

1968

Proceedings of the Nebraska State Bar Association House of Delegates Meeting, 1967

Murl M. Maupin

Nebraska State Bar Association, president

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GEORGE B. BOLAND
Omaha

Chairman of the House of Delegates

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Omaha

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Lincoln

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Leo Eisenstatt, <i>Chairman</i>	Omaha
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Murl M. Maupin	North Platte
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Bert L. Overcash	Lincoln
Claude Berreckman	Cozad

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John J. Wilson	Lincoln
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ELECTED DELEGATES

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Archibald J. Weaver	Falls City
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SECOND DISTRICT

Dixon G. Adams	Bellevue
Francis M. Casey	Plattsmouth

THIRD DISTRICT

Warren K. Dalton	Lincoln
John W. Stewart	Lincoln
Warren K. Urbom	Lincoln
Richard D. Wilson	Lincoln

FOURTH DISTRICT

Robert K. Adams	Omaha
John W. Delehant, Jr.	Omaha
Leo Eisenstatt	Omaha
Robert C. Fisk	Omaha
John E. North	Omaha
Harry B. Otis	Omaha
Harold L. Rock	Omaha
Albert G. Schatz	Omaha
Thomas A. Walsh	Omaha

FIFTH DISTRICT

Wallace W. Angle York
Charles L. Whitney Aurora

SIXTH DISTRICT

Lumir Otradosky Schuyler
Charles H. Yost Fremont

SEVENTH DISTRICT

George F. Johnson Superior

EIGHTH DISTRICT

Harry N. Larson Wakefield

NINTH DISTRICT

Thomas E. Brogan Norfolk
Bernard Ptak Norfolk

TENTH DISTRICT

Alfred W. Blessing Hastings
John J. Sullivan Clay Center

ELEVENTH DISTRICT

Lloyd W. Kelly, Jr. Grand Island

TWELFTH DISTRICT

Thomas W. Tye Kearney

THIRTEENTH DISTRICT

William A. Stewart, Jr. Lexington

FOURTEENTH DISTRICT

Charles E. McCarl McCook

FIFTEENTH DISTRICT

John B. Cassel Ainsworth

SIXTEENTH DISTRICT

William S. Dill Valentine

SEVENTEENTH DISTRICT

Clark G. Nichols Scottsbluff

EIGHTEENTH DISTRICT

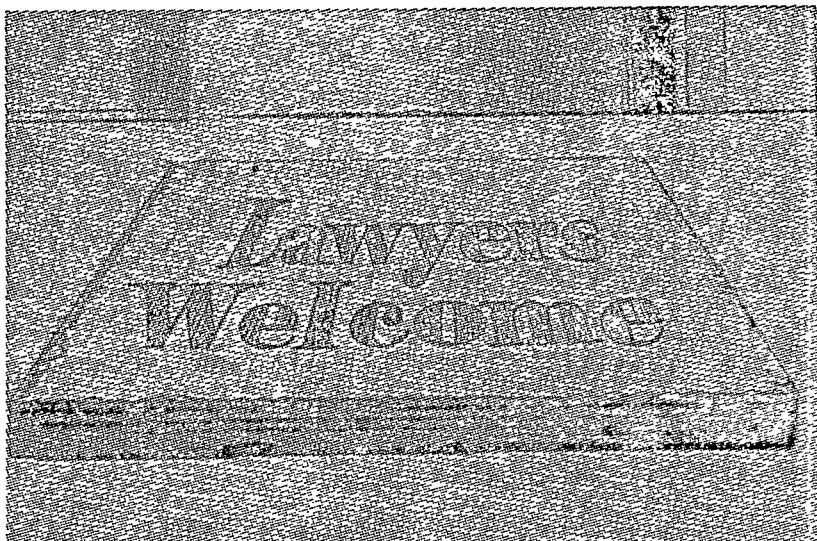
P. M. Everson Wymore

NINETEENTH DISTRICT

R. L. Smith Chappell

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Harold E. Connors Greeley



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NEBRASKA STATE BAR ASSOCIATION

HOUSE OF DELEGATES

WEDNESDAY MORNING SESSION

October 18, 1967

The opening session of the House of Delegates of the Nebraska State Bar Association, convening in Hotel Sheraton-Fontenelle, Omaha, Nebraska, was called to order at nine thirty-five o'clock by Robert D. Mullin of Omaha.

ROBERT D. MULLIN: Your Chairman declares a quorum to be present and welcomes all of you to this meeting of the House of Delegates of the Nebraska State Bar Association at the Sixty-Eighth annual convention of this Association.

My role this morning is a very pleasant and brief one. This is my final privilege of appearing before the House of Delegates in my responsibility and assigned job of Chairman of the House. I have served in this job for two years. I've enjoyed every moment of it and I would like to express my sincerest appreciation to everybody in the House who treated me with such courtesy and friendliness during my service. I can't recall one instance when anybody tried to devil the Chair, as sometimes happens in other organizations.

My second function up here this morning is indeed a pleasant one, and that is to introduce the man who succeeds me. This is a man who has served with distinction and great success during his year as President of the Omaha Bar Association. He is a brilliant attorney and he is a tireless worker. I know that under his leadership the House of Delegates will accomplish many, many things in the two years ahead.

Without further delay and in order that your program may now move ahead, it is my distinct pleasure to turn this gavel over to my successor, Leo Eisenstatt.

LEO EISENSTATT (In the Chair): Thank you, Robert. Thank you very much.

It is a pleasure and a privilege to serve you as Chairman of the House of Delegates. I hope that my service will meet with your pleasure.

I think we all owe a debt of gratitude to Bob Mullin for his very excellent service and tireless efforts on behalf of the Bar Association the past two years.

I hope the next year or two will see a greater activity on behalf of this House, and later on in the program this matter will be discussed in a little greater detail.

The first order of business, gentlemen, will be the calling of the roll. Mr. Turner!

SECRETARY-TREASURER GEORGE TURNER: A quorum is present, Mr. Chairman.

I move that the Calendar as prepared by the Chairman of the House, which each of you has, be approved as the order of business.

CHAIRMAN EISENSTATT: Thank you.

The meeting having been legally organized, there is present before you a draft of agenda or calendar referred to by George in his motion. There will be one or two changes which have occurred since that was prepared, and for want of a better location there will be two reports to be added to the agenda which we will number 13a and 13b: 13a will be the report of the County Law Libraries Committee by William H. Meier and 13b will be the report of the Trustee of the Rocky Mountain Mineral Law Foundation by Paul Martin. Subject to the will of the House, some variation may be required due to attendance or lack thereof, and subject to those changes I now have a motion to approve the Calendar which is printed and at your desk. Do I hear a second?

HARRY N. LARSON, Wakefield: I second the motion.

CHAIRMAN EISENSTATT: Having been moved and seconded, any comment? We now call for the question. All those in favor say "aye"; any opposed by the same sign.

The Calendar being approved, the meeting can now proceed to its business.

The next order of business is the report of the Secretary-Treasurer, Mr. George Turner.

REPORT OF SECRETARY-TREASURER

George H. Turner

Mr. Chairman, Members of the House: Ordinarily at this point in the program I report to you the result of our annual audit. By action taken at the last meeting of the House, I had the audit

prepared in multiple copies and sent one to each member of the House, so you really have had my report in advance.

However, if there are any questions any member of the House may have concerning this audit, I should be pleased to try to answer them. I don't see any, Mr. Chairman.

CHAIRMAN EISENSTATT: Thank you for your report, Mr. Turner. There being no request for comment, the report of the Secretary-Treasurer will be accepted. George, of course, was referring to the Peat-Marwick report which was received by each of you prior to this meeting.

I now ask for a motion to approve the report of the Secretary-Treasurer.

THOMAS R. BURKE, Omaha: I so move.

THOMAS W. TYE, Kearney: I second the motion.

CHAIRMAN EISENSTATT: All those in favor please signify by saying "aye"; opposed same sign. Carried.

Under the rules creating the House there is a provision for the introduction of any resolutions. If there had been any presented prior to the meeting, a committee would have been appointed. There were none. Do I have any resolutions for adoption by the House at this time? There being none, we will go to the next item of business.

At your places there is a copy of a blanket motion dealing with the committee reports. Prior to this meeting I solicited each of you and advised you of a change in our prior procedure for the purpose of providing more time for discussion of matters which in the past may not have had sufficient time and suggested that those reports which required no action be covered by a blanket motion. I might say that I received comments from most of you, all of which were in favor of this change in procedure. I also solicited all of the committee chairmen and those that are listed and set forth in the draft of motion are those which as far as the committee chairmen were concerned were agreed to as being covered by the blanket motion.

BLANKET MOTION RE COMMITTEE REPORTS

RESOLVED that the following committee reports be received, approved, adopted, and incorporated in the proceedings of this meeting as filed and as shown in the printed program:

STANDING COMMITTEES

Legislation
Legal Aid
Unauthorized Practice of Law
Crime and Delinquency Prevention
American Citizenship
Public Service
Judiciary

SPECIAL COMMITTEES

Administrative Agencies
Cooperation with American Law Institute
Availability of Legal Services
Lawyer Referral
Legal Economics and Law Office Management
Medico-Legal Jurisprudence
Publication of Laws
Oil and Gas Law
World Peace Through Law
Cooperation with Law Schools and on Admission to Practice
Rules of the Road
Special Appellate Procedure Legislation
Constitutional Amendment No. 7

That all of the special committees listed above be continued except the Special Committee on Appellate Procedure Legislation and Special Committee on Constitutional Amendment No. 7;

That all committees continue to carry out during the ensuing year the charges and responsibilities heretofore given them and report to the House of Delegates at the Mid-Year and Annual meetings of 1968.

The approved committee reports follow:

REPORT OF THE COMMITTEE ON LEGISLATION

This year for the first time the Nebraska State Bar Association employed a Legislative Representative. Our organization was such that he was the only person authorized to appear for the Association. The results under this system were most gratifying.

At the 1967 Session, the Association supported 30 legislative proposals of which 17 came from committees and 10 from the Judicial Council. All 30 were passed in acceptable form.

Four bills were opposed. Two of them were killed, one amended

to an acceptable form and one, the Debt Management Bill, was passed over our objection.

Through the Legislative Session it became apparent that many committees had legislation to propose, but the requests came to the Legislative Committee too late to receive action this year. If committee proposals are to properly be prepared for introduction, employment of competent help will be needed in the off-year so that the legislation can be drafted and the whole affirmative legislative program be ready for introduction before the Legislature convenes.

Your committee recommends continued use of a legislative representative and expansion of the program to the fullest extent permitted by the budget.

William J. Ross
Donald C. Sass
William Grossman
H. D. Addison
John M. Brower
James F. Green
William B. Brandt
Virgil Haggart
J. C. Nielsen
J. W. R. Brown
John G. Tomek
William J. Panec
Otto H. Wellensiek
William H. Mecham
John J. Higgins
E. J. Robins
Malcolm Young
Floyd A. Sterns
Julian H. Hopkins, Chairman

REPORT OF THE COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW

Proposed Conferences. Progress has been made toward submission of statement of principles between lawyers and collection agencies, with excellent rapport. A proposed statement may be available for submission at the annual meeting of the House of Delegates.

Ground work has been laid with some indication of progress for a conference committee with another lay group, but confusion exists as to present status of that proposed conference.

Conference Committee Policy. The Committee renews its comments about conference committee policy contained in its 1966 report, in which it recommended:

1. The concept and function of conference committees be studied and implemented.
2. Consideration be given to giving conference committees standing committee status within the Bar Association.
3. Consideration be given to adopting as policy of the Association that one-third of the members of the conference committee have served on the Unauthorized Practice of Law Committee at least 3 years of the 10 years last preceding their original appointment to a conference committee.

Estate Planning. The Committee has received substantial complaint of specific instances of aggressive and sometimes abusive practices by mutual fund salesmen, insurance agents and "estate planners." Preliminary survey indicated 2 instances required detailed investigation. With approval of the Executive Council of the Association, counsel has been retained to investigate these 2 instances.

Another complaint involved an insurance agent who reportedly offered to have wills drawn for a husband and a wife upon payment of \$300.00 to the insurance agent. This complaint has not been verified at the time of this report. The Committee emphasizes again the fact that a lawyer must accept employment directly from the client and not through an intermediary, and his financial dealings should be directly with the client and not through an intermediary. The Committee reiterates the fact that unauthorized practice of law would be substantially curtailed if lawyers admitted to practice would not permit themselves to be used, wittingly or unwittingly, as tools of unauthorized practitioners. Lawyer-client relationships can be preserved and the best interests of the clients and of the public served only through direct lawyer-client employment and association independent of any intermediary.

Municipal Bonds. The Committee constantly receives reports of excessive representations by municipal bond firms of services they can render within the legal field and of actual preparation of ordinances, resolutions, ballot proposals, minutes and similar documents by municipal bond firms independently. One specific complaint has been received. The American Bar Association Unauthorized Practice Committee rendered an opinion on municipal bond firm activities this year. This opinion has been called to the atten-

tion of municipal bond firms in Nebraska and it has been recommended by bond counsel that a meeting be set up between municipal bond firm representatives and the Unauthorized Practice Committee. It may be that this troublesome problem can be substantially relieved within the next 12 months.

Debt Adjusting. The Legislature passed, over Bar Association opposition, a bill for licensing and regulating of debt adjustment firms. Question has been raised as to whether or not this legislation is constitutional. The Committee at this point has made no recommendation on possible action.

The Bar Association legislative representative has recommended the Bar Association seek to devise a procedure for court supervised debt consolidation, whereby debtors will be assured of legal review of legality of contracts, claims, interest charges and similar questions which a debt adjustment firm cannot properly consider. Preliminary steps are being taken toward devising of such a plan, on which the Committee hopes to obtain the assistance of lawyers active in OEO programs and legal aid.

Simulated Process. The Committee continues to receive examples of simulated process, and thereupon direct attention to the possible offense to the use of the form. Collection agencies remain helpful in attempting to eliminate forms which simulate either court processes or government agency notices.

The Committee recommends its suggestions relative to conference committees be implemented during the coming year.

Bevin B. Bump
Joseph C. Byrne
Raymond M. Crossman, Jr.
John P. Ford
J. Taylor Greer
LaVerne H. Hansen
Francis J. Kneiff
Peter E. Marchetti
August Ross
Edward Shafter
Bernard Sprague
Ronald G. Sutter
J. Marvin Weems
Albert T. Reddish, Chairman

REPORT OF THE COMMITTEE ON CRIME AND DELINQUENCY PREVENTION

A meeting of the Committee was held in conjunction with the mid-year meeting of the House of Delegates. At this meeting, among other items, a report was made on the progress of legislation recommended by the Committee at the 1966 meeting of the House of Delegates. This Committee was instructed, at that time, to prepare specific legislative proposals to be presented to the Committee on Legislation. This was done with reference to all recommendations adopted. Bills were introduced on the first three recommendations, but none was introduced on the fourth recommendation. The three bills recommended were subsequently duly enacted by the Nebraska Legislature.

The Committee presently is concerned with a further study of the county attorney system with the view of strengthening the prosecution abilities of the various county attorneys. We are advised that the County Attorneys Association is now interested in exploring the possibility of a system of district attorneys for the prosecution of criminal offenses. This Committee will cooperate with that association in making a study of this problem. The cooperation of the Committee has also been pledged to cooperate with the Attorney General of the United States in the area of crime prevention and crime control.

We have no specific recommendations other than that these studies continue.

