg: The issues were different.

Grad: Was the first professional services contract a time-and-materials agreement or a fixed-price agreement?

Goldberg: I believe the first one was a time-and-materials agreement because that was the easiest one to do.

Grad: You would put your people on customer premises performing specific work usually alongside some of their own people, right?

Goldberg: Yeah, fixed-price contracts were typically our own people, and with time-and-materials contracts, it was typically blended.

Grad: And, invariably, if they thought they saw somebody good, this was a cheap recruiting opportunity.

Goldberg: Absolutely.

Grad: What did you do about it?

Goldberg: Only once did I actually elevate it to upper management—at Equitable Life Insurance—and it wound up costing my company dearly.

Grad: Is that right? How? In what way?

Goldberg: Well, they hired one of our people. We objected. In most cases when that happened, I would object and show the customer the contract. They would say, "Yeah, you're right. Can we pay you a fee?" We always wanted to preserve a customer relationship so we would say, "Absolutely." And we would charge them a fee. But the guy at Equitable Life said, "Go screw yourself." I escalated it and wound up with a very senior executive who said, "How did this ever get to my level?" He wrote me a check and we did no more work at Equitable Life.

Grad: Wow. That's a pretty painful lesson, isn't it?

Goldberg: Yeah. In those days, if you decided to take on a customer you did it with great caution.

Grad: So the contract terms were fine but the issue was how do you enforce them in an effective manner.

Goldberg: Most customers lived with them or negotiated through them. Every now and then you got a recalcitrant customer, but I think they were the exception in those days. I think today it's very different. Today the customers define *all* the terms.

Grad: Let's switch now to the fixed-price contract.

The 1706 Issue

Thatcher: Well, before you do that, this is exactly the foundation of the 1706 battle.

Grad: What is the 1706 battle?

Saunders: The independent contractor issue.

Goldberg: I'm not sure they are connected.

Saunders: Oh, I think they were. ADAPSO wasn't the first association to pursue it, but ADAPSO got deeply involved in it when the professional services company saw the advantage.

Grad: What is 1706?

Saunders: It was Section 1706 of the Tax Reform Act of 1986 which imposed rules on the tax treatment of independent contractors, making it difficult for people who had been employees to become independent contractors. There was a movement afoot among many programmers to set up themselves up as independent contractors who worked through body shops. They sought significant tax advantages such as being able to deduct the cost of their basement office and that sort of thing. I can't remember which industry group it was that went to Congress and got this little provision into the tax reform act. And then all hell broke loose.

Grad: I remember a gentleman named Jay Goldberg becoming the bête noire of a bunch of people because of 1706. Can we put that on a side note here and come back to it?

Goldberg: Yeah. I'm not sure they are connected.

Thatcher: You don't think there's a link? You don't think the right to hire someone is a link?

Goldberg: No, because that right to hire would have been whether you were an independent contractor or full time employee.

Thatcher: Okay.

Goldberg: I think it was a completely separate issue. It was an important issue in the evolution of the industry but not related to the contracts issue.

Thatcher: I'll never forget Tony Stepanski who ran AGS Professional Services who felt very strongly that the client didn't have a right to hire his employees, just like you did.

Goldberg: No, he felt much more strongly than I did because he would actually sue. He actually went after employees.

Thatcher: But clients countered with, "Well then, I'm going to deal with firms who use independent contractors who I can treat as I wish."

Goldberg: But even the firms who specialized in using independent contractors had the same clauses. That's why I don't think there's a connection.

Thatcher: Did they? That's interesting. Okay. I didn't fully appreciate that.

Warranties

Saunders: One thing that I observed over the course of the time that I was involved in this at ADAPSO, and then at the Software Publishers Association, is that these contracts were very pro-vendor and they initially didn't have any warranties. And for a long time they continued to be presented without any warranties.

Several voices: No. No, no.

Saunders: Yeah, they were. They were as-is contracts. But, in practice, you guys were providing warranty service. You didn't want to put it in the contracts, but in order to maintain the customer relationships you were providing warranties.

Grad: Are you talking professional services? Are you talking products?

Saunders: All of them.

Goldberg: I don't think so. Let me go back to my recollection of what the situation was at that time. We were all companies that had no assets. And our customers were the largest companies in America. The idea that any one of those companies could literally, with one lawsuit, put any one of us out of business was a terrifying prospect. So we developed as much protection as we could so that if our software screwed up, we'd give the customer back his money, but we wouldn't be responsible for anything beyond that.