Gerald S. Vitamvas, Chairman
Bernard J. Ach
Donald L. Brock
Harold E. Connors
Seward L. Hart
Melvin K. Kammerlohr
John H. Keriakedes
Alfred J. Kortum
Richard L. Kuhlman
Walter J. Matejka
Richard E. Mueting
Clark G. Nichols
W. W. Nuernberger
Elizabeth Pittman
Walter D. Weaver

REPORT OF THE COMMITTEE ON AMERICAN CITIZENSHIP

The enthusiastic response from the members of our committee reflects that during the past year our Nebraska lawyers and various bar associations have conscientiously accepted their responsibility of

assisting in promoting the public interest in the affairs of American citizenship and the maintenance of good government on a local and national level.

Many instances can be cited of the members of the Nebraska State Bar Association in serving as speakers on local television and radio programs as well as at school and civic service clubs in expressing the ideals of American citizenship and good government on Law Day. Certain members of the Bar have served on television panel programs on Sunday afternoons which were aimed primarily at the citizen's responsibility in participating in jury service and serving as witnesses when the occasion required.

Nebraska lawyers have actively participated in County Government Day through bar associations, as well as in conjunction with the American Legion in certain instances, by explaining to high school groups the functions and responsibilities of the County and District Courts as well as the duties of various county officials.

Speakers are also furnished from the various local bar associations for the schools on Veterans Day and other patriotic occasions on subjects relating to the American Constitution, loyalty to our country and the necessity and importance of supporting and maintaining a strong and sound government and respect for law and order.

The alarming increase in violations of law among our youth, and particularly in crimes of a serious nature, even including felonies, furnish abundant evidence of a growing disrespect for law and order.

We recommend therefore, that Nebraska lawyers meet this this challenge and exercise an even more diligent and conscientious effort, than in the past, in promoting respect for the law; good citizenship, loyalty to our Nation and its institutions, in order to preserve and guarantee the blessings of justice and liberty.

Leslie H. Noble, Chairman
Rollin R. Bailey
Glen A. Burbridge
Wendell P. Cheney
Jack L. Craven
Sarah Jane Cunningham
Donald E. Endacott
Fred R. Irons
Richard L. Kuhlman
Francis D. Lee
Lewis R. Leigh
Everett A. Anderson
Howard W. Spencer
Clyde R. Worrall

REPORT OF THE COMMITTEE ON PUBLIC SERVICE

Law Day activities in Nebraska showed measureable progress this year in virtually every phase of the program. While this growth is part of a continuing trend, the degree of the progress was greater than usual and must be credited in part, at least, to an earlier beginning.

Our State Chairman for 1967 was Allen L. Overcash of Lincoln who made a persistent effort to recruit local leadership. As a consequence, we had 69 counties with active chairmen.

Mr. Overcash was assisted by Soren S. Jensen of Omaha as Vice Chairman. We are pleased to report that Mr. Jensen has accepted the leadership of the Law Day USA effort in Nebraska for 1968.

Once again we find ourselves indebted to the press, radio and television media for outstanding cooperation in helping to bring the message of Law Day to the people of our state. The radio and television industry contributed public service time evaluated at more than \$5,000.00 at regular commercial rates. The Nebraska press was more generous than ever; and once again we were the beneficiaries of contributed space by four of the major outdoor advertising companies in Nebraska.

During the past year we continued to send to the radio stations from time to time a series of one-minute radio tapes under the title "Mr. Middleton, Attorney-at-Law." These tapes are produced from manuscripts written by our public relations counsel and carefully checked prior to their use by a panel of attorneys from our Committee. Each message dramatizes the counsel given by an attorney on legal problems of interest to laymen.

We have had some gratifying comments on the professional quality of these tapes from the stations; and we are pleased to report that they are being used by a wide network across the state.

Meanwhile, we have continued work on an experimental 15-minute television program which we hope will go into production at station KUON-TV in Lincoln this fall.

Our Committee has carefully reviewed the script which is proposed for this test program and we are impressed with the fine job that has been done in the script which has been written by our counsel. It is a fresh and interesting presentation which should be appealing to the average viewer; and yet it will carry with it the purpose of the program, which is to bring to the public a better understanding of a lawyer's services to his client, so much of which is unfamiliar to the average person.

If this pilot program is successful and is used extensively by both commercial and educational television, we shall recommend production of more such programs in the future.

The Awards Program is a public relations activity which we hope will gain in stature. Two awards are included. The first is the **President's Award**, which can be made to a member of the Bar for outstanding contributions to furtherance of public understanding of the legal system and confidence in the profession; and the second is the **Award of Appreciation**, which is presented to an individual, not a member of the Bar, who has performed outstanding service in helping to create a better understanding of the legal profession and the system of law and justice within which it operates.

It is the hope of our Committee that high standards can be maintained in this awards program. In this connection we do not believe it is necessary that these awards be given every year; but rather that they be given only in instances of truly outstanding merit.

Earlie this year we reviewed four film strips loaned to us by courtesy of the Missouri Bar. These were produced for the purpose of communicating to lawyers and their staff members some of the major findings from the **Mo-Bar Pren-Hall Survey on Lawyer-Client Relationships**.

Our Committee was much impressed by these film strips and recommended purchasing a full set for use in Nebraska. The first showing will be before the Omaha Bar Association and subsequent showings are being arranged for Lincoln and elsewhere.

It is our hope that these film strips will be utilized throughout the state along with panel discussions prepared to give emphasis to the principal points made in the film strips as produced by the Missouri Bar. (They can also be utilized in individual law offices as well as in the colleges of law).

We are deeply indebted to the Missouri Bar for its cooperation in the development of this project.

Another continuing public service of the Nebraska State Bar Association is the distribution of informational material to newspapers on a variety of legal subjects of interest to the general public. Legal pamphlets and other publications of value in terms of public service are available from the Nebraska State Bar Association and we **recommend the continuation of this service to the public.**

It is the earnest hope and recommendation of your Public Service Committee that this program of public service be continued and expanded; and that an adequate budget be provided to us for the maintenance of necessary growth.

Most of the activities described in this report are carried out for us by our public relations counsel, Thomas L. Carroll, of Lincoln, who has served the Committee now for a number of years.

In this connection we are pleased to report that we have just received the following letter from Dean Tyler Jenks, assistant director of public relations for the American Bar Association:

"Your report of activities for Law Day USA 1967 in Nebraska is without a doubt the best report of its kind, and the most complete, that we have ever received in the ten years of our Law Day USA observance. We appreciate the time and effort put forth in preparation of such an excellent report."

We believe that on a dollar-for-dollar basis the Nebraska State Bar Association has one of the outstanding public relations programs in America. It is our purpose to maintain and improve it with the continuing support of the Association in the year ahead.

Frederick S. Cassman
Lawrence S. Dunmire
Dale E. Fahrnbruch
Robert Hollingworth
Soren S. Jensen
Richard A. Knudsen
Edmund D. McEachen
Robert A. Nelson
Allen L. Overcash
Wilbur L. Phillips
William B. Rist
Charlie I. Scudder
Charles Thone
Milton R. Abrahams, Chairman

(The Report of the Committee on the Judiciary was filed at the Mid-year meeting but acted upon at the Annual Meeting.)

REPORT OF THE COMMITTEE ON JUDICIARY

Traffic Court Conference.

The Chairman of the Committee represented the Nebraska State Bar Association at the Nebraska Traffic Court Conference held December 1, 2, and 3, 1966, at the University of Nebraska Center for

Continuing Education. This conference was jointly sponsored by the American Bar Association, Northwestern University Traffic Institute, the University of Nebraska, the Governor's Traffic Safety Coordinating Committee and the Nebraska State Bar Association.

The purpose of the conference was to improve the administration of traffic courts through educational efforts. A number of traffic judges were in attendance and the comments from those in attendance were generally favorable. One suggestion made at the conference was that a manual or handbook for traffic court judges would greatly facilitate uniformity in the handling of traffic violations. Judge McManus of the Municipal Court in Lincoln was especially interested in this possibility. Mr. Richard L. Samuels, Assistant Director of Traffic Court Programs of the American Bar Association, advised that such a manual had been used to good effect in some other states, Arizona for one. The Executive Council of the Association has given consideration to initiating a program for improving traffic court procedures in Nebraska. Any program of this nature, including the preparation of a manual for traffic court judges would necessarily involve substantial effort and expense. The Committee on Judiciary, therefore, refers consideration of such a program to the Executive Council.

U. S. Senate Bill 1026.

Senator Sam J. Ervin, Jr., (North Carolina) Chairman of the Sub-Committee on Constitutional Rights of the Senate Committee on Judiciary, (Nebraska's Senator Roman L. Hruska is also a member) wrote to President Maupin in April asking for an expression of opinion on the passage of Senate Bill 1026 then pending before the Committee. This bill, among other things, would establish standards for the selection of jurors in states as well as federal courts and would prohibit discrimination in the selection of jury panels on the basis of race, national origin, sex or economic status. President Maupin asked that the Committee on Judiciary consider the matter and report. A summary of the provisions of the bill and copies of statements by adherents and opponents were forwarded to the Committee and written responses requested. Of the fourteen members of the Committee, three responded favoring the bill and nine replied opposing it. This result was reported to the President at the meeting of the Committee on June 9, 1967. The results of the poll were discussed and the consensus was to take no further action.

Merit Plan for Selection of Judges.

Article V. Section 21 of the Nebraska Constitution sets out the method for filling vacancies in the Supreme Court and District Courts and in other courts "made subject to" Section 21 by law.

(By statute Section 21 is applicable to municipal judges and workmen's compensation court judges as well.) It provides that vacancies shall be filled by the Governor from a list of "at least two" nominees presented to him by the appropriate judicial nominating commission. Experience since 1962 has indicated that the function of the nominating commission in selecting well qualified nominees can and has to a degree been frustrated when the nominating commission nominated an unnecessary large number of nominees. The members of the Committee on Judiciary who were present at the meeting of the Committee on June 9, 1967, unanimously agreed that the proper functioning of the Judicial Nominating Commission requires that the number of nominees be limited. We are advised that the State of Iowa limits the number of nominees to two (three in the case of Supreme Court Justices). It was the consensus of the committee that such a limitation would be appropriate in Nebraska. One of the members of the Committee has been advised that such a limitation could effectively be incorporated into a statutory provision without the necessity of amending the constitution. The Committee recommends to the Executive Council that the Legislative Committee be requested to prepare appropriate legislation for introduction at the 1969 session of the legislature limiting the number of nominations made by the Judicial Nominating Commissions to two.

James N. Ackerman, Chairman
Auburn H. Atkins
Chauncey E. Barney
C. M. Bosley
Thomas F. Colfer
Robert V. Denney
Harold W. Kay
Clark O'Hanlon
Kenneth M. Olds
Carlos E. Schaper
George E. Svoboda
Ralph E. Svoboda
Richard N. Van Steenberg
Joseph T. Vosoba

The recommendation of the Committee on the Judiciary that the number of nominations made by the Judicial Nominating Commissions be limited to two was not adopted but was referred back to the Committee for further consideration.

REPORT OF THE COMMITTEE ON COOPERATION WITH THE AMERICAN LAW INSTITUTE

The Nebraska Bar Association was well represented at the annual meeting of the American Law Institute. Those attending as elected and ex officio members of the Institute were the Honorable Harvey M. Johnsen, United States Circuit Judge, the Honorable Hale McCown, Justice of the Nebraska Supreme Court, Clarence A. Davis, Henry M. Grether, Jr., Dean of the University of Nebraska College of Law, David Dow of the University of Nebraska College of Law, John C. Mason, Laurens Williams, and the Chairman of your Committee, Edmund D. McEachen.

At the annual meeting, one day was devoted to discussion of the Study of the Division of Jurisdiction between State and Federal Courts; one day was spent in discussion of the Restatement of the Law, Second, Torts; one day was spent in discussion of the Restatement of Law, Second, Contracts; and one day was spent in discussion of the Restatement of Law, Second, Conflict of Laws.

In addition, the Institute is considering the formation of a restatement of labor relations law and a restatement of public control of land use, and is conducting an advisory group study of suggested revisions of the Federal Estate and Gift Tax Laws.

Work also is continuing on the Model Penal Code, and, although not finalized, this Code has been used in stimulating, and in the drafting of, revisions of penal codes in a number of states. It is interesting to note that the tentative drafts of the Institute's Model Penal Code were extensively used in development of the recently adopted Criminal Code of the City of Omaha. The Chairman of the committee which developed that Code estimates that at least 60% of the Code is taken directly from the tentative drafts of the Model Code. Also, an ad hoc committee appointed by the Governor of Nebraska has made extensive use of the tentative drafts of the Model Penal Code in its study of crime control and criminal justice, which ultimately can be expected to result in proposals for revision of the criminal laws of Nebraska. The Chairman of your Committee has assisted the Governor's Ad Hoc Committee in obtaining certain out of print tentative drafts of this Model Penal Code for its use.

The Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association have continued to work toward continuing education of lawyers, developing model courses of study and course materials on selected subjects and encouraging development and growth of State organizations for continuing legal education, with professional directors and staff.

At the present time well over half of the states have such organizations, including our neighbors, Colorado, Kansas and Missouri. Development of such an organization, and further efforts in continuing legal education for members of the Nebraska Bar, are matters which your Committee believes should receive continuing study by the Nebraska State Bar Association.

Your Committee further recommends continuing effort to revise Nebraska statutes in those few areas in which they depart from the Uniform Commercial Code, in order to provide desired uniformity in commercial law throughout the country.

Your Committee feels that the Committee and its work should be continued and that the Nebraska Bar Association continue to be represented in meetings of the American Law Institute by a liaison member. The Restatements and other studies of the Institute have enormous impact in the courts and on the laws throughout the nation, and it is most important that the State be represented in the studies conducted by the Institute.

The Committee recommends that the Committee and its work be continued.

Edmund D. McEachen, Chairman
Hale McCown
James A. Doyle
Allen Garfinkle
Henry M. Grether, Jr.
Fred T. Hanson
Daniel B. Kinnamon
Thomas N. Wright

REPORT OF THE SPECIAL COMMITTEE ON LAWYER REFERRAL

During the past year this committee has continued its efforts to encourage local bar associations to adopt a referral plan so that persons who do not know a lawyer but who can pay a fee have a means of obtaining legal advice. The Lincoln Bar Association has just recently commenced the operation of a referral service in connection with its new legal aid office. In Omaha the referral service sponsored by the Omaha Bar Association has continued to thrive. Statistics for 1966 and the first half of 1967 are as follows:

	1966	6 mos.-1967
Number of active referrals	565	208
Number of cases closed	240	130
Total fees collected	\$9,584.00	\$5,010.00
Average fee per closed case	\$ 39.93	\$ 38.53
Highest fee collected	\$ 800.00	\$ 349.00
Number of closed cases in which the fee collected exceeded the minimum of \$7.50	98	41

The increased emphasis on making legal services available to all persons, regardless of their economic status, has highlighted the importance of an efficient, well-publicized lawyer referral service. The Office of Economic Opportunity has given a much needed shot in the arm to almost all legal aid programs where poor persons can receive legal assistance. But the person of moderate means who needs an attorney, but doesn't know one, must still either go to the yellow pages of the telephone book or rely on the advice of well-meaning friends. It is this class of persons that a bar sponsored referral service can effectively help. Surveys indicate that 90 per cent of the people who apply at a referral office do not know a lawyer and have never before experienced a need for one. Thus a referral service not only discharges an obligation of the organized bar to the public; it is also beginning to emerge as a structure through which the economic lot and career of lawyers can be slowly and steadily enhanced. Simultaneously the client receives the independent advice and counsel of his own lawyer at a price he can pay.

The report of the Committee on Availability of Legal Services, found elsewhere in this program, points out some of the steps being taken by the Nebraska Bar Association to insure that all persons who need legal advice can obtain it. The Lawyer Referral Committee pledges its cooperation and assistance in this endeavor.

John R. Dudgeon
 Leo Eisenstatt
 Richard R. Endacott
 William W. Graham
 Charles A. Nye
 Donn C. Raymond
 Arnold J. Stern
 Alfred G. Ellick, Chairman

REPORT OF THE COMMITTEE ON LEGAL ECONOMICS AND LAW OFFICE MANAGEMENT

The Committee at the time of submission of this report is in the process of taking a poll on law office management practices.

A questionnaire containing 92 questions has been sent to all active members of the Nebraska State Bar Association and this poll should provide meaningful data both for the Committee in its functions and for the individual lawyers of Nebraska.

During the year, the Committee has prepared articles which have appeared in the Nebraska State Bar Journal in connection with law office economics subjects and materials. The Committee has also provided speakers and programs to local bar association meetings on the subject of fees and economics.

The Chairman of the Committee was sent as a delegate of the Association to the Second National Conference on Economics of Law Practice sponsored by the American Bar Association in New Orleans on April 6 to 8. The Chairman's report of that meeting appeared in the July, 1967, issue of the Nebraska State Bar Journal and you are referred to that report and the suggestions contained therein.

Amendments to the minimum fee schedule which were adopted by the House of Delegates last year have been printed and supplied to the members. The Committee continues to give study to the schedule and to developments in other states.

The Omaha Bar Association is engaged in the institution of a program of installment loan financing of legal services and members of the Committee are assisting in this project.

The Young Lawyers Section annual poll of starting salaries for 1967 law graduates and the results are as follows:

Total Responses:	43
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Private Practice in Nebraska:	17
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(A + following the salary indicates that in addition to the salary either a bonus arrangement is also included or that the lawyer will receive a certain percentage of his own business.)

Omaha	7
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Monthly

Scale

\$500

500+

520+

550+

600

600

600+

	Lincoln	5
\$450+		
500		
600		
600+		
700		
.		
	Outstate	5
\$500		
500		
550		
550		
600		
		—
		17
Business:		7
Accounting firm	\$700	
Accounting firm	750	
Accounting firm	800	
Insurance Company	750	
Bank	600	
Corporation	700	
Trade Ass'n.	900	
Other		
Government, state and federal		5
Service		10
Miscellaneous		4
		—
		43

During the year, the Committee met with the Committee on Public Service and the two committees jointly recommended that the film strips on economics and public relations prepared by the Missouri Bar Association in connection with its Pren-Hall Survey be acquired by the State Bar Association for presentation at local bar meetings. These film strips will be available and you are encouraged to utilize them, and the Committee continues to hold itself available in assisting in the providing of speakers or programs on the subject of law office management and economics for your local or district bar associations.

It is recommended that the Committee be continued in order to implement and complete the projects outlined in this report:

Lansing Anderson
 Thomas R. Burke
 Thomas M. Davies
 Harvey D. Davis

Richard A. Dier
Leo Eisenstatt
James J. Fitzgerald, Jr.
Clinton J. Gatz
Robert A. Munro
Robert G. Simmons, Jr.
Richard Tempero
Benjamin M. Wall
Howard H. Moldenhauer, Chairman

REPORT OF THE SPECIAL COMMITTEE ON MEDICO-LEGAL JURISPRUDENCE

To this date there have been no further conferences or communication with the State Medical Association. This supplements the following report:

1. As a result of conferences with the Medical-Legal Committee of the Nebraska State Medical Association, a Joint Medico-Legal Plan for Screening Medical Malpractice Cases was proposed by us at the request of the doctors. As a result of the decision in the case of *Nichter v. J. Malcolm Edmiston* in the Supreme Court of the State of Nevada (Nov. 18, 1966), the following amendment to Paragraph 4 of the application was proposed:

"The undersigned applicant, and his or her counsel, do hereby agree that the evidence received or offered at the Hearing Panel and deliberations, discussions and conclusions of the Hearing Panel, and of the individual members thereof, and the testimony of all persons appearing before it will be confidential within the Hearing Panel and privileged as to any person in any matter or proceeding other than the actual hearing before the Hearing Panel, and that no person will be asked in any action or proceeding to testify concerning the evidence received or offered before the Hearing Panel, or the deliberations, discussions, conclusions, or proceedings of the Hearing Panel or the opinions of any individual member thereof, of the testimony of any person or witness appearing before or testifying at a hearing before the Hearing Panel."

The Medical Association has taken no further action on our proposed plan. The matter has been before the Medical Association, and on April 14, 1967, I received a letter from Dr. J. P. Gilligan, Chairman of the Medical-Legal Advice Committee, and Dr. Paul Bancroft, Chairman of the Council on Professional Ethics, a copy of which I am attaching hereto as a part of this report. I have kept in communication with my Committee and have advised them

of these developments. As you will note, the Medical Association states that they feel that no definite decision can be made before the 1968 annual session of their organization. It is the consensus of the Committee on Medico-Legal Jurisprudence of the Nebraska State Bar Association that we should simply mark time until the State Medical Association can decide what they want to do with the plan we prepared and proposed for them.

2. This Committee, at the request of the Nebraska State Medical Association, conducted a seminar at the Fontenelle Hotel at the Annual Convention of the Medical Association. The vignette was entitled "Trial Demonstration on Flexion-Extension Injury of the Cervical Spine (Whiplash)." I acted as moderator, Judge Rudolph Tesar of Omaha was the judge, plaintiff's attorneys examining and cross-examining the medical witnesses were Robert D. Mullin and Michael McCormack of Omaha, and the attorneys representing the defendant were Albert G. Schatz and Eugene P. Welch of Omaha. The medical witnesses were Bruce J. Brewer, M.D. of Milwaukee, Wisconsin, and Bruce Claussen, M.D., of North Platte, Nebraska. The program, to which members of the State Bar Association were also invited, was very well received by an overflow crowd in the ballroom of the Fontenelle Hotel. It is with genuine pleasure that I report that many members of the Nebraska State Medical Association were profuse in their compliments on the program we put on, as well as the tax program in the morning.

Our Committee is continuing to carry on its responsibilities in liaison with the Nebraska State Medical Association, and it is the recommendation of this Committee that it should be continued.

Harry L. Welch, Chairman

REPORT OF THE COMMITTEE ON PUBLICATION OF LAWS

This Committee has continued to investigate the use of electronic data processing in the publication of Nebraska statutes. Nebraska appears to be unique among the states in having the Legislature, the University College of Law and the State Bar Association coordinating their efforts in this endeavor. The Nebraska statutes through the 1965 session of the Legislature are presently on electronic tape and being used for various research projects. Only six other states are in an equivalent position.

The Committee feels that the Bar Association should continue to cooperate with the various agencies in research on electronic processing of Nebraska statutes.

Richard M. Duxbury, Chairman

REPORT OF THE SPECIAL COMMITTEE ON WORLD PEACE THROUGH LAW

Supplementing our report made to the Mid-year meeting of the House of Delegates in Lincoln, June 19, 1967, we report that the World Peace Through Law Center is developing in Geneva, Switzerland. There are a number of Nebraska lawyers who have contributed to this Center and for your convenience, if you are interested, membership applications are available on the Secretary's desk.

The Third World Conference was held in Geneva, Switzerland, July 9-14, 1967.

We were in hopes to have a detailed report of the conference in time to give you a summary of it. However, the report has not yet been received. There were numerous topics for discussion including doing business abroad, trade and investment matters including foreign aspects of decedents' estates, foreign law aspects of litigation and administration in the United States of alien-connected estates.

It is very apparent that in three years remarkable accomplishments have been attained with the initial goals of the Center.

First to mobilize the interest, the participation, and the responsibility of the legal profession of all countries in pursuit of World Peace Through Law, an unusually effective and rapidly growing voluntary international organization of the legal profession, has been established and substantial progress has been attained in the accomplishment of the Center's objectives.

Secondly, many important proposals and programs have been developed and approved through the process of an international consensus which when effected will provide convincing evidence to the peoples and governments of the world that mankind's most practical hope for world peace is order under the Rule of Law.

Thirdly, new goals are being created on a near universal basis for the development of international law and legal institutions to provide the reality of the peaceful resolution of international disputes and conflicts.

This is a special committee appointed for the purpose of cooperating with the ABA Committee on World Peace Through Law and it is therefore recommended that the committee be continued.

On behalf of the Committee:

J. C. Tye, Chairman

REPORT OF THE SPECIAL COMMITTEE ON COOPERATION WITH LAW SCHOOLS AND ON ADMISSION TO PRACTICE

The meeting of the above Committee was held on June 9, 1967, at the Mid-Year Meeting. Four members of the Committee were present. The Committee respectfully reports:

1. It was recommended that the practice of publishing photographs and biographical sketches of Nebraska and Creighton Law School Seniors in the Nebraska State Bar Journal be continued.

2. Note was taken of the passage of LB 429, whereby the Supreme Court may, by rule or order, authorize law students who have completed their junior year to practice as attorneys on such conditions and with such supervision as the Supreme Court may prescribe. Dean Henry Grether of the Nebraska Law School reported that representatives of the two Law Schools would prepare for the Supreme Court's consideration a suggested rule for implementation of LB 429.

3. The Committee feels it serves a purpose in its availability for advice and assistance, and is a means by which the Deans of the Law Schools and the Bar can consider matters of mutual concern. It is accordingly recommended that the Committee be continued.

Charles E. Oldfather, Chairman
David Dow
James A. Doyle
Julian H. Hopkins
M. A. Mills, Jr.
Robert D. Mullin
Benjamin C. Neff, Jr.
Judge John E. Newton
Marvin G. Schmid

CHAIRMAN EISENSTATT: The next item on the agenda is the report of the State Advisory Committee, Raymond Young, Chairman.

REPORT OF ADVISORY COMMITTEE

Raymond G. Young

It is not feasible to have our annual report published in the permanent program, the reason being that there are twenty district committees and we always try to get each of them to bring his committee work up to date, so we try to have a clean docket as nearly as possible when the annual meeting comes around. Therefore, with your permission, Mr. Chairman, I should like to read the report, which isn't very long.

The profession suffered a very severe loss in the death on April 10, 1967, of George B. Hastings, who was renowned as a lawyer of extraordinary ability and as a leader in worthy civic and religious causes.

He was President of this Association in 1952, and in 1966 was the recipient of the President's Award for distinguished service. He was a past Commander of the Nebraska Department of the American Legion and a past Rotary District Governor. In 1954 and 1955 he was National Moderator of the General Council of the Congregational Church.

From 1939 until the date of his death he was a member of The Advisory Committee. He was a man of wisdom and sound judgment, devoted to the highest standards of our profession. He served us well and we deeply regret his passing.

The Supreme Court appointed Thomas F. Colfer of McCook to succeed Mr. Hastings.

The disciplinary activities since the annual report made October 12, 1966, may be summarized as follows:

Reviews

A review of the proceedings before the Committee on Inquiry of the Sixth District resulted in the filing of a Complaint which is pending in the Supreme Court.

Charges against a district judge were dismissed for want of jurisdiction.

Charges against two lawyers were found to be without merit.

One review is pending before the committee.

Responses in two proceedings for reinstatement were prepared and filed in the Supreme Court.

Meetings

The committee held meetings in Omaha on October 13, 1966, and March 21, 1967.

Supreme Court

One Complaint against two members of the Bar is pending. Referee's report and respondents' exceptions have been filed.

One application for reinstatement is pending. The application for reinstatement and petition for modification which were pending at the date of the last report were denied.

Committees on Inquiry

Districts in which no action by Committees on Inquiry has been required are 1, 5, 10, 18, and 20.

Districts in which informal investigations have shown charges to be without merit and to require no formal action are 6, 7, and 17.

Charges are pending before Committees on Inquiry as follows: One each in Districts 2, 8, 13, and 16. In District 2 an investigator has been appointed by the President of the Association.

Controversies were amicably disposed of without formal action as follows: One each in Districts 9, 11, and 14.

In District 15 one Complaint was filed, on which two hearings were held. The respondent surrendered his active license.

In District 3 (Lincoln) charges which at date of last report were pending in four matters were dismissed without formal action. One case has been heard and awaits decision. Charges are pending in two cases.

In District 4 (Omaha) five matters were pending at date of the last report. Four of them were dismissed after consideration, and one became part of the subject of a Complaint which was filed in the Supreme Court. Charges were filed in fifteen cases. Their status is as follows: Six were considered and dismissed; one was withdrawn by complainant; seven await the Committee's action; one resulted in Complaint filed in the Supreme Court.

In District 12 it came to the attention of the Committee that some lawyers were causing their names and addresses to be published in the weekly newspaper under the heading "Professional Services." The attorneys were admonished by the Committee. The objectionable practice has ceased.

In District 19 the Committee caused the discontinuance of bold type listing in the telephone directory. Charges in one other matter were heard and were dismissed for lack of merit.

Advisory Opinions

The Advisory Committee adheres to its policy of declining to render an opinion upon a course of action which has been accomplished, as distinguished from a prospective action, or in respect of which charges are pending, or which seems likely to come before the Committee for review of the action of a Committee on Inquiry.

Some of the opinions which have more than a limited application are as follows:

1. The Committee on the Availability of Legal Services requested an opinion by the Advisory Committee on the ethical considerations implicit in the establishment by the Association of a non-profit corporation, to be financed by the Association and the Office of Economic Opportunity, to employ lawyers to provide free legal service to the poor.

The Advisory Committee made a study of the subject and formulated an opinion having special reference to Canons 35 (relating to Intermediaries), 27 (on Advertising), and 47 (Unauthorized Practice by lay agency, personal or corporate). Guide lines were set forth stating the limitations under which such charitable activities are ethically permissible.

2. The Committee was of the opinion that, under the facts stated, an attorney cannot properly represent both the driver and his passenger-guest, there being a conflict of interest between them.

3. Lawyers may not properly permit their landlord to publish the photographs of the members of the law firm in an advertisement of the office building.

4. The Committee disapproved the practice of an assistant city attorney, whose duty is to prosecute ordinance violations, sharing an office with an attorney who defends persons charged with such offenses.

5. An attorney for a trust may not ethically act to procure the dismissal of the trustee. Under the circumstances stated, he may accept employment by the successor trustee.

6. It is not per se violative of any Canon for a lawyer who owns the building in which he has his office to rent a portion of the building to an accountant and a portion of it to an insurance agency, there being no community of interest between the lawyer, the accountant, and the insurance agent other than a common roof, a common entrance to the reception room (separate entrances from the reception room) and one receptionist.

7. There is no impropriety per se in a lawyer rendering service to a cemetery association as its manager, the law office and the association office being separate, and the name of the association not appearing on the law office door.

8. The Committee refuses to read any exception into Canon 9 which provides in part that "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. . . ."

At the request of the President of the Association, the Committee prepared an analysis of the Supreme Court Rules Creating, Controlling and Regulating Nebraska State Bar Association, Articles X and XI, and a synopsis of Disciplinary Procedures in Nebraska. The materials were embodied in a report which President Maupin made on "An Effective Plan" to the National Conference of Bar Presidents at the 1967 Annual Meeting of the American Bar Association in Honolulu.

As a matter of general interest it should be known to every lawyer that there is being drafted by the American Bar Association a Code of Professional Responsibility which is to replace the present Canons of Professional Ethics promulgated in 1908. It is expected that the new Code will contain no fewer than ten, nor more than fourteen Canons, instead of the present forty-seven.

A tentative draft of the report of the American Bar Association Committee is scheduled for release in the Spring of 1968. The Committee plans to make its final report and recommendations to the House of Delegates at the February 1969 mid-year meeting.

The report is signed by all members of the committee. (On motion the Report was received and placed on file).

REPORT OF THE SPECIAL COMMITTEE ON FEDERAL CRIMINAL JUSTICE ACT

Robert J. Kutak

First of all I would like to correct the identification on your agenda. I am not the Chairman of the committee. Mr. Patrick L. Cooney is the Chairman of the committee, but as so many of you gentlemen know, he has suffered an illness recently and asked me to pinch-hit in his absence.