Thatcher: Consequential damages.

Goldberg: Consequential damages was the big issue because these software companies went from payroll to payroll. Even the biggest of the companies, because they were growing so fast, were just literally keeping up with payroll.   We were terrified that a large company would put in our payroll system or our accounting system, something would get screwed up, people would be paid incorrectly, and the customer would come back to us for the damages that they had incurred, not what they had paid for the software.

Saunders: But you were able to get that accepted and into the final contract by having these be industry-sanctioned agreements.

Goldberg: Absolutely. That is exactly how that happened. But I believe today that it's the same, isn't it?

Saunders: No, it's not. Now you get ninety days.

Goldberg: Ninety days of what?

Saunders: Ninety days of warranty coverage.

Goldberg: That's just a pricing issue. When maintenance starts is simply a pricing issue.

Saunders: No, I'm not talking about maintenance, I'm talking about the basic warranties that are provided under any professional service agreement or product license agreements these days.

Grad: I've been involved as an expert witness in some lawsuits and all the contracts I've looked at—Computer Associates or GEAC agreements, for example—say no consequential damages, period.

Saunders: Consequential damages is a different issue. That's a limitation on liability.

Grad: Almost all of them have an arbitration clause, limiting the right to sue.

Saunders: Right.

Goldberg: The warranty just had to do with when the customer started paying maintenance. You could warrant the product for a year and then maintenance would kick in. Or you could warrant the product for ninety days and then maintenance would kick in.

Grad: She's using a different term, Jay.

Saunders: Right.

Grad: Let's see if I can help interpret. The warranty concept is that I commit that something will perform your task correctly. What software companies commit to is that it will perform what we say it will do correctly. That is not the same thing.

Saunders: As to consequential damages, of course, they always had, and continue to have, limitations on liability.

Grad: The contracts I've seen, which relate to mainframe software, not PC software, guarantee that it'll do what I say it will do. If you point out to me that it's not doing what I say it will do, then I will correct it to the best of my ability to make it do what I say it will do. I go no further.

Goldberg: Our companies all say that today.

Saunders: All say that today, but the contracts under discussion didn't say that.

Goldberg: They all said the software would perform in accordance with the documentation.

Thatcher: That kind of wording is not in that 1979 license agreement? I thought it was.

Saunders: No.

Goldberg: I bet it is. In accordance with the documentation. That's the way it used to be phrased.

Grad: Article 13 of the Product License Agreement with End User talks about warranty of performance and provides different alternatives. We're not going to go through the wording in detail but warranty was one of the major issues and we were saying to the companies in this agreement…

Goldberg: We give you this documentation and the brochure and we guarantee the product will do what we say. We would also say that if you modify the product in any way that the warranty no longer applied.

Grad: In the Contracts Reference Directory, we told the software company if you choose this wording, here is what you're subject to, here's what you're protected against. We didn't tell them whether or not to include the warranty clause. They made the choice. They may have turned around and said to their customers that this is what the industry said they should

do, or this is what other people do. We were trying to be very careful because it was a very sensitive issue. Milt really was concerned about it.

Change Management

Goldberg: Fixed-price contracts for professional services were much more difficult because the customers didn't understand the development process. It's still a problem today in fixed-price contracts but, in those days, it was much more of a problem because the buyers were so naïve and uneducated. So the analogue we always used was building a house. We would have a design document agreed to by the customer. We would sign a fixed-price contract to develop to those specifications. And then the customer would change the requirements. So the language in the contract for changing the specifications, and doing additional work, was always crucial. That's where all of the disputes occurred. I'm not sure that problem's been fixed. I think it's probably still a problem today. The only difference is today the customers are much more aware of the ramifications of changing the specifications and so there's a more business-like approach to it than there was in those days.

Grad: I know that, in general, the view in the 1970s was that if you took on a fixed-price contract, there was no way the customer could ever specify it well enough. Even if they *had* specified it well enough, they were going to change their minds and there was no way you were going to be able to renegotiate your price once you had a fixed-price contract in place.   I think that the companies that belonged to ADAPSO during the 1970s did very few fixed-price contracts. It was death. The customer was powerful. If you wanted to keep the customer, they could get away with changing anything that they wanted. The only customer that I can remember that we would do fixed-price contracts with was the government. The federal government did have a process for changing the requirements.

Thatcher: Change management.