Since the report is short, but important, I will again indulge the House by reading it:

With the passage of the Criminal Justice Act of 1964 the federal court system for the first time could realistically anticipate adequate representation of those persons standing before it who were themselves unable to pay for their own defense.

Prior to this time, under typical procedures existing in the federal system, counsel was not appointed until arraignment. Counsel who was assigned was often not selected in any systematic manner. He served without compensation and had no means to obtain investigative or other services necessary for the preparation and trial of the case. The results of such a situation could be foreseen,

but scarcely tolerated. They reflected little credit on our legal system and concept of justice. It was painfully clear that defendants with appointed counsel had less chance of having the charges against them dismissed, less chance of being acquitted when they went to trial, and a greater chance, if convicted, of being sent to jail instead of being placed on probation.

The purpose of the Criminal Justice Act of 1964 was to assure that the poor would enjoy the same protection in criminal proceedings as those who did retain their own counsel. The Act placed emphasis upon the appointment of only the qualified members of the Bar. Selection at random was discouraged. Once appointed by the court, counsel ordinarily continues to serve throughout the entire proceedings. Appointments are to be made at the earliest stage in the proceedings—whenever the accused first appears without counsel. The standards for eligibility are keyed, not to a state of indigency, but to a financial inability to obtain counsel. The procedures for obtaining counsel are designed to discourage abuse, not waiver. Counsel, whether appointed or retained by a defendant who is financially unable to obtain fact-finding services necessary to prepare an adequate defense, can obtain them under the Act. Attorneys appointed under the Act are compensated for their services and reimbursed for their expenses incurred in connection with the defense.

The plans implementing the Criminal Justice Act in this district and the various districts across the country became effective in August of 1965. The federal courts have now had a little more than two years of experience with the program. Enough time has elapsed to discover whether, as a result of the availability of these provisions the quality of representation in court-appointed cases is, in fact, improved. A Special Committee of the Judicial Conference of the United States—and by the way, gentlemen, Judge Harvey Johnsen of the Eighth Circuit is a member of that committee—is now in process of reviewing a detailed study of the operation of the Act to determine that precise question. Undoubtedly, when its work is finished this committee of the Judicial Conference will make specific recommendations for amendments to the Criminal Justice Act. It can be foreseen without examining the empirical evidence gathered by the study, that such matters as the standards for eligibility, the methods and time of appointment, the scope of services other than counsel, and provision for payment, to mention just a few, require modification of the Act.

The American Bar Association assumed an active role in the adoption of the initial legislation. Its leadership was instrumental in the passage of such a bill after nearly a quarter century of legisla-

tive stalemate. With the Bar's growing concern regarding the matter of the availability of legal services, we can confidently expect the Association actively to recommend and support the necessary revisions to this pioneering legislation.

In this event, the Nebraska State Bar Association's Committee on the Federal Criminal Justice Act has its work cut out for it in the next few years. It is our purpose to furnish assistance to the federal district court and the Bar in the administration of the plan implementing the Act in this district. An ad hoc committee of this Bar Association drafted the original plan. It also drew up the original panel of attorneys assuring both participation by competent counsel and a fair allocation of such appointments among the members. The federal district court has already called upon our committee to review and update the panel of attorneys. Several meetings were held throughout the year to develop such a new list. The work is expected to be completed and a panel ready for submission to the court for its approval later this fall. Our effort has been not only to update the list of attorneys but to revamp it so that it could be more useful to the court and to the U. S. Commissioners as well. The committee anticipates that in light of the forthcoming recommendations for revision of the Act that it will also be requested to review and possibly revise the plan implementing that Act in this district.

For such reasons it is the recommendation of the undersigned that the committee be continued for another year. We feel its work is in keeping with the expanding role and growing obligations of our professions.

MR. KUTAK: Mr. Chairman, I do move the adoption of the motion for the continuation of the committee for another year.

CHAIRMAN EISENSTATT: Is there a second to the motion?

THOMAS R. BURKE, Omaha: I second the motion.

CHAIRMAN EISENSTATT: All those in favor signify by saying "aye"; all opposed. Carried.

CHAIRMAN EISENSTATT: I now call on the Committee on Continuing Legal Education.

REPORT OF COMMITTEE ON CONTINUING LEGAL EDUCATION

Harold L. Rock

First of all, the committee is working with the Section on Real Estate and Trusts and the Taxation Section on the program for next

year's annual meeting, and they are preparing a book on probate. Probably many of you are already involved in it. It is moving along very well under the jurisdiction right now of Deryl Hamann.

The committee makes two recommendations and I will read those. The background on the first recommendation is that we for a long time have been trying to get, and the two groups have been trying to *get* us to get, a program with the Practicing Law Institute and the ALI-ABA group. We are at the point where both groups would like to come to our state and present programs.

The recommendation of the committee is as follows: The committee recommends that efforts be made to schedule a program of the ALI-ABA Joint Committee and the Practicing Law Institute in the State of Nebraska during 1968 on the general subject matter of some phase of commercial law, such as banking law or dealing with the various chapters of the Uniform Commercial Code. The American Bar Association Committee is willing to work up a program on any other subject matter that we request.

The second recommendation is that the committee be used as a coordination center, an information center, for all the Legal Aid programs or the Continuing Legal Education programs that are carried on in the state.

We had an instance very recently where the committee, I believe it was the Banking Committee, was planning to put on a program on the Commercial Code at the same time the PLI would be putting on their program. In several other cases near misses have occurred on programs scheduled at the same time. The Continuing Legal Education Committee receives requests for information from the American Bar Association and their Continuing Legal Education program so that they can publish in journals—the PRACTICAL LAWYER, I think, publishes one schedule—so they can publish coming events in the various states, and they like to know what is going on in Nebraska.

If the Continuing Legal Education Committee or, eventually, I suppose, if an Executive Director is made apart of this organization then he would act as a clearing house for information concerning all Continuing Legal Education activities in the state, without intending to suggest that the committee should exercise any regulatory function as a result of the information it obtains. In other words, we just would like to be able to tell people what is going on and to know ourselves, and to coordinate a little better those Continuing Legal Education activities that are carried on.

I move the adoption of the recommendations and the report.
(The Report was adopted)

CHAIRMAN EISENSTATT: I now move to the Committee on Practice and Procedure.

REPORT OF COMMITTEE ON PRACTICE AND PROCEDURE

Norman Krivosha

This report is intended to supplement the report delivered to the mid-year meeting of the Nebraska State Bar Association and appearing on Page 60 of your program. You will recall that the report delivered to the mid-year meeting indicated that the committee intended to concern itself in the coming year with three specific areas. One was the matter of the Dead Man's Statute, a second involved the settlement of claims of minors, and the third involved the entire area of the Nebraska Rules of Civil Procedure.

Taking them up individually, I wish to report that a subcommittee has now been appointed consisting of Mr. D. Nick Caporale, Mr. Ken Elson, and Mr. William T. Mueller, who will, during the coming year, investigate the entire area of the Dead Man's Statute and make recommendation to the House of Delegates as to whether any changes should be made. These changes would then go to the Legislative Committee for drafting of legislation. We have further associated ourselves in this endeavor with the University of Nebraska College of Law, and Mr. Fred Sweet, a student, is presently researching the matter of the Dead Man's Statute and will work with the subcommittee members in this regard.

A second subcommittee consisting of Albert G. Schatz, Warren C. Schrempp, Robert E. Sullivan, and Hans Hottorf has been created with the task of further examining the matter of settling claims of minors. Here, again, a student at the University of Nebraska College of Law, Mr. LeRoy Hahn, has agreed to do some of the preliminary research for the subcommittee.

In regard to the final area, that being the Rules of Civil Procedure, it now appears that some extensive research must be done before any intelligent recommendations can be made. For that reason, a meeting of the entire Committee is now set for Saturday, November 11, 1967, at which time we will attempt to divide into subcommittees and devote the coming year to examining what changes, if any, should be made in the Nebraska Rules of Civil Procedure and what portions, if any, of the Federal Rules of Civil Procedure should be adopted. Here, again, we have discussed this matter with the University of Nebraska College of Law and may be able to obtain the assistance of law students to aid in the research so as to lighten the burden placed upon the members of the committee.

As indicated in the mid-year report, it would be our intention to make preliminary studies for consideration by the House of Delegates, and then perhaps more specific work by a special committee or committees established for the purpose of refining and completing the recommendations in regard to the Rules of Civil Procedure.

Mr. Chairman, I move the adoption of the report of the committee.

ARCHIBALD J. WEAVER, Falls City: I'll second that.

CHAIRMAN EISENSTATT: Are there any questions? There being none, I now call for the question. All those in favor signify by saying "aye"; all opposed. The motion is carried.

CHAIRMAN EISENSTATT: The next is Item 12, the report of the Daniel J. Gross Welfare and Assistance Fund.

**REPORT OF TRUSTEES OF THE DANIEL J. GROSS-
NEBRASKA STATE BAR ASSOCIATION
WELFARE AND ASSISTANCE FUND**

Harry L. Welch

The itemized and detailed report of the Dan J. Gross Fund is contained in your booklet and I will therefore not go into it.

There is one aspect that I want to talk about very briefly, and I would like to give it to this House. As I have said before, Dan Gross died in 1958 and in his will he left \$25,000 to the Nebraska State Bar Association for the welfare of needy lawyers, their wives and children. He also left \$1,000 to Judge Harvey Johnsen. I speak of this because it is an item in my report. Judge Johnsen donated his \$1,000 to the fund.

Myself, John C. Mason of Lincoln, and Lester Danielson of Scottsbluff are now the Trustees of that fund. Due to our astuteness in investment policies, we've got now more money than we started with, even though we have passed out a considerable amount of money to lawyers and their families that needed help. The trouble of it is we can't give away enough money to the proper and needy people. The Chairman of this committee is watching the funds very closely so that when his time comes he will of course get a substantial portion of it (laughter), but be that as it may, the suggestion has been made that since this fund is growing—and to have this fund grow serves no purpose—we would like an expression from this House or perhaps a committee that would be appointed by your

Chairman, that we name a scholarship program whereby, say, two, boy or girl, members of the families of a lawyer who couldn't perhaps send them to law school otherwise, to provide two scholarships for such a purpose.

We thought of that originally and talked with Judge Harvey Johnsen about it. The Judge said at that time, which was several years ago, "No, if Dan had wanted to provide a scholarship program he could have done so. He knew how to do it and provide for it in the will."

But as I say, I think now the time has come when we should give a new look to the beneficiaries of this fund, and I would like to ask you, Mr. Chairman, to perhaps name a small committee who should review this matter with a view to telling us and advising us, because we have certain strict duties under that will, even though it is rather a wide-open bequest, we would like to have an expression from this group or some committee thereof to advise us whether or not it wouldn't be the wishes of this committee that this program be expanded a little bit and that we provide some scholarship program of some type or other for the children of needy lawyers, or lawyers whose children couldn't otherwise afford to go to law school.

This committee of course need not be moved to continue. This isn't exactly a Bar committee. This is a report of the Trustees of this fund. That is my report, Mr. Chairman.

CHAIRMAN EISENSTATT: Thank you, Mr. Welch. Is it your thought that some time after this meeting a committee be appointed to meet with your Trustees to examine an expansion of the welfare activity, so to speak, of your committee, and may suggest areas it might well use these funds?

MR. WELCH: I think that would be fine.

CHAIRMAN EISENSTATT: In aid of the Chairman on that, are there any ideas from any of the members of the committee now that might be suggested to aid the Dan Gross Trust Fund? We will give that our immediate attention. We hope that perhaps by the mid-year meeting something can be worked out. I would like you to advise me, Mr. Welch, as to the exact terms of the trust. Perhaps it might help our committee in seeing how far we might have to go, or just what the confines are we are working under.

CHAIRMAN EISENSTATT: Next is the Report of the Committee on County Law Libraries.

REPORT OF COUNTY LAW LIBRARY COMMITTEE**William H. Meier**

Mr. Chairman and Members of the House of Delegates: At the request of the State Bar Association, the District Judges Association has appointed a special committee on County Law Libraries to carry out the responsibilities placed upon the District Judges by the laws of this state.

Your committee on Law Libraries is pleased to report that we have been able to work out with the like committee of the District Judges Association a recommendation to that association that the following steps should be taken by the District Judges of each of the judicial districts. This report is being made to the District Judges this morning and I hope it will be adopted. These are the steps:

1. On the opening of each term of court in each county, an inspection of the County Law Library should be made to determine the condition of the library, the facilities and types of legal publications contained in the library, the housekeeping condition of the library and what additions or deletions or changes should be made, if any.

2. As soon as possible after such inspection has been made, the judge or judges should make his or their report of findings and recommendations regarding the County Law Library. This should be made a matter of record in the court and the Clerk should be requested or directed to supply a copy of the report to the County Board and to the governing board or committee of the County Law Library.

3. If no committee or governing board has been established for the management of the County Law Library, then the judge or judges by rule of court should create such a committee or boards, consisting of the District Judge (or one of the judges) as chairman, the Clerk of the District Court as secretary, the County Judge as Vice-Chairman, and the County Attorney and some other county official, officials or attorneys as members of the committee or board of the County Law Library for the county.

4. The County Law Library Board or Committee should be admonished by the judge or judges to establish suitable rules regarding the acceptance of gifts of usable law publications, the method of checking out books for use, recording withdrawals and return of books and such other matters as experience may indicate to be advisable.

I move the adoption of this report and that the committee be continued.

CHAIRMAN EISENSTATT: Do I hear a second?

HARRY N. LARSON, Wakefield: I second it.

CHAIRMAN EISENSTATT: Any discussion? Any question? All those in favor signify by saying "aye"; all opposed. The motion is carried.

Mr. Martin, are you prepared to give a report on the Trustee of the Rocky Mountain Mineral Institute Foundation?

REPORT OF THE TRUSTEE OF THE ROCKY MOUNTAIN MINERAL LAW FOUNDATION

Paul L. Martin

The Rocky Mountain Mineral Law Foundation was organized in 1955 to promote research and continuing legal education in oil and gas and mining law and taxation. In the years since then the Foundation has gained a national reputation not only for its annual Institutes, but for its increased research activities and for its publications in the field of mineral and public-land law.

Among the better known of its publications are the following:

1. Rocky Mountain Mineral Law Institute Proceedings. An Index to Volumes 1-10 has also been published.
2. The Gower Federal Service (Public Lands Oil and Gas Leasing Service—1947 to date).
3. Gower Federal Service—Outer Continental Shelf.
4. Gower Federal Service (Public Land Mining Service). A compilation of the general mining laws and regulations was added in 1965 as an optional feature of the service, and is now being expanded to include state laws.
5. American Law of Mining (five-volume treatise).
6. Law of Federal Oil and Gas Leasing.
7. Rocky Mountain Mineral Law Review.
8. Water Law Newsletter, a periodical report of water law developments in the western states.

In addition to the Foundation's publications, it has been active in other programs of interest to oil and gas and mining attorneys. We have also submitted a research proposal to the Public Land Law Review Commission.

Scholarships—Each year the Foundation makes available scholarships to students at each of its fifteen-member law schools. The scholarships are designed to promote and encourage interest in oil and gas and mining law and are awarded annually to law students who have done outstanding work in this field.

The papers on water law presented at the 1967 Institute mark a new endeavor of the Foundation. While papers on water-law topics directly related to mineral resources have been offered at previous Institutes, the Foundation is now committed to a continuing education program in water law. Proceedings of each Institute are edited by the Foundation and published by Matthew Bender and Company.

Next year's Institute will be held in a new location—Flagstaff, Arizona. The University of Arizona College of Law, the Arizona State Bar, and the Arizona Mining Association will be hosting the 1968 Institute on the campus of Northern Arizona University, in the cool Ponderosa forest highlands just a few miles from the Grand Canyon. We are excited about this opportunity to hold an Institute in a true vacation land, and hope you will make plans now to attend the Fourteenth Institute in Flagstaff in July, 1968.

I have served on the Executive Committee during the past year and have thoroughly enjoyed the work and the association with the leaders of the Oil and Gas Industry in the Rocky Mountain states.

Representing the University of Nebraska College of Law is Professor Richard S. Harnsberger and Professor Michael J. O'Reilly represents the School of Law of Creighton University. They are both taking an active part in the work of the Foundation.

Present members of the Association consist of fifteen law schools, twelve Bar associations, six mining associations, and three oil and gas associations.

CHAIRMAN EISENSTATT: No. 14 is the report of the Section on Real Estate, Probate and Trust Law, Keith Miller, Chairman. Mr. Miller could not be present and has submitted a written report which I will ask be placed on file. He states:

The Executive Committee of the Section met periodically with members of the Committee on Continuing Education and the Section on Taxation in planning the compilation of the Nebraska Estate Administration Manual for presentation at the 1968 annual meeting of the Bar. Many members of the Section are now actively engaged in the original drafting, or reviewing of drafts of specific chapters of the manual.

The Committee on Fees and Commissions of the Probate and Trust Law Division, working in coordination with a similar committee of the Omaha Bar and with the Committee on Economics, is pointing toward specific recommendations to be presented at the 1968 mid-year meeting.

The Committee on Title Standards has submitted various recommendations for legislation and for revision of existing standards. Copy of its minutes is appended hereto, and its Chairman, Walter Huber, will present the same to the House of Delegates for approval.

The Executive Committee recommends that a substantial portion of the membership of each of the eight standing committees of the Section be kept intact throughout the coming year for the purpose of continuity.

I will now call upon Mr. Walter Huber to present a part of the Section's report on Title Standards.

REPORT OF COMMITTEE ON TITLE STANDARDS

Walter G. Huber

The Title Standards Committee has been quite active. We have seventeen members, fourteen being present at the mid-year meeting, and ten of those same fourteen were present at the fall meeting, at which time certain action was taken.

We have three motions which can be considered in one, and when I get through with that there is one other matter to bring up to the House of Delegates that pertains to our particular Section.

We found this past year that we had to consider standards with regard to abstracts of title because of the new law which has created registered abstractors, which means they must be not only bonded but also have a state license. As a view of that, our committee went into the matter of whether the Title Standards, as far as the legislative part of them is concerned, should be repealed. The committee decided that they should be, on the ground that originally they were put in, as far as we were able to determine, without any particular sanction of the Title Standards Committee, just because it was feared that lawyers would not follow the Title Standards. We think that that rule is gone and the Standards can be followed without their being legislative acts. Furthermore, we believe, as will be pointed out by these two Standards that are proposed today, that it is impossible to keep the Standards current because of the fact that legislative acts are passed and there is no attempt made to incorporate these changes into the Standards. The only other alternative

that I could see to that would be if there was some machine process that would automatically relate these other laws to these title standards and the legislature would be forced to consider them at that time.

So we have three motions:

1. The first is that the House of Delegates be requested to instruct the Legislative Committee of the Nebraska State Bar Association to prepare and present a bill to the state legislature repealing Section 76-601 to 76-644 inclusive, Reissue Revised Statutes 1943 of Nebraska.

2. That Title Standard No. 8 be amended to read as follows: Standard No. 8—Abstract—Compiled by Title Owner. Where an abstractor duly qualified, as provided by law, has certified an abstract of title to real estate in which he himself is interested, it is not negligence on the part of the examiner to accept such abstract. Revised October 18, 1967.

Comment. Certification by such duly qualified abstractor can neither create nor remove defects of record title. It is in the nature of an additional protection to persons dealing with the property. No case can be found where an abstractor or his bondsman escaped liability on the ground that the abstractor had an interest in the property. Such holding would be an absurdity, allowing a man to profit by his own wrong. A grantor in a warranty deed does not escape a liability on his warranties on the ground that he has an interest in the property.

Prior to November 18, 1965, an abstractor need only be bonded, but on and after that date the abstractor must be registered. This standard has been revised to conform to Section 25-1292 Reissue Revised Supplement, 1965, and Section 76-509 through 76-528 Reissue Revised Statutes, 1943.

However, it is noted that the legislature has not as yet changed Section 76-611, Reissue Revised Statutes, 1943, which was original Title Standard No. 8.

3. The third motion: That Title Standard No. 22 be amended to read as follows: Standard No. 22—Abstract—Certificate—Limitation. For the purpose of examination, an abstract should be considered sufficiently certified if it indicates that the abstractors were bonded on the dates of their respective certificates dated prior to November 18, 1965, and further indicates that the abstractors were registered on the dates of their respective certificates dated subsequent thereto. It is not a defect that at the date of the examination the statute of limitations may have run against the bonds of some of the abstractors. Revised October 18, 1967.

Comment. If an abstract shall be successively certified to by abstractors who were bonded under the provisions of Section 76-506, Reissue Revised Statutes, 1943, prior to November 18, 1965, and by registered abstractors thereafter, the same is entitled to be received in all courts as prima facie evidence of the records therein contained. See Section 25-1292 Revised Statutes Supplement, 1965.

This Standard has been revised to conform to Section 25-1292 as amended in 1965. However, it is noted that the legislature has not yet changed Section 76-625, Reissue Revised Statutes, 1943, which was original Title Standard No. 22.

CHAIRMAN EISENSTATT: Do you move the adoption of these?

MR. HUBER: I am not a member of the House.

CHAIRMAN EISENSTATT: Do I hear a motion?

ARCHIBALD J. WEAVER, Falls City: Mr. Chairman, I will move their adoption.

CHAIRMAN EISENSTATT: Do I hear a second?

JOHN J. WILSON, Lincoln: I'll second that motion.

CHAIRMAN EISENSTATT: Is there any discussion or any question?

CLARK G. NICHOLS, Scottsbluff: Yes, do I understand that the original purpose of having a Title Standards enacted as a statute was to make it clear and provide a legal basis for provision in the statute that it is not negligence to pass a title if it complies with those standards? If that is correct, then aren't we stripping ourselves of some protection by the repeal of the statute? Also, if we can repeal them, why can't we bring them up to date?

MR. HUBER: The first question with regard to negligence was considered by the committee, and the committee felt that generally accepted standards of passing title would be the test if the matter came to court and that the legislation might be not a true basis for absolving an attorney, that the courts may not let an attorney out simply because you have legislation.

On the second point, in addition to these two standards that I have mentioned it has been called to the attention of our committee that we now have a new Act in 1967 which will require two other standards to be changed which are statutory with regard to filing papers in connection with probate of wills and estates, and also another standard which eliminates the need for corporate seals on deeds, which is not statutory. The latter, of course, can be taken

care of very easily. This former problem, as you can see, in these new Standards we had to make a Comment that the legislature had not repealed these particular acts but as far as we were concerned we felt these new standards should replace them and be superimposed or supersede the legislative acts, because of having the sanction of our committee and the Section, and we hope of the Bar Association as a whole.

CHAIRMAN EISENSTATT: Are there any further comments?

ROBERT K. ADAMS, Omaha: Are we in a position to adopt the second and third motions until No. 1 is enacted by the legislature?

MR. HUBER: Mr. Adams, the three motions can be dealt with separately or as a unit. The two Standards will have nothing to do with whether these other ones are repealed or not. The whole point is, these Standards are the Standards of the Nebraska State Bar Association. The legislature saw fit to adopt them up to a certain point, and since that time there has been no legislative adoption of any of the Standards that I have had anything to do with since I have been Chairman of this committee.

HERMAN GINSBURG, Lincoln: I have a keen interest in the work of this Title Standard Committee. What Mr. Huber has pointed out is true. It was a mistake perhaps in the first instance to adopt the Standards as legislative acts, and now we are beginning to see what happens. These matters that Mr. Huber has referred to are not the only statutory Standards that are obsolete because of various changes either in legislation or decisions of the Supreme Court. However, as has been pointed out by Mr. Huber, the Standards which the Bar Association adopt are one thing, the repeal of the legislative standards, if I may call them that, is another matter.

I would like to suggest that this House go on record as approving the two suggested new Standards. I would like to suggest that we in some manner defer the matter of the repeal for further study. Perhaps we can arrive at some sort of a statutory enactment in lieu thereof, giving some sort of sanction to Bar Association Standards when, as, and if adopted by the Bar Association. I am not prepared to say whether that would be constitutional or not. I think we could work something out. But my reason for being rather hesitant about the repeal of the statutory standards at this time in one fell swoop is that I wouldn't be surprised if there exists throughout the state a number of attorneys who might take advantage of that situation to say, "Well, before we had a statutory rule that said we had to agree to such-and-such, and now the legislature has repealed that and maybe that rule no longer exists." I think we might have the creation of some possible arguments or difficulties, and I think we

could eliminate the situation if we would refer to the appropriate committee of the Real Estate Section enactment of some sort of statute giving statutory sanction to the standard. I think that is a matter that requires further study and further consideration.

Therefore at this time I would suggest, and I would so move, that we adopt the two new standards and defer the matter of the repeal of the statutory standards, with the recommendation that the committee give further consideration thereto.

CHAIRMAN EISENSTATT: I take that as being the offering of an amended resolution.

ROBERT K. ADAMS, Omaha: I second that.

CHAIRMAN EISENSTATT: We will now hear discussion on whether we accept the amended motion. What is your point of order?

JOHN E. NORTH, Omaha: That it would have to be an amendment to the motion.

CHAIRMAN EISENSTATT: First I would like an expression of opinion from Mr. Huber as to whether he would accept the amended motion.

MR. HUBER: As far as I am concerned, this action was unanimous by our committee, but I think our committee would be willing to go along with whatever the House desires in this respect. I can see that there might be some basis for trying to get a sanction of the Standards. I have a question in my mind whether the legislature would want to go on such a blanket proposition because in reality they would be okaying anything that we did, I suppose, and would infer that it would cover things in the future as well. But this is a matter that would have to be gone into, I suppose.

CHAIRMAN EISENSTATT: Will the original mover and second accept the amendment? Note, for the record, that it has been accepted.

Is there any other discussion? I now call for the question on the amended motion. All those in favor signify by saying "aye"; all opposed. The motion is carried.

MR. HUBER: Gentlemen, the other matter in one word is brevity. That is what you are all interested in right now, and that is whether you are interested in the Nebraska Title Standards Committee working with the Nebraska Land Title Association in going into the matter of abstracting standards.

Several years ago the Executive Council of this Association appointed a special committee to try to work with the Nebraska

Land Title Association in improving abstracts. Mr. Davis served on that committee. I was appointed by the Nebraska Land Title Association at that time. The committee met. They thought they should start in on a certificate, and they did. The Land Title Association said. "Well, since lawyers have so many different ideas, we want the Bar committee to formulate a suggested certificate and then we will circulate it to our membership." That is the last that has ever been heard of that work. That was several years ago.

We got the idea through Mr. Harold Elliott, who is secretary and one of the members of our committee, that maybe the thing could be handled better by the Title Standards Committee of this Section working on abstract standards, as they have done in Iowa. They have put these through in Iowa. They have also amended them. They seem to have worked out very well.

The point is that this committee, and this was brought up before, I don't know whether it came to you last year or not, either authorize our committee to work with the appropriate committee of the Nebraska Land Title Association or have the matter referred to the Executive Council of this Association, if that is needed, to unscramble the dead horse and get us back to work. Incidentally, this isn't anything that can be done in a day or two. It may involve legislation. But Iowa has very brief abstracts. They don't show anything there that isn't absolutely necessary. The Title Association seems to feel that it wouldn't interfere with their work because they can get as much for showing less.

CHAIRMAN EISENSTATT: Will you state a proposed motion, Mr. Huber?

MR. HUBER: The proposed motion would be that the Title Standards Committee of the Section of Real Estate, Probate and Trust Law be authorized to work with the Nebraska Land Title Association in forming abstracting standards of the Nebraska Land Title Association.

FREDRIC R. IRONS, Hastings: I so move.

HERMAN GINSBUURG, Lincoln: I'll second the motion.

CHAIRMAN EISENSTATT: Any discussion? All those in favor signify by saying "aye"; all opposed. The motion is carried.

MR. HUBER: The only other thing, we had a legislative matter that got pigeonholed, and in view of the discussion this morning we hope that will get into proper channels.

CHAIRMAN EISENSTATT: I would like to hear the report of the Taxation Section. Mr. Hamann!

REPORT OF SECTION ON TAXATION

Deryl F. Hamann

The Section on Taxation is participating in four separate matters as follows:

1. **Annual Institute on Taxation.** The Section on Taxation will present its Annual Institute on Taxation in Kearney, Nebraska on December 15, and in Scottsbluff, Nebraska on December 16. These Institutes are generally in line with the Institutes conducted in prior years with the exception that greater emphasis is being placed on Nebraska taxation this year, due to recent changes in the tax structure of Nebraska. No Institute by the Nebraska Bar Association is planned for presentation in Omaha.

2. **Great Plains Tax Institute.** The Nebraska State Bar Association and the Nebraska CPA Society, together with the University of Nebraska, are again co-sponsoring the Great Plains Tax Institute which will be held in Lincoln, Nebraska on December 4 and 5. While there is some duplication of the Great Plains Tax Institute and the Nebraska Bar Association Tax Institute, the Great Plains Tax Institute has not drawn lawyers from Central and Western Nebraska, and it is felt that a separate Institute for the lawyers in that part of the state is still very much desired. The last Nebraska Bar Association Institute which was held in Omaha (during a year when the Bar Association was *not* co-sponsoring the Great Plains Tax Institute), was rather poorly attended. For these two reasons, it is the judgment of the Executive Committee of the Section on Taxation that it is preferable to put on the two Institutes in Central and Western Nebraska, and to co-sponsor the Great Plains Tax Institute, rather than put on a third Bar Association Tax Institute in Eastern Nebraska, as had previously been the custom.

3. **Committee on Sales and Income Tax.** The Section on Taxation is cooperating with the Taxation Section of the Nebraska CPA Society to act as a mutual "clearing house" with respect to complaints which may be made by members of the respective professions concerning the operation of the Nebraska sales and income tax. Insofar as the function of the Section on Taxation of the Nebraska Bar Association is concerned, we are operating within two strict limitations: (a) the first limitation is that any recommendations which we make will be made through the Legislative Committee of the Bar Association; and (b) no recommendations will be made with respect to substantive questions, but only with respect to "the administration of justice and administrative procedure" to minimize the danger of an attack on the integrated Bar under the rationale of *Lathrop v. Donohue*, 367 U.S. 820, 6 L.Ed. 2d 1191.

I might point out that this originally came up with somebody raising, among other things, the question of shouldn't we do something about the Girl Scout cookie sellers being exempted from this. After we went all the way around it, it now appears that is probably substantive and not procedural anyway, so I will leave that to my successor to decide that.

4. **Nebraska Estate Administration Handbook.** The Section on Taxation, the Committee on Continuing Legal Education, and the Section on Real Estate, Probate and Trust Law are cooperating in the preparation of a Nebraska Estate Administration Handbook. You have heard about that before so I won't elaborate on that further. The Honorable Jerrold L. Strasheim is Chairman of the Committee on Continuing Legal Education, and our efforts in this area are detailed in the report of that committee.

The members of the Executive Committee of the Section on Taxation are: Deryl F. Hamann, Chairman; Richard E. Person, Secretary; Flavel A. Wright, Member; John M. Gradwohl, Member; Thomas R. Burke, Member; Robert G. Simmons, Jr., Member.

The terms of Messrs. Gradwohl and Wright will expire at the end of 1967.. It is anticipated that new members of the Executive Committee will be elected, and new officers elected at the time of the December 15-16 Institute on Taxation.