Grad: There you had a change management process. But other companies didn't.

Thatcher: The Big Eight really were the early players in fixed-price contracts but they were also the early players in effective change management.

Grad: Was Andersen a leader in change management methodology?

Thatcher: Yeah. Part of the reason that they developed Method One was to have a methodological framework so that people could agree on milestones as they went along and deliverables throughout the implementation of a system. Then it became a marketing approach where the Big Eight would—this is anecdotal, but I think it's pretty valid—bid a job knowing full

well that, with an effective change management system, the job was going to end up being three, four or five times the size of the original bid.

Grad: The companies that were providing services to the Federal Government—CSC and the others—would low-ball, underbid, to get the contract, because they were banking upon a number of changes being made over the two or three years of the contract. The Federal Government had an engineering change process and the companies felt that the customer wasn't going to switch vendors in the middle of a project. If you maintained good relations with the purchasing agents, you would get authorization for changes and the contracts would end up two, three, four times as large.

Thatcher: I think that was basically borrowed from the engineering business.

Grad: Absolutely. I think it was because of the government experience in dealing with hardware change in the aircraft industry and so forth.

In the time that we have left, I'd like focus on the first two contracts a little bit and then maybe the ones you worked on, Mary Jane. How did the process work? Dick, do you recall the process of getting this first contract, the Program License Agreement, in place? Do you remember the sequence of events? If you remember any of people involved, it would be helpful.

Thatcher: It started before Esther got involved. We tried to pool some contracts and do it on our own. And it became clear very quickly that that was unrealistic because of fears that Milt had, and the fact that none of us were lawyers, and that none of us had the time to pull all this stuff together. And I think you're the one, Burt, who promoted getting professional help to drive the process. That's when you brought Esther into the equation, and it then became a team effort led by Esther, supported by company executives in each particular area, whether it was software products or professional services or VARs or what-have-you. There were a series of meetings and she established a process for creating the contracts. The first step of the process was to send your contracts to Esther. Then she would do a cut-and-paste to create a draft which got circulated through the committee several times for comments, and then it was finalized.

Grad: My recollection is that we tried to do this within SIA. We had a Contracts Committee and people wouldn't give us their contracts because they had no confidence that the contracts wouldn't get passed around. We solved that problem by bringing in a third party. My memory is that it was probably Oscar Schachter, who was very active in SIA, who suggested Esther.

SIA was both software products and professional services at that point. The two groups hadn't split apart yet. I think we probably started on the Professional Services Agreement about the same time, Jay.

Goldberg: We would meet at Esther's and Oscar's apartment. We'd meet in their kitchen or living room and there were usually five or six people there.

Grad: Do you remember some of the people who worked on the Professional Services Agreement?

Goldberg: Oscar was one of them.

Grad: He was with Advanced Computer Techniques, Charlie Lecht's company, at the time, I think. Do you remember any of the other people who were involved Jay?

Goldberg: No, I don't.

Grad: Dick, do you remember some of the people involved in the software product contract? Any recollection? Did we have an IBM representative working on that one?

Thatcher: We did. Was it Ed Kane?

Grad: No, it was somebody from their legal side. It was a lawyer, not a businessman.

Goldberg: I sure don't remember an IBM attorney at any of these meetings.

Grad: You don't?

Saunders: Yeah, there were. There were IBM attorneys.

Grad: Certainly later on there were.

Thatcher: I don't recall an IBM attorney being involved but I do recall IBM input.

The Program License Agreement

Grad: Let me read the titles of some of the articles in the Program License Agreement first and then I'm going to do the same for the Professional Services Agreement and see what you remember as being the most significant or most difficult.

- Parties and Definition
- License Grant

The concept of a license was central to everything, right?

Goldberg: People were beginning to understand that they couldn't sell software. In the early days, people would actually sign a contract of sale for the software.

Grad: So this was very significant.

Goldberg: Yes, but I think that by that time period everybody understood that you had to license software, not sell it, to retain ownership rights to it.

Grad: By the end of the 1970s that was clear.

- A whole article on Program Support Services: what did maintenance cover, when did it kick in

The typical practice then was one year "free" maintenance as part of the initial license agreement. Later on, maintenance couldn't be included in the license agreement; it had to be a separate transaction from an accounting standpoint.

- Training, maintenance, program support, call-in service, whatever else you want to do
- Data conversion
- Consultation
- Enhancements

We never did figure out a way to define enhancements other than to say, we'll give you what we choose to give you. That's effectively how it has always been done—no one is entitled to anything in the way of enhancements. One of the problems is putting a value on the commitments you've made. If you've committed to doing enhancements, what have you committed to?

Thatcher: Well, it really depended on how you structured your deal. For example, if you read John Cullinane's article in the *Annals*, he started charging an annual support fee. You paid an initial fee and then paid an annual support fee and that went on forever and you got everything. So it wasn't an issue.

[*Ed. Note: Volume 24, Number 1, of the* IEEE Annals of the History of Computing *was distributed to all attendees at the meeting.*]

Grad: Couldn't they release a new feature or a separately-priced capability that wasn't included?

Thatcher: No, it was all thrown in.

Grad: Well, Syncsort did something very similar to that.

Thatcher: As long as you kept paying…

Grad: You got whatever.

Thatcher: When you stopped paying, you couldn't use the software any more. I don't know if he had a recovery process or not.

Grad: He was able to get away with that then.   That's interesting, because most companies would not sign that kind of agreement now.

Goldberg: It was an annual license.

Thatcher: Didn't Computer Associates use that model? I think they did.

Goldberg: There was a guarantee to the customer that you would keep the product current if IBM came out with a new generation computer or system software modifications. So that was essentially what you guaranteed.

Grad: That's right.

Goldberg: If the hardware or the systems software changed, you would keep it running.

Grad: And that was an issue because the customers would say, "We've paid all this money for the software, we want to be able to keep using it. You can't put me out of business by jacking up the annual rates."   Of course, when a company was acquired by Computer Associates, among others, the rates just took off.

Frana: How did you handle the customers that didn't want to upgrade?

Goldberg: That became a real issue because you would wind up with multiple versions of the product to be maintained. So eventually there became a mandatory upgrade where you would tell your customers that you would maintain software going two or three versions back, or

for a period of time.   And if they didn't upgrade, then you could no longer support them. That became a really big issue.

Grad: And, of course, the license agreement specified that it's yours to use, but you have no right to resell it. Even transfer rights were blocked in many cases.

Saunders: Moving it from computer to computer was sometimes blocked.

Thatcher: To reinforce what Jay said, we had a policy that if you stopped paying for maintenance but then you called for support, you had to go back and make up all the payments that you missed before we would answer your question.

Grad: Yeah, you never got a free ride. In some cases there was a penalty charge because, otherwise, the customer would just wait until he needed to make a support call and then just make up the missed payments. That was a no-loss proposition for the customer.

Frana: Did you institutionalize the change? Did the customer always know when a new version was coming out?

Thatcher: Many companies did. They developed a regular schedule of new releases and upgrades. On top of that, with the influence or evolution of user groups, the change process actually got institutionalized in conjunction with a user group which would submit requests for upgrades. The company would decide which of those requests it wanted to incorporate in the next release. There would be an agreement either formally or informally with the executive committee of the user group, and that was what was in the next release.

Grad: Almost every product company ended up with these user groups. We didn't have much activity in ADAPSO related to user groups, did we? They may have been modeled after the original IBM SHARE and GUIDE.

Thatcher: A very important function.

Goldberg: Yeah, but I have a feeling that it is one of those areas where everybody felt proprietary about what they were doing because everybody had their own style.

Grad: Did you ever have a user group for one of your products?

Goldberg: Oh, yeah, we had many of them.

Grad: I know you did, Dick.

Thatcher: Well, it was great for promotion. They initially started as parties for our customers. And then they became sales sessions as well as parties. Then, in many cases, the users took them over. They became organizations that were truly independent of the software company.

Grad: But the contracts didn't really address the user groups. That was an evolved process. The other articles here include:

- Property Rights
- Proprietary and Trade Secret Information
- Liability and Default

No way we're going to go into this in detail, but the range of coverage was very broad.

Goldberg: Property rights was an important issue. A lot of the software products were built in conjunction with customers. For example, we would start out with a core product and then some company would tell us they'd like to have a particular feature. If it was a feature peculiar to that company, we handled it one way. But we handled it differently if we thought we could sell that feature to a hundred other companies. We would negotiate ownership of the modifications differently in that case and provide maintenance of the modifications.

Grad: Did you write separate contracts for those?

Goldberg: Yes. The issue of ownership was crucial because if you did something for a customer, you wanted to make sure at the end of the day you owned the rights to it.

The Professional Services Agreement

Grad: In your professional services companies, who owned the work you did for the customer?