...The session adjourned at twelve-fifteen o'clock...

WEDNESDAY AFTERNOON SESSION

October 18, 1967

The afternoon session of the House of Delegates was called to order at one-forty o'clock by Chairman Eisenstatt.

CHAIRMAN EISENSTATT: Gentlemen, with your permission I would like to call back to order the meeting of the House of Delegates. I would like to spend the next few minutes covering some of the matters which we were not able to get to this morning. Then, if by that time we don't have enough members—the Executive Council is meeting now—we may have to recess until they complete before we can start on our scheduled afternoon program. So with your permission, in the hope that the rest of our members will appear in the next few minutes, I will ask for Mr. Kay to present his report for the Section on Practice and Procedure.

REPORT OF SECTION ON PRACTICE AND PROCEDURE**Harold W. Kay**

The Section on Practice and Procedure was responsible for putting on the program at the last annual meeting. With the help of the Committee on Practice and Procedure, the law schools, and many others, a program was presented on the subject of "Evidence."

In addition to taking part in the program last year, the Section participated in the recent Institute on 1967 Legislation in Lincoln. The activities of the Section will continue.

The newly elected officers of the Section are James Knapp of Kearney, Chairman; Kenneth Elson of Grand Island, Vice-Chairman; and William P. Mueller of Ogallala, Secretary.

CHAIRMAN EISENSTATT: Next is the report of the Section on Tort Law. Mr. Bernard Smith is the Chairman of that Section. He has submitted a written report. He is now engaged in the meeting of the Executive Council and asked me to present the written report, which I now give you:

The Executive Committee for the Tort Section reported to this House at the 1966 session that study and consideration had been given to resolving the conflicts between the Section and the Nebraska Association of Trial Attorneys.

It was then noted that there was duplication of the objects and purposes of the two groups. Conflicts existed between the programing of NATA and the Bar Association.

During the current year the Executive Committee has continued its effort to partially resolve the conflicts and duplication of effort. Several meetings have been held with representatives from both groups.

It is with pleasure that this committee can report that there was understanding and cooperation of both groups. There were numerous problems and collateral matters to be resolved. Our primary objective was to co-sponsor a program for the 1967 meeting of the Bar Association. The end result is that the Section on Tort Law together with NATA appointed James Bruckner of Lincoln as Program Chairman, representing NATA, and Frank B. Morrison, Jr. of Omaha as co-chairman representing this Section.

It is further considered that the program chairmen have put together an informative, educational, and worthwhile program for all members of the Association.

The Executive Committee continues to believe that the cooperation of the two groups as demonstrated during the past year may be continued and that the conflicts of programs, objects and purposes may be mitigated, if not eliminated.

The Section contemplates a meeting during this meeting of the Bar Association and will, at that time, elect a new member of the Executive Committee to fill the term of the Chairman, whose term has expired. Election of officers will be held and the new member and officers will be reported to the Chairman of this House.

That report can be accepted and filed.

Mr. Overcash, the Chairman of the Section on Insurance, Banking, Corporate and Commercial Law, states that he has nothing further to offer at this time and that the report as shown in the printed program constitutes their full report. He asks that that report be included in the proceedings of this meeting. I don't think any action is needed on that.

Let the record show that that report which appears in the printed program will be accepted and filed.

REPORT OF THE SECTION ON INSURANCE, BANKING, CORPORATE AND COMMERCIAL LAW

The activities of this Section during this year have been primarily organizational. There is attached hereto a detailed statement of the officers and committees of the various Sections comprising this general Section.

Attention is particularly called to the organization of the Sub-section dealing with banking and commercial law. A large number of lawyers have been joined together in these activities under the able leadership of Charles Wright.

One of the matters presently under consideration by the entire Section is the desirability of obtaining some means for publishing and disseminating the information developed by the various agencies of this Section.

The Insurance Sub-section headed by James Hewitt is preparing an agenda for a meeting Wednesday, October 18, 1967, at Omaha preceding the annual meeting of the Association. This meeting will be held in the late afternoon and will consist of two different panels, one to discuss certain problems peculiar to the life insurance business and another panel to discuss problems peculiar to fire and casualty underwriting. These panels will be followed by a dinner meeting with a speaker of general interest to the insurance indus-

try. The Insurance Sub-section has in mind the possibility of a general clinic at some later date on subjects of general interest to the Bar.

One of the activities of the Banking and Commercial Law Sub-section has concerned the Uniform Commercial Code. This sub-committee headed by Mr. Robert Guenzel has sponsored seven legislative bills at the recent session of the Legislature as follows:

LB 663 (relating to commercial checks) and LB 721 (relating to sale of binder twine) restored laws inadvertently repealed in 1963.

LB 664 (dealing with conflicting provision on the assignment of accounts receivable) and LB 720 (dealing with the procedure to attach a share of stock) repealed sections of existing legislation that were not repealed by the enactment of the Uniform Commercial Code.

LB 660 clarifies a prior uncertainty concerning security interests in construction equipment. A bankruptcy court in another state had held, under statutes similar to those in Nebraska, that this type of chattel was required to be registered under the Motor Vehicle Laws, with the result that security interests recorded under the requirements of the Uniform Commercial Code were invalid against a claim of title by the trustee in bankruptcy. LB 660 provides that most types of construction equipment are not subject to registration under the Motor Vehicle Laws, with the result that security interests may be perfected in accordance with the requirements of the Uniform Commercial Code.

LB 662 repeals the old chattel mortgage provision requiring publication that was reinstated by the Press Association in the 1965 session of the Legislature.

LB 791 provides that sale by a merchant of entrusted goods conveys good title only if the entrusting was for the purpose of sale.

The committee working on the Uniform Commercial Code feels that there is a real need for an institute on the Code and request has been made of the Executive Committee of the Nebraska Bar Association for permission to schedule such an institute at various points in the spring of 1968.

The Legislative Committee of the sub-section on Banking and Commercial Law headed by Robert L. Berry and assisted by Mr.

John C. Mason sponsored two bills at the recent session of the Legislature. LB 787 amends Section 21-2007 (1) and provides that a corporation may be organized to conduct banking business under the banking laws of the state and may use a name which includes only the word "bank" without using or adding any of the other corporation name designations set forth in the amended statute such as corporation, company, incorporated or an abbreviation of the same.

The other Legislative Bill, LB 788, amended various existing sections of the State Banking Act so as to spell out that a corporation and not a group of individuals must file an application for a bank charter. This bill also requires that at least 20 per cent of the proposed amount of paid-up capital stock surplus and undivided profits of the applicant corporation must have been paid in at the time its application is filed.

The Corporation Law Sub-section had several meetings during the past year with the primary purpose being to review the Nebraska corporation laws. Following a conference with Senator Roland Luedtke and representatives of the Corporation Division of the Secretary of State's Office, proposed amendments to the Nebraska Business Corporation Act were prepared and submitted and ultimately adopted by the Legislature. These changes can be found included within LB 368.

The sub-section also considered suggested changes in the laws relating to non-profit corporations, some of which were incorporated into LB 367.

Some difficulty has been experienced in obtaining general support for the organization and operation of a sub-section dealing with municipal corporation law. This is occasioned by a general lack of continuity in the office of City Attorney in many smaller cities and towns. There are, however, many public corporations and governmental subdivisions falling within the category of municipal corporations and it is hoped that those interested in this field will indicate their interest to Mr. Ralph Nelson so that the organization and operation of this subsection may be completed.

The participation of all members of the Bar in the work of this section, its sub-sections and committees is solicited. Anyone having problems in this area or desiring to share in these activities may communicate with any of the organizational personnel listed below.

Bert L. Overcash, Chairman

**ORGANIZATION OF NEBRASKA STATE BAR ASSOCIATION
SECTION ON INSURANCE, BANKING, CORPORATE AND
COMMERCIAL LAW**

**SECTION OFFICERS
AND
EXECUTIVE COMMITTEE**

Bert L. Overcash, Lincoln—Chairman
Charles E. Wright, Lincoln
James W. Hewitt, Lincoln
Howard H. Moldenhauer, Omaha
Ralph D. Nelson, Lincoln

- I. Banking and Commercial Law—Charles E. Wright, Chairman

Subsection Officers

(a) **Committee on Banks and Banking**

Charles S. Reed, Omaha—Chairman
Daniel J. Monen, Jr., Omaha—Secretary

(1) **Subcommittee on Legislation**

Robert L. Berry, Omaha—Chairman
John C. Mason, Lincoln
Wilber S. Aten, Holdrege
Charles E. Wright, Lincoln
Richard L. Berkheimer, Lincoln
P. M. Moodie, West Point
William B. Brandt, Unadilla
Robert E. Sullivan, Wahoo

(2) **Subcommittee on Bank Operations**

E. L. Vogeltanz, Ord—Chairman
Miles Lee, Broken Bow
Charles H. Phares, Central City
Thomas F. Colfer, McCook
L. M. Clinton, Sidney
George W. Haessler, Wahoo
James P. Monen, Norfolk
Robert D. Baumfalk, Beatrice
Paul P. Chaney, Falls City
Alexander McKie, Jr., Omaha
Howard E. Tracy, Grand Island
Deryl F. Hamann, Omaha

- (3) **Subcommittee on Relationship Between Lawyers and Banks**
 - Fred R. Irons, Hastings—Chairman
 - Robert E. Vogler, Guide Rock
 - Virgil J. Haggart, Jr., Omaha
 - George P. Burke, Kimball
 - J. H. McNish, Sidney
 - Richard H. Williams, Lincoln
 - Bernard Sprague, Red Cloud
 - Edwin C. Perry, Lincoln
 - Barlow Nye, Kearney
 - Thomas E. Brogan, Norfolk
- (4) **Subcommittee on Non-Bank Lending Institutions**
 - Norris G. Leamer, So. Sioux City—Chairman
 - Donald B. Rood, Omaha
 - Thomas M. Davies, Lincoln
 - Daniel J. Monen, Jr., Omaha
 - E. A. Cook III, Lexington
 - Clement B. Pedersen, Omaha
- (5) **Subcommittee on Loan and Service Rates, Including Installment Sales**
 - George O. Kanouff, Omaha—Chairman
 - John E. Wenstrand, Omaha
 - Marvin G. Schmid, Omaha
 - Donald W. Pederson, North Platte
 - Ronald D. Svoboda, Weeping Water
 - Charles S. Reed, Omaha
- (b) **Committee on Commercial Law**
 - Robert C. Guenzel, Lincoln—Chairman
 - Wallace A. Richards, Lincoln—Secretary
 - (1) **Subcommittee on Legislation**
 - Robert C. Guenzel, Lincoln—Chairman
 - Joseph J. Barmettler, Omaha
 - Jack H. Hendrix, Trenton
 - Virgil J. Haggart, Jr., Omaha
 - Robert H. Berkshire, Omaha
 - Jerrold L. Strasheim, Omaha
 - John M. Gradwohl, Lincoln
 - (2) **Subcommittee on Education**
 - Virgil J. Haggart, Jr., Omaha—Chairman
 - David L. Crawford, Lincoln
 - Donald H. Bowman, Lincoln
 - Jack W. Marer, Omaha

James R. Hancock, Scottsbluff
Wallace A. Richardson, Lincoln
D. C. Pierson, Lincoln

II. Insurance Law

James W. Hewitt, Lincoln—Chairman
Herbert C. Henderson, Lincoln—Vice Chairman
William A. Wilson, Lincoln—Secretary

Executive Committee:

James W. Hewitt, Lincoln—Chairman
Herbert C. Henderson, Lincoln
Hans J. Holtorf, Gering
Wilber S. Aten, Holdrege
T. J. Fraizer, Lincoln
George E. Svoboda, Fremont
Jack W. Marer, Omaha

III. Corporation Law

Howard H. Moldenhauer, Omaha—Chairman

Executive Committee:

Howard H. Moldenhauer, Omaha—Chairman
Clarence E. Heaney, Jr., Omaha
A. Lee Bloomingdale, Jr., Omaha
Tyler B. Gaines, Omaha

IV. Municipal Corporation Law

Ralph D. Nelson, Lincoln—Chairman

CHAIRMAN EISENSTATT: We next call on Claude Berreckman to give a report on the Young Lawyers Section.

REPORT OF YOUNG LAWYERS SECTION

Claude E. Berreckman

Mr. Chairman and Members of the House: The Nebraska Young Lawyers Section won the Award of Achievement at the ABA annual convention in Honolulu on August 4, 1967, for its continuing legal education clinics conducted for Nebraska lawyers during the past year. This Award of Achievement competition is sponsored and conducted annually by the Young Lawyers Section of the American Bar Association. Our entry was one of thirty-eight among Bar Associations in states having a population of less than three million.

We emphasized our Insurance Institute which was very capably organized by Tom Tye of Kearney. This Institute was held in Lincoln last September 16 and 17. We also submitted in our entry our "Bridge the Gap" Clinic which is held in June of every other year.

We were called upon at the House of Delegates' meeting of the Young Lawyers Section to explain the mechanics and the substantive content of our Insurance Institute on the 4th of August, and Dick Huebner of Grand Island, one of our delegates, did an excellent job in this presentation.

Although I had the honor of accepting this award, I should point out that it was earned by Howard Moldenhauer, my predecessor, Tom Tye, John Gourlay, Dick Huebner, Bill Campbell, Glen Burbridge, and Al Kortum, members of the Executive Council of the Young Lawyers Section.

This award is especially a fine tribute to the perennial organizers, these are the masters, George Turner and John Gradwohl of the Nebraska College of Law who give us a great deal of assistance in our clinics.

In addition to the Insurance Institute, which was reported to you last year by Howard Moldenhauer, the Young Lawyers Section co-sponsored the Regional Moot Court Competition for Regions 10 and 12, held in Lincoln last November 18 and 19. I would like to recognize Glen Burbridge and Bill Campbell of Omaha and John Gourlay of Lincoln for their fine efforts in assisting the Nebraska and Creighton Law Schools in hosting the Regional Moot Court Competition.

Our Bridge the Gap Institute was presented to some fifty-five recently graduated law students at the Kellogg Center in Lincoln on June 21 and 22 of this year. I would especially like to recognize the thirteen lawyers who gave generously of their time and skillful efforts in preparing excellent outlines and presenting their specialty to these new lawyers. They are Sam Van Pelt of Lincoln; Judge Rudolph Tesar of Omaha; Tom Burke of Omaha; Robert "Jobbie" Johnson of Omaha; Ed Langley of Lincoln; Howell Bauer of Lincoln; Claude Berreckman of Cozad; Howard Tracey of Grand Island; Bob Barnett of Lincoln; Tom Carey of Omaha; Norm Krivosha of Lincoln; Ed Carter, Jr. of Lincoln; and Harold Rock of Omaha. The entire Bridge the Gap Institute was organized and conducted by John Gourlay of Lincoln who has been a real workhorse in the Young Lawyers Section.

Finally, we presented our Legislative Clinic at the Cornhusker Hotel in Lincoln on September 29 and 30 of this year. We were pleased to have 165 lawyers register from 55 different Nebraska cities. We have had many favorable comments from Nebraska lawyers on this Legislative Clinic, and Dick Huebner from Grand Island was the General Chairman. Dick and John Gradwohl did an excellent job in lining up speakers and presenting our Legislative Clinic.

At the annual meeting of our Section Don Treadway of Fullerton and Jeff Cheuvront of Lincoln were elected to succeed Al Kortum and myself as members of the Executive Council.

The following have been elected officers of the Young Lawyers Section for the coming year: Chairman, Bill Campbell of Omaha; Vice-Chairman, Dick Huebner of Grand Island; Secretary-Treasurer, Don Treadway of Fullerton.