Goldberg: We would always try to own it and the customer would always push back.

Grad: Did you win in many cases?

Goldberg: Usually not, because they were smart enough to know that it was work for hire. But occasionally we would. If we saw an opportunity to develop it further, we'd negotiate to own it. A lot of software products were built out of professional services contracts.

Grad: I remember Dick Thatcher setting up an agreement for four or five sponsors to pay for developing a new product.

Goldberg: Right, that's exactly how it was done because we didn't have the money to build it.

Grad: The sponsors paid for developing it and they got a license to use it when it was done.

Goldberg: I would bet that if you went back and looked at the history of the successful products in the business, you would find more than half, perhaps the vast majority, were customer-funded developments. You'd find a customer, build something for them, and then you'd say, "Hey, that worked pretty well. Can I sell that to other people?" Then you would negotiate ownership. That wasn't in the contracts we're looking at now because it deals with licensing a product once it's become institutionalized.

Thatcher: I recall discussions about drafting a sponsorship agreement in one of the meetings because it became a very complex process, with issues of ownership rights and royalties. One of the players who was very active in that space was ISA, Insurance Services of America, which had, I think, fifteen or twenty large insurance companies as customers.

Grad: Also Anacomp and Hogan Systems in banking. Big, big money involved. They never finished a product but... [*Laughter*] ...they got hundreds of millions of dollars out of sponsorships.

The articles in the Professional Services Agreement were:

- Parties and Services; what was the scope and site?
- Modification and Cancellation
- Term
- Payment
- Staffing; who owns the people, whose employees, that kind of thing.

Did the issue come up about when people worked for a customer for more than a certain period of time on the customer's site, they became a de facto employee of the customer according to the IRS?

Goldberg: That was later. It was an IBM-driven issue. IBM was the first one to really understand that and they put a six-month limit on their employees working at a customer's site.

Grad: Was this the late 1980s maybe?

Goldberg: Yes.

Thatcher: It's still, by the way, an important issue today. Staffing companies are rotating people all the time.

Grad: Your people were on the customer's site but they were your employees. You were paying their social security, etc.

Goldberg: Yes, but there were companies that used so-called 1099 employees which was the 1706 issue.

Grad: Is that at the same point in time or is that later?

Goldberg: Same point in time. It was a big issue in ADAPSO. I had a problem because I came down on the wrong side of that.

Grad: Yes, you did.

Goldberg: I really thought that Section 1706 was something that ADAPSO should figure out how to deal with. Jack Courtney, who was ADAPSO Chair in 1988, was vociferous on the issue and, in fact, got ADAPSO to oppose companies that used independent contractors instead of full-time employees. I thought he was wrong because it would prevent companies that used independent contractors from ever joining ADAPSO, which it did.

Thatcher: Right. It resulted in the formation of the National Association of Computer Consultant Businesses.

Goldberg: That's exactly right. Which today is an incredibly large organization. From a membership standpoint, I always had the view that the association should work to represent a wide range of constituents and not take a position that would exclude parts of the industry. There were others that felt that the association existed for its current membership and should promote its interests. That's where our views crossed.

Grad: Jack Courtney was the president of Computer Task Group at that time.

Thatcher: There never would have been an NACCB were it not for the 1706 issue. All of those people would have become part of ADAPSO.

Grad: One article in the Professional Services Agreement was Warranty of Performance.

Goldberg: Yeah, we essentially said to our customers—to your point, Mary Jane—that we're not responsible for anything.

Saunders: Right.

Goldberg: You pay us and we're responsible for nothing.

Saunders: Right. That was my point. It was not really a limitation of liability. It was telling the customer that they really were not getting anything. It was being provided as-is, and that the software company owned it, not the customer. They got the right to use it for a limited period of time.

Grad: This agreement—let me make sure I'm right here—says Professional Services Agreement. Is this only the time-and-materials agreement, or does this include fixed-price work?

Goldberg: We had multiple versions. We had a time-and-materials agreement, and we had a fixed-price agreement.

Thatcher: What's the date on the Professional Services Agreement?

Grad: October of 1979.

Thatcher: Really? So it followed right after the Product License Agreement.

Additional Agreements

Grad: I think these two were going on in parallel. I think Jay and the people he was working with were doing one, and Dick, you and I and others were working on the other one. And then, I think, there may have been a delay. Yeah, December of 1980 is the next one, which is a Computer System Agreement with End User.

Goldberg: That was the old service bureau agreement.

Grad: Well, I don't think so, because the next agreement is called Batch Processing Services Agreement.

Thatcher: I think the one called Computer System Agreement was for VARs.

Grad: I think the VAR agreement was the third one done. I don't know if we were calling them VARs at that point in time or not.

Goldberg: We called them OEMs.

Grad: The Batch Processing Services Agreement was done by Esther and is dated October of 1980. The Computer Services Agreement is dated December of 1980. The next one in this book is the Remote Processing Services Agreement. It was done by Ron as the Assistant General Counsel in 1982.

Let's see, they are not in the book by time sequence. I'd forgotten that. The next one is also by Esther who is identified as Special ADAPSO Counsel-Contracts. This is called a Non-exclusive Marketing Representative Agreement. That's using a third party to sell your products.

Thatcher: What was the date on that?

Grad: The date is July 1981. Here's another one that she did that is copyrighted in 1982, without a month—An Exclusive Distribution Agreement. How about the book you have, Mary Jane? Let's look at that.

Saunders: The first one is the Software Product Acquisition Agreement done by Esther in February, 1983.

Goldberg: That's when you are buying a product from another developer to remarket or reuse.

Saunders: I started with ADAPSO in 1983 and the Software Product Maintenance Agreement was one of the first projects I did.

Thatcher: Was that for PC's or for mainframes?

Saunders: It was for mainframes. Work on PC contracts didn't start until 1985. This next one is an Exclusive Distribution Agreement (International) which Ron did in November, 1983.

Grad: Because by then the international market was big business for the software product companies.

The Warranty Drafting Aid

Saunders: This next contract is incorrectly attributed. The name on it is Bob Daunt but this is something I actually wrote in 1985. It's a Warranty Drafting Aid. If you look at this and the Software Publishing Agreement, which was in 1986, this was at the point where the PC guys were trying to decide whether to join ADAPSO or form their own organization. So there was a lot of emphasis on creating product that would be of value to them. One of the critical issues for those guys was how to deal with warranties.

Goldberg: The shrink-wrap issue.

Saunders: Right. This Warranty Drafting Aid is actually not a whole contract. It is just the part of the contract that involves warranties because that is what the shrink-wrap license was.

Goldberg: This may seem trivial today but, in those days, when you sold software to a big company, they got a piece of paper that they had a chance to review, and then they could accept the terms of the contract or reject them. The PC software guys handed you a box and in the box was a warranty or disclaimer. The question was: If a customer wasn't going to sign it, what was the contractual relationship? Because, for the first time, there wasn't a negotiation, there wasn't a signature.

Grad: They put it under plastic so you could read the thing before you opened the box.

Goldberg: Today, customers understand that it's a license agreement. But in those days there was really a question as to whether it was binding.

Frana: But it has changed back a little bit, hasn't it? Because now you accept/decline if you purchase the software.

Saunders: Yeah, because it's smarter that way. But because the agreement had to be on the back of the box, it really forced us to pick and choose those things that were important. What was important was that this was a license to use, not a sale. Also to put in the reservation of rights for the Federal Government so that they didn't end up owning it. And then the warranty provisions. That was it.

Goldberg: There was no accept/decline because nothing was online. Today, you download, you scroll and you click yes. But in those days what you got was in a box. You installed it on your computer. You weren't connected to anything.

Grad: "Accept" meant you ripped open the plastic. The minute you opened the plastic cover, you accepted it.

PC Software Publishing Agreement

There's a Non-exclusive Software Distribution Agreement for Microcomputer Software here and, again, it's aimed directly at the PC industry.

Saunders: It is the original software contract, sort of modified, with a new label on it, so that we could say, "We put this together for you PC guys."

Grad: We had at that point brought the PC software people into ADAPSO and were trying to set them up as a separate section. Esther Dyson, the editor of *Release 1.0*, and Paula Brooks, president of Unitech Software, were the two key people trying to organize that.

Goldberg: And then the big issue arose with the piracy lawsuit.

Saunders: Right. We were going to file the first piracy lawsuit but the ADAPSO Board wouldn't pursue it and Ken Wasch did.

Grad: This is when SPA, the Software Publishers Association, run by Ken Wasch, picked up that issue and did an incredibly good job with it. SPA became the association that most of the PC software companies joined.

Goldberg: They came to us first.

Saunders: They did come to ADAPSO first.