In conclusion, I wish to express the sincere appreciation of the Young Lawyers Section to George Turner for his never failing assistance during the past year, and we are indebted to the Executive Council of the NSBA for their active support of our programs.

I also wish to personally thank all of the many lawyers who participated in the Young Lawyers Section's activities during the past year.

CHAIRMAN EISENSTATT: Gentlemen, at this time I think it would be appropriate to move to those matters which are listed in our agenda for the afternoon session, but I might advise that many of the parties who are either chairmen or instrumental with respect to the matters to be discussed are now across the hall meeting with the Executive Council. I would like to take a short break. I would like to ask that you keep yourself available so that we can call the meeting back into session as soon as the President and the other members of the Executive Council come in. I feel that this discussion this afternoon might be one of the most important meetings that this House has, or will be called upon to consider for a long period of time. It is something which I think requires the presence of each and every member of the House of Delegates.

Unless there is some suggestion from the floor for other matters to fill in the time while we are waiting for the Executive Council—maybe I had better ask. Is there any suggestion from the floor about any matters that might be brought up for discussion while we are waiting? There being none and the Chair not having any to suggest, I will declare a fifteen-minute recess. I will seek out the members of the Executive Council and see if I can get them in here.

... Recess ...

Gentlemen, although there are a few absentees, I think that substantially most of the members have returned to the room, so with your permission I would like to recall the meeting to order to take up the matters which are covered in the agenda for the afternoon session.

First of all, with respect to Item No. 22, the Advisory Report of Committee on George Turner Deferred Compensation, we are not in a position to render a report at this time because the Executive Council did not take any final action. However, I think it would be in order to state that a committee of the Executive Council has been in session, has been meeting, and has arrived at some tentative conclusions which have to be approved providing benefits for our Secretary, Mr. Turner, in event of his retirement or termination of employment either at an agreed upon retirement age or in the event of any disability. We thought it would be in order that this House know that such a provision has been considered, that a lot of attention has been given to it and that there will be some action taken probably at the November meeting of the Executive Council.

We next move to Items 23 and 24 of the agenda, and with your permission I am going to have the report of the Committee on Executive Director presented and the interim report of the Committee on Reorganization, and then I think we will discuss these matters together at the conclusion of those presentations. However, I think that we will have separate motions follow or flow from the reports of the committees and the discussion.

So with your permission I now ask Mr. Joseph C. Tye, Chairman of the Committee on Executive Director, to present his report.

REPORT OF THE SPECIAL COMMITTEE ON EXECUTIVE DIRECTOR

This special committee appointed by President Murl M. Maupin for the purpose of studying the desirability of creating the office of Executive Director of the Nebraska State Bar Association commenced work April 1, 1967. Various facets of the study of such an official were assigned to members of the committee and were promptly reported to subsequent meetings of the committee. Following several meetings an interim report was made to the House of Delegates at the mid-year meeting June 9, 1967.

Further study has been conducted and the various members of the committee have endeavored to discuss this subject with as many members of the association as possible.

Your committee makes the following report and recommendation.

1. That an official to be designated as, the administrative assistant to the executive council of the Nebraska State Bar Association be employed.

- a. Such official to be employed by and to work under the direction of and be responsible to the executive council of the Nebraska State Bar Association. He would cooperate with the Secretary-Treasurer of the association whose duties and responsibilities would remain the same as at present.
 - b. Such official to be an active member of the Nebraska State Bar Association if possible.
2. The administrative assistant to assume the duties, responsibilities and functions of,
 - a. The Public Relations program of the Nebraska State Bar Association,
 - b. Special counsel for the Nebraska State Bar Association,
 - c. The continuing legal education program of the Nebraska State Bar Association.
3. In order to implement this office, your committee believes it will be necessary to acquire additional office space. The space now available for the Nebraska State Bar Association activities provided in the State House is not adequate for an expanded program. It may be possible, with the assistance of the Supreme Court, to obtain additional space in the State House, at least for a temporary period. If this is not possible, it will then be necessary to obtain suitable quarters for the administrative assistant elsewhere. The availability of such space has been investigated by this committee and it is believed that space is available, in Lincoln, for a reasonable price. Lincoln is designated since it is the unanimous opinion of the committee that headquarters for the Nebraska State Bar Association either temporary or permanent must be in Lincoln, Nebraska.

The Committee has given consideration to future permanent quarters for the Nebraska State Bar Association. Such quarters may not be necessary for a few years but it appears to us that we should be looking forward to a permanent home for the Nebraska State Bar Association. At present, there seemed to be two or three possibilities for consideration.

....

- a. A separate and complete building to be constructed and owned by the Nebraska State Bar Association. Such a building might be implemented by and through the Nebraska State Bar Foundation.
- b. Permanent quarters in one of the new office buildings to be constructed in the near future.

- c. It appears that the law school at the University of Nebraska may have a new building in which event permanent space for the Nebraska State Bar Association might be provided by cooperation with the University, both as to acquisition and maintenance. Such a possibility is most appealing to the committee at this time.

The question of financing an administrative assistant to include necessary office force and the expense incident to the duties and responsibilities of such an office particularly an expanded continuing legal education has been considered at all times by this committee. We are hopeful that such an office and program could be implemented with the present income of the Nebraska State Bar Association. We believe reasonable registration fees should be charged for all institutes in order to provide for the publication of materials which would be available to each member of the association. By using the funds now spent for public relations, special counsel or lobbyist and the present continuing legal education program with perhaps some savings from other expenditures, we feel that the program could be implemented without an increase in dues for the present. A small increase in dues might become necessary depending upon the activity of the association.

This being a special committee appointed to study the desirability of creating the office of Executive Director of the Nebraska State Bar Association and make report to you, I move that this report be received, placed on file, given such consideration as you may determine making report of any action to the Executive Council of the Nebraska State Bar Association and that this committee be discharged.

Ralph E. Svoboda
Wilber S. Aten
Leo Eisenstatt
Dale E. Fahrnbruch
Charles E. Wright
Claude E. Berreckman
William G. Campbell
Tyler B. Gaines
Murl M. Maupin—Ex-officio
member
George B. Boland—Ex-officio
member
Joseph C. Tye—Chairman

CHAIRMAN EISENSTATT: Before asking the Committee on the Reorganization of the Bar to report, I would like to suggest that the Executive Council at its last meeting did approve a part of

this program. Before calling for discussion from the floor, I would like now to call on Herman Ginsburg, the Chairman of the Committee on Reorganization of the Bar to present his report at this time.

REPORT OF THE COMMITTEE ON REORGANIZATION OF NEBRASKA STATE BAR ASSOCIATION

Herman Ginsburg

The Executive Council of the Nebraska State Bar Association has heretofore appointed a Committee on Reorganization of the Nebraska State Bar Association, consisting of the undersigned.

This Committee has met on several occasions and has submitted its report in writing to the Executive Council, as follows:

"1. The Committee has held several meetings and given elaborate consideration to the report of the Special Committee on the Employment of an Administrative Assistant for this Association; and this Committee approves of so much of the report of said Special Committee as recommends the employment of an Administrative Assistant, and the establishment of his duties, responsibilities and functions as set forth in said report; and this Committee recommends that the Executive Council proceed promptly with the implementation of said report.

2. Insofar as the report of said Special Committee refers to the acquisition of headquarters space for this Association, this Committee recommends that temporary headquarters on an interim basis be procured as soon as possible, but that the determination and acquisition of permanent headquarters space for this Association be held in abeyance until after this Committee is in a position to make a report thereon.

3. This Committee is of the opinion that need exists for the amendment of the Rules and By-Laws of this Association so as to recognize the scope and functions of this Association, in the following areas:

- (a) Fiscal Management
- (b) Functions, scope and constitution of committees
- (c) Functions, scope and constitution of sections, including the consideration of greater autonomy, for the sections and their right to establish section dues
- (d) Functions and jurisdiction of the House of Delegates
- (e) Functions and jurisdiction of the Executive Council

- (f) Election of delegates to the House of Delegates
- (g) Election of Officers
- (h) A general overall review of the organization and functioning of the Association in the field of membership services

4. This Committee further recommends that in the event of the approval of this report by the Executive Council, the matters herein set forth be referred to the House of Delegates at the coming meeting in October of 1967, for approval by the House of Delegates and its direction for the implementation thereof, including the solicitation of the views of members generally in relation to the subjects herein discussed.

5. This Committee further recommends that, upon approval by the Executive Council and the House of Delegates, as above set forth, the Committee be continued with authority to proceed to prepare suggested amendments to the Rules and By-Laws of this Association for consideration by the Association and submission to the Supreme Court upon ratification thereof by the House of Delegates."

The report of this Committee was considered at a meeting of the Executive Council, held on September 10, 1967, at which meeting the report was approved; and this Committee instructed to submit said report to the House of Delegates for action; and with the recommendation that, in the event the report be adopted by the House of Delegates, the President of this Association be authorized to appoint a Committee on Reorganization of the Nebraska State Bar Association to carry out and implement this report.

Herman Ginsburg, Chairman
J. C. Tye
Frank J. Mattoon
William E. Morrow
Robert C. Bosley
Leo Eisenstatt
John C. Gourlay
C. Russell Mattson
Charles E. Wright
Murl M. Maupin

CHAIRMAN EISENSTATT: The motion that is presently pending before the House is as set forth in the copy of the resolution which is at each place, which calls for an amendment to the rules of the Association by adding a new Section 6 to cover the Administrative Assistant.

I would assume under the present status of the record that there is another motion pending which was made by the Chairman of the committee, Mr. Joe Tye, which was read by Mr. Svoboda.

...Resolution referred to by Chairman Eisenstatt but not read into the record:

RESOLVED that Article V of the Rules Creating, Controlling and Regulating the Nebraska State Bar Association be amended by adding a new Section 6 to read as follows:

6. Administrative Assistant. The Executive Council shall employ an official to be designated as Administrative Assistant to the Executive Council to assume the duties, responsibilities and functions of the Nebraska State Bar Association with respect to

- (a) The Public Relations program,
 - (b) Act as Special Counsel,
 - (c) The Continuing Legal Education program,
- and
- (d) Such other duties, responsibilities and functions as shall hereafter be given to him by the Executive Council.

Such official to be an active member of the Nebraska State Bar Association, if possible, and shall, in addition, cooperate with the Secretary-Treasurer in the administration of his duties and responsibilities.

BE IT FURTHER RESOLVED that the Executive Council make the proper and necessary application to the Supreme Court of Nebraska for the adoption of the foregoing amendment.

BE IT FURTHER RESOLVED that the Executive Council implement this resolution by employing such Administrative Assistant, providing him with the necessary office space, office equipment and secretarial and office help as needed to carry out his functions, duties and responsibilities.

BE IT FURTHER RESOLVED that the Executive Council take such further and additional steps as may be necessary or convenient to carry out the recommendations set forth in the report of the Special Committee on Executive Director as appears on Page 30 of the printed program....

MR. GINSBURG: Mr. Chairman, in order to bring the matter to a head, may I move that the resolution be amended so that the same read as follows:

"RESOLVED that the Executive Council be directed to employ an official to be designated . . ." and so forth, and that the second paragraph read: "BE IT FURTHER RESOLVED that the Executive Council, *if necessary*, make proper and necessary application to the Supreme Court of the State of Nebraska for the adoption of any required rule to carry out Paragraph One hereof . . ." and then the remainder to be the same.

JOSEPH C. TYE: I'll second that.

CHAIRMAN EISENSTATT: All right, we now have before the House an amendment to the motion. Do you wish to speak to the amendment?

JOHN J. WILSON, Lincoln: No. I would like to offer a substitute motion. Let's divide this question up so we know what we are talking about.

First you are talking about an Administrative Assistant. We haven't discussed space. Nobody knows about that. I would like to offer a substitute motion to all of them that we adopt No. 1 and 2 of the Special Committee's report. Then we can talk about the rest of it as we go along.

WARREN K. DALTON, Lincoln: I'll second that motion.

CHAIRMAN EISENSTATT: All right, we now have before the House a substitute motion for the amended motion and the original motion.

JOHN E. NORTH, Omaha: Now which "Special Committee" is he talking about?

CHAIRMAN EISENSTATT: He is talking about the Special Committee on Executive Director, were you not, Mr. Wilson?

MR. WILSON: Yes. It is on Page 30 of the printed reports.

CHAIRMAN EISENSTATT: We now call for discussion on the substitute motion presented by Mr. Wilson. Do we have any discussion on that?

CLARK G. NICHOLS, Scottsbluff: Yes. It seems to me if we just adopt the substitute motion then we've got an Administrative Assistant but we don't have any place to put him. The resolution with Mr. Ginsburg's amendment would take care of the whole thing.

CHAIRMAN EISENSTATT: Then it would be your recommendation that this substitute motion be overruled and that we then proceed with the amended motion.

BERNARD A. PTAK, Norfolk: I would like to know, If the Executive Council has power to employ an Administrative Assistant, why are we considering that at this time?

CHAIRMAN EISENSTATT: I think I can answer that by saying that under the present rules the House of Delegates has the power to recommend and initiate programs for the Bar Association.

MR. PTAK: This has already been approved by the Executive Council?

CHAIRMAN EISENSTATT: They are asking for the House's approval.

HARRY B. OTIS, Omaha: Speaking against the proposed substitute motion, it seems to me that what we are trying to do is get this whole situation into posture where the Executive Council has the power. It is not mandatory upon them to hire this Executive Director, and if you adopt No. 1 and No. 2 they *must* do it, as I read it. Maybe I am wrong: "That an official to be designated as the Administrative Assistant to the Executive Council of the Nebraska State Bar Association be employed..." I don't think that the substitute motion is what we really want here. I thought we were going to try to get away from the mandatory aspect of amending the Articles and get into a situation where the Executive Council *may* move after Mr. Ginsburg's committee has reached proper conclusions.

CHAIRMAN EISENSTATT: I think you are in error. The Ginsburg amendment would require the Executive Council to employ an Administrative Assistant and would also cover the additional point of space, clerical help, et cetera.

RICHARD D. WILSON, Lincoln: I think the Wilsons ought to stick together, so I would like to put in a plug for the substitute offered by Jack Wilson.

First of all as to space, it doesn't seem to me like either one should decide the space. You look at the printed one and it doesn't decide where you put the space. I agree it is a separate subject and I certainly don't know enough about it to vote on it one way or another at this point.

It seems to me as though the wording of No. 1 and No. 2 of the Special Committee's report is an adequate approach, since the Executive Council already can employ anybody they want to. We are saying that we ask them to employ an Administrative Assistant. It seems to me like that approach is better than trying to amend the rules. Actually, I don't know how many of us have studied the rules. I haven't studied the rules. If the Executive

Council has authority to do this, to me I would like to see us recommend to them that they do it, ask them to do it, and that is what I understand Jack Wilson's motion will do.

HARRY B. COHEN, Omaha: Mr. Chairman, I've read the Committee's report and I've heard Mr. Tye here. If I recollect some of the background of this, Mr. Tye in the Committee's report absolutely recommends the employment of an Administrative Assistant to the Executive Council. That is their recommendation. They also concluded that the Executive Council has the right to employ such a person.

Now, the Executive Council of necessity, if it employs such a person, will have to find means of implementing such employment, such as space, salary, sources of funds, things of that nature. The recommendation of the committee is a positive one. They are recommending that we actually employ such a new person. I think what we ought to do is adopt the committee's recommendations if we *want* to adopt them. If we don't want to adopt them, that is something else. But if we are going to follow the recommendations of the committee, we ought to adopt *their* recommendation. It is up to the Executive Council then to implement, and that is the nature of this committee report. I think the *resolution*, myself, is out of order because I think the report and recommendation of the committee should first be taken up. I think that is the orderly way to proceed.

CHAIRMAN EISENSTATT: Well, that is what we've got up right now on the agenda. Is there any other discussion before we take a vote on the substitute, or the Wilson motion?