Goldberg: The ADAPSO board had a heated discussion because of what they wanted us to do…

Grad: Who's "they"?

Goldberg: Microsoft and a handful of other PC software vendors. They said, "We want to bring a series of lawsuits against the major corporations in America for illegally copying our software and we're looking for a trade association to work with us on it. We insist on your funding support and the use of your name." And there was a very heated discussion at the ADAPSO board.

Grad: Were you Chair at the time or was this before you were Chair?

Goldberg: It was either right before or when I was chairman. So I was either Vice-Chairman or Chairman.

Saunders: You were chairman in 1986?

Goldberg: 1987.

Saunders: Yeah, that's about the time. We were going to sue American Brands.

Goldberg: And that was another argument I lost. I felt that it was important for us to step up and represent all constituents, but a lot of the guys from the timesharing and network services companies were terrified that the big companies that were going to get sued would turn against them.

Saunders: I left ADAPSO in March of 1989 and became General Counsel with SPA.

Grad: You were considered a traitor and a turncoat. You do understand that? [*Laughter*]

Saunders: I knew that. But I did it because I wanted to be involved in the piracy litigation. I then ran their litigation program. In addition, what the SPA membership wanted was exactly the same thing that the ADAPSO membership wanted. So there was an entirely separate Contracts Reference Directory that I developed at SPA.

Grad: You stole it?

Saunders: I stole the idea.

Grad: Did you steal the contracts? [*Laughter*]

Saunders: No!

Thatcher: Make sure this conversation is being recorded.

Goldberg: It was entirely reverse engineered. I want the record to note that she's not blushing. [*Laughter*]

Saunders: No! I didn't steal the Directory! Believe me!

Ron called me up and said, "It's copyrighted." I said, "I know it's copyrighted." He said, "You can't take it." I said, "I know, I don't want it." He said, "It's good." I said, "I'm going to do a better job." And what we did that was different was that we provided it on diskette.

Grad: Well, that's clearly different. The words were the same but, hey, it's electronic. It's different. [*Laughter*]

Saunders: But that was important.

Grad: Anyway, this Software Publishing Agreement was clearly done to appeal to Microsoft. Mike Maples, a top executive at Microsoft, was a very active member of SIA. The decision to create a separate ADAPSO section for PC or microcomputer software companies was a very hard decision because we felt that the two groups had more issues in common for *business* software than issues that were different. Not necessarily so for consumer software.

Goldberg: Yeah, but the groups were different culturally.

Grad: The ADAPSO microcomputer section never succeeded.   SPA grew, and then they went on to include game software and educational software.

Goldberg: In retrospect, they really were different and there was very little recognition at the time about the differences.

Grad: We were business software people, selling to big companies. Theirs was a whole new culture dealing with selling millions of copies instead of a few. I think that it made a difference.

The next one here is the Non-exclusive Distribution Agreement for Microcomputer Software.

Thatcher: Can we stop on that point? Notice that, for historical purposes, two major trade associations—NACCB, the National Association of Computer Consultant Businesses, and SPA, the Software Publishers Association—both started, in effect, out of ADAPSO, each driven by a single, very compelling issue. Then they evolved into more comprehensive trade associations.

Grad: Interesting, because I think what Ken Wasch offered was his agreement that they would litigate. Well, they would negotiate or litigate, but they would go to the companies and do something about it.

Saunders: He agreed to litigate. But we also started negotiating as a result of me not being twelve people.

Goldberg: It was all about litigation.

Grad: Let me just finish these last two agreements. Mary Jane, you did the Non-exclusive Distribution Agreement for Microcomputer Software in 1986, again following that same theme. And then there's a Site Licensing Agreement in 1986 which was done by Joe Ruble?

Saunders: Yes, Joe was the junior attorney and I was very, very tied up in the 1706 issue by that point.

Educational Benefits of the Contracts Directory

Grad: The last one in this book is dated 1986. You can see the shift in emphasis covering all the sections. The point you make, Dick, is an interesting one. This reflects the evolution and changes that did and didn't take place within ADAPSO. It covers just a seven-year period. But that was a period of incredible change, and the contracts provided benefit for software products, professional services, and service bureaus.

Goldberg: Benefit and standardization. I think standardization is one of the main things that came out of it.

Grad: But that was tricky. We had to be very, very careful.

Goldberg: It felt that way to me. We were always very conscious of the issue. But I don't mean standardization from an antitrust perspective. It was a real thorough discussion of what the issues were, and what the positions were with everybody disseminating the results to customers.

Grad: A thinking-through process and an educational process.

Goldberg: Yeah, that's what I mean by standardization. Because even at the end of this, we did not have the same contracts. I'm sure at the end of this process, if you had looked at Dick's contracts and at my contracts you wouldn't know that they had come from the same source. But they contained a lot of the same meat.

Grad: I've had a chance to look at some contracts by Computer Associates over the course of about twenty years. I've had a chance to look at the GEAC contracts, which are the old McCormack & Dodge and MSA contracts, and to see how they had changed over time. Lawsuits have often hinged upon what is industry practice, and this Directory is part of the evidence that has been used in a couple of these trials. I've used these contracts as representing industry practice.

Thatcher: I think the other thing that ties in with Jay's earlier comment that you're really educating the client is that, in the late 1970s and early 1980s, we were also educating the lawyers. There were a lot of lawyers who were seeing intellectual property as an emerging practice and didn't really know a lot about what was going on in that space, and they came and sat in on some of our meetings.

Frana: That's very important. Historians sometimes try to put two things together that don't seem to go together and they struggle with it. These are very logical, very clear, very eloquent solutions to the problems. But was it the weighty issues that were driving this activity? Or was it the fact that you guys have logical, clear, elegant programs? It seems like gifted programmers as artists would innately understand the whereas, the wherefores, the kinds of things that get put into these contracts. Not true?

Grad: That was part of the educational process, to get the business people to see the risk of inadequate contracts.

Goldberg: In fact, that really *was* the problem. A lot of programmers had set up companies and were selling software and couldn't see the importance of contracts.

Grad: This was a real education to them.

Frana: That surprises me.

Goldberg: It's hard to understand the naiveté of both the buyers and the sellers. This was a new business and the issues were not straightforward and clear. And programmers were really the least-equipped to deal with business issues, maybe. I used to be a programmer. Were you a programmer, Dick?

Thatcher: For a little while, until I realized what my strengths were.

Goldberg: I was a programmer for six or seven years in the early stages of my career. First of all, none of us had business school training or backgrounds. It's not like today. We all had either a liberal arts education or a technology education. There was no place that you could learn this stuff. There wasn't any place that you could go. So a programmer and a salesman would start a software company, usually because they did a project at a big company and developed something that they thought had value. Then they would take it and try to resell it a hundred times. And it was all done on a shoestring, starting out in somebody's house with a credit card used to cover expenses or whatever. There was no road map, I guess, is the right way to put it. So when you would talk about these issues, not only did people not understand them on the buying side, but even on the selling side. You had to educate the software entrepreneur about why it was important.

Thatcher: Go back and look at the agenda for the conferences. How do I sell a software package? How do I hire people? All the basics of business. They received their education in ADAPSO.

Grad: Luanne Johnson makes the comment that she got her MBA at ADAPSO meetings. That's how she learned to run a software company.

Thatcher: And this was the legal side of the business.

Goldberg: The analogue to me is the Internet. If you look at this whole bubble with Internet entrepreneurs—guys who were 23 years old, 25 years old, 27 years old and didn't know anything. They just got a tiger by the tail and rode with it. That's the way it was with us, only over an extended period of time. Time was compressed in the Internet boom but, if you look at all the stuff that occurred, we were going through the same things in the 1960s and 1970s. Only it took fifteen years instead of a year and a half.

Frana: I guess when I read through these I saw modular programming.

Grad: Absolutely. We did that. There is hardly anything technologically you'll come across in the 1990s or late 1980s that we weren't doing in the 1960s and 1970s.

Goldberg: You're reading about web services now, right? Web services is modular programming.

Saunders: But it was done in that style to avoid pitfalls that Milt Wessel saw from a legal perspective. One observation I can make as a still practicing lawyer is that these Directories have had tremendous impact on the legal profession because they spawned a number of other books with model contracts. One of the reasons ADAPSO stopped drafting them is because people in the private sector started coming out with similar books and we began promoting those instead. There was a book on drafting forms and agreements by Richard Raysman and Peter Brown that was quite good. What you see as a result is that there is now an entire category of books on drafting license agreements and other computer-related contracts.

Grad: Let me close the session. There is one other comment I'll make. Esther Roditti has written an article about the history of contracts in the industry and about the intellectual property issues. She's promised that we'll be able to get a copy of that. Thank you very much.