MR. GINSBUURG: Mr. Chairman, I hope I will be forgiven for talking so much, but I still think that the substitute motion does not do the complete job. The substitute motion, since it refers only to Paragraph One and Two, would I think therefore be limited to Paragraphs One and Two. You will notice, and perhaps I am just quibbling but I am quibbling for a very important purpose because I think that this is important, Paragraph Two of the report just relates to the Public Relations program, Special Counsel, and Continuing Legal Education. You will notice that the resolution refers to "such other duties, responsibilities, and functions as shall hereafter be given to him by the Executive Council." I think that is very important and a very vital matter. Those of us who have been presenting this matter have not intended to limit the Administrative Assistant to any particular field but to make him truly an Administrative Assistant to the Executive Council so that he would perform all such duties, functions, and responsibilities as would be given to him by the Executive Council.

I see no problem, I am unable to comprehend why anyone has any questions about space. Nobody questions the fact that the Executive Council employed Katherine Shultz and the Executive Council is setting a salary for her and paying for her. If the Executive Council employs an Administrative Assistant it will be John Doe and they will get him an office some place and they will pay for the telephone and the office rent, and so forth. It always seems to me that the greater includes the lesser, and if you authorize the Executive Council—but in this case it is more than an authorization; you are requesting or directing the Executive Council to do something—certainly as the United States Supreme Court has said, and I believe our state Supreme Court would go along with it, you give somebody authority to do something and it includes all necessary acts that have to be performed in order to carry out the greater responsibility that you give them.

I have no pride of authorship. I am sure Mr. Tye doesn't either. But I do think that the original point that was brought out, that we attempt to make this motion an amendment to rules was an oversight and a mistake. It seems to me that the amended motion, simply discarding the matter of rules and using language directing the Executive Council to do so, takes care of the situation, if this House wants it done.

There is one other thought that struck my mind that I want to get out and then I swear I won't talk any more. Somebody brought up the point that if the Executive Council already has the power to do this why do we need to consider this? Here is the Point: The Executive Council has simply said, "You are the House of Delegates; you are the ones that are to set the program for the House. We are willing to do this if you want it. If you tell us to do it, we will do it. If you don't tell us to do it maybe it will be done and maybe it won't."

If you want to just abdicate your responsibilities and say "We don't care. We leave it up to the Executive Council," that of course is your responsibility and you have the right to do that. The Executive Council by this presentation here today is simply asking, "What do you want us to do?"

CHAIRMAN EISENSTATT: Are we ready for the question? The question before the House to be voted upon is on the substitute motion presented by Mr. Wilson, that Paragraphs One and Two of the Special Committee's report appearing on Page 30 be adopted. All those in favor signify by saying "aye"; all those opposed. The motion is lost.

The next item before the House is the adoption of the motion amended by Mr. Ginsburg and seconded that the original motion as presented read: "RESOLVED that the Executive Council shall employ an official..." et cetera, and that in the next paragraph below the first paragraph, "that the Executive Council, if necessary, make proper and necessary application..." and then the remainder of the motion as is. Are you ready for the question?

JOHN E. NORTH, Omaha: There is a point of order here. That second part will not comply with the rules. I think that the amended motion was to drop out the application to the Supreme Court, to have everything in there just as you have it except the application to the Supreme Court.

CHAIRMAN EISENSTATT: No, the status of the record is that that paragraph read "That the Executive Council, *if necessary*, make the proper and necessary application..."

MR. NORTH: The BE IT FURTHER RESOLVED paragraph?

CHAIRMAN EISENSTATT: Yes.

MR. NORTH: Well, the point is that the Executive Council can't make application unless the requirements are met and it is submitted in writing to the House of Delegates.

MR. GINSBURG: Mr. Chairman, absolve me from my oath that I wouldn't speak any more.

CHAIRMAN EISENSTATT: You're absolved.

MR. GINSBURG: I am perfectly willing to take out this paragraph, but what I thought was, should it develop that an amendment to the rules is necessary, this resolution itself if carried by a two-thirds vote would be sufficient authorization to the Executive Council to apply to the Supreme Court for an amendment.

MR. NORTH: If you will read this, we must vote to amend the Articles to the Rules Creating, Controlling and Regulating the Association, and we have not done that. If we do do that, it has to be submitted to the Supreme Court; if we don't do that, it cannot be submitted to the Supreme Court. That is what the problem is.

MR. GINSBURG: Well, if there is any question about it, I am willing, with the approval of my second, to take out of my amendment this second paragraph altogether. I left it in there because I thought it might serve some useful purpose. If it doesn't, it wouldn't hurt anything.

JOHN C. MASON, Lincoln: Point of order, Mr. Chairman. There have been references made to the second paragraph, this

paragraph, that paragraph. Frankly, I don't know exactly what the proposed motion is as it relates to what I see in front of me on this typewritten page. Would you please clarify.

CHAIRMAN EISENSTATT: All right, the present motion would eliminate the top three lines of the printed resolution plus the figure 6 and "Administrative Assistant." The word "Resolved" would be inserted so as to read: "Resolved that the Executive Council shall employ an official to be designated as Administrative Assistant to the Executive Council to assume the duties, responsibilities, and functions of the Nebraska State Bar Association with respect to (a), (b), (c), and (d).

"Such official to be an active member of the Nebraska State Bar Association, if possible, and shall, in addition, cooperate with the Secretary-Treasurer in the administration of his duties and responsibilities.

"BE IT FURTHER RESOLVED that the Executive Council, if necessary, make the proper and necessary application to the Supreme Court of Nebraska for the adoption of the foregoing amendment..." The remainder...

MR. NORTH: The difficulty, Leo, is that it is not an amendment. You have taken out the language that is amendatory, so you have to delete that.

CHAIRMAN EISENSTATT: All right, then how do we resolve this?

MR. NORTH: Delete that paragraph.

MR. GINSBURG: Just eliminate the first "BE IT FURTHER RESOLVED."

CHAIRMAN EISENSTATT: By approval of the mover and the amender, the first "BE IT FURTHER RESOLVED" paragraph is eliminated, and as amended then the resolution will be as shown on the printed form.

Are there any questions? I now call for a vote on the question. All those in favor signify by saying "aye"; all opposed. The motion is unanimously adopted.

Now, Mr. Ginsburg, do you have a motion to present?

MR. GINSBURG: I want to repeat again that this motion which I am about to make presupposes that everyone has read the report of the committee, and therefore the motion which I now propose is as follows: I move that the report of the Special Committee on Reorganization of the Nebraska State Bar Association be

adopted, and that said committee be continued as a special committee of this House with instructions to prepare a draft of Rules and Bylaws for the recommended reorganization of this Association, and thereupon to submit the same to this House at the earliest possible date for consideration and, if approved, to submit the same to the Supreme Court of the State of Nebraska for its approval.

CHAIRMAN EISENSTATT: Do I hear a second?

JOHN J. SULLIVAN, Clay Center: I second the motion.

CHAIRMAN EISENSTATT: Is there any discussion or question? The question will now be put. All those in favor of the motion please signify by saying "aye"; all opposed. The motion is unanimously carried.

Thank you very much, gentlemen. I would like to suggest that a rather important milestone in the history of our Association has been met, considered, and adopted, and I hope that it will be an auspicious one. I would like to compliment the members of the committee for their work and labors, and I think a great debt of gratitude is owed to the members of Mr. Tye's committee, and similarly to Mr. Ginsburg's committee, although their work is just beginning.

THOMAS W. TYE, Kearney: I think the later report of the Special Committee on Executive Director was that that committee be continued to cooperate with Mr. Ginsburg's committee. Has there been any action taken on that?

CHAIRMAN EISENSTATT: To the contrary, it was recommended that it pass from the scene, be discharged—and with the heartfelt thanks of our House and the Association.

CHAIRMAN EISENSTATT: Thank you very much, and thanks to the members of the committee who came here today to be available, if necessary, for consideration of any of the matters presented.

This substantially completes our agenda for the day except for one possible matter. However, before going to that, is there any matter which any member of this House wishes to present to the House of Delegates at this time? Is there any unfinished business?

Gentlemen, there is one other matter that I would like to bring to your attention, and in view of the expeditious manner in which we have discharged our business I think that perhaps we may have time to consider it. This refers to Item 21 of the agenda, which is a discussion of the future role of the House of Delegates.

I realize that the deliberations and actions of Herman Ginsburg's committee will probably move into this area with a venge-

ance, nevertheless I would like to present to you some thoughts and ideas that I have that you might consider, and perhaps have suggestions that we can follow because the actions of Mr. Ginsburg's committee will probably take a year or maybe two years before a final report is presented, and will require a great deal of action.

First I would like to call your attention to the fact that under the rules creating this House of Delegates, this House has many important duties. This has been read before but I want to read it again: "To propose and initiate such policies for the Association as may be deemed advisable, and designate appropriate personnel to carry out and make effective such policies." I think that what we've done today does fulfill that to some extent.

It is my feeling and belief that the members of this House, if they are going to be effective, are going to have to take a more active role in knowing what is going on and participating in the development of programs for the benefit of our Association, and the administration of justice, and our duties and responsibilities to the public.

It is my opinion that the legal profession is in a great state of ferment at this time. There are things that we are letting pass by without consideration—the application of law in social action, making available legal services to the poor, the areas of economics, Continuing Legal Education, et cetera.

There was a case in the United States Supreme Court, *Lathrop v. Donohue*, which could have very important effects upon the activities of our Association.

I would like to have an expression of opinion from you as to what you feel this House should be doing, pending a more extensive revision of our rules and regulations, as to carrying out its duties and responsibilities.

I make these following suggestions: For example, with respect to the revision of the Canons of Ethics when the American Bar does present them, would it be your feeling that this House consider those, deliberate, and give instructions to our delegates to the American Bar House of Delegates as to what our feeling is?

There is a great deal of discussion going on in the American Bar about specialization. Would it be your feeling that this House consider those matters so that we can instruct our delegates to the American Bar Association on it and perhaps implement it on a local basis?

How and in what manner can this House be a soundingboard for what our constituency, the members of our Association, require?

What areas of reform in, say, our rules of civil procedure and in the passage of appropriate legislation, what can be done to make more effective, modernize, update, and bring about a better administration of justice?

I am just kind of hitting the high points. What, for example, should our Association be doing with respect to adoption of a Model Probate Code that the American Law Institute has presented which our committee in cooperation with the ALI has asked that we consider?

What should we do with respect to the employment of law students in the practice of law which has now been made effective by LB 429, which will probably be ready for presentation to the Supreme Court prior to our mid-year meeting?

What should we do at our mid-year meeting, for example, by way of program and activity? Should we have that meeting? And what in addition should we be doing?

There have been comments and suggestions that the minimum fee schedules that have been adopted are not being followed or upheld as they should be by the courts and by fellow lawyers.

These are some of the matters which I think are before us, and I think if this House is to discharge its duties and make our Association a vital and vibrant force, we ought to be thinking about them.

I would appreciate anything that *you* might tell me or might present at this time in those areas or any others. Does anybody have any comments or suggestions? Do you think that we should, for example, have some kind of an Executive Council of the House of Delegates to aid the Chairman in formulating policies, consisting of members throughout the state that might take the initiative of finding out what our members think and what we should be doing to carry these important matters for presentation to our various local and regional Bar Associations within the state in order to get them generated to action in these areas?

Well, let me just ask you generally, Is it your feeling that the House of Delegates should take a more active role?

... General assent ...

All right, then will you let me make suggestions, and they will be suggestions only, to you for consideration at future meetings?

...General assent...

All right, does anybody have any thoughts about or objections to having more than two meetings a year, our annual and mid-year meetings of the House, if there can be a meaningful program adopted?

Well, I can present that to you if we can work up something. I am then going to ask in the near future for the help and cooperation of the members. If any of you have any desire to volunteer on a program for revitalizing or expanding the activities of the House, I would be happy to meet with you as soon as we have adjourned to get your name and I will be calling on you for help. Otherwise you will be selected for such purposes.

FRANCIS M. CASEY, Plattsburgh: Leo, it seems to me this one thing you suggested, an Executive Committee of this House, would be very appropriate. It's difficult to get all of this group together more than twice a year but your Executive Committee could do a lot of things in the interim.

CHAIRMAN EISENSTATT: All right, thank you.

There being no further business, I now declare the meeting adjourned, subject to recall at the end of the meeting. The rules require a meeting at the conclusion of the Bar Association meeting on Friday for whatever matters that need to be considered by the House at that time. Thank you very much. It has been a pleasure.

...The House adjourned at three forty-five o'clock...

REPORTS RECEIVED AT MID-YEAR MEETING

REPORT OF THE SPECIAL COMMITTEE ON APPELLATE PROCEDURE LEGISLATION

This was a special committee appointed by the President of the Association in January of 1967, for the purpose of investigating the necessity of, and preparing if deemed necessary, a proposed procedural statute which would expedite appeals to the Supreme Court of Nebraska or which would confer additional original jurisdiction upon the Supreme Court of Nebraska in cases involving constitutional questions arising from the adoption of new statutes. We were instructed to maintain appropriate liaison with the Nebraska State Legislature currently in session and with the membership of the Supreme Court in the process of our activities.

The committee completed its work in the month of April, 1967, with the following results:

1. It was determined that if the scope of the original jurisdiction of the Supreme Court should be enlarged as a matter of policy, it was necessary to proceed by amendment to the State Constitution rather than by statutory enactment, and that it would be inappropriate at this time to propose consideration of such Constitutional amendments, in view of the nature of the problems which the Legislature desired to overcome and prepare to meet.

2. It was determined that in the present state of the law, there was no impediment to an immediate original action in the Supreme Court on any matter within the scope of its original jurisdiction which might involve a determination of the constitutionality or unconstitutionality of an existing statute once it had been enacted by the Legislature even though the time had not arrived when such statute would go into effect, provided the matter as presented to the State Supreme Court involved a genuine case or controversy and not merely theoretical questions for determination.

3. It was suggested that if the Legislature desired to do so as a matter of policy, it could enact a statute which would provide funds and set forth the circumstances under which such an original action in the Supreme Court might be accompanied by an allowance of reasonable attorneys fees and costs in such amounts and for such parties as the Supreme Court might determine. The Legislature was concerned that important constitutional questions might not receive adequate presentation to the Supreme Court, and further that the financial burden of carrying forward such litigation

on the part of the individual litigants other than the State, State officers, or State agencies, would be a deterrent to adequate representation of all interests.

The foregoing conclusions reached by the committee were presented to representatives of the Legislature and the Judicial Council, and as a result a Legislative Bill (LB 878) has been introduced in the current session of the Legislature to implement the suggestion included in Item 3 above.

The assignment of this committee is completed, and as it is a special committee created for a specific purpose, there is no recommendation that it be continued in effect.

Vance E. Leininger, Chairman
James W. R. Brown
Richard L. Berkheimer
Edward F. Carter, Jr.

REPORT OF THE SPECIAL COMMITTEE ON EXECUTIVE DIRECTOR

On March 1, 1967 President Murl M. Maupin appointed this Special Committee to study the desirability of creating the office of Executive Director of the Nebraska State Bar Association.

We were given the background or reason for the appointment of the Committee. A proposed amendment to the rules creating, controlling and regulating the Nebraska State Bar Association was presented to the House of Delegates at the last annual meeting. Following debate on the proposed amendment, it was moved that the motion to adopt said amendment be laid on the table until the 1967 meeting of the House of Delegates. This motion carried.

It was then moved that the President be authorized to appoint a committee for the purpose of studying the question and report back as soon as the study was completed and in advance of the next year's meeting if possible.

The first meeting of this Committee was held April 1, 1967. Following a general discussion of the subject, individual members of the Committee agreed to gather information and material deemed necessary to enable the Committee to adequately study the proposed plan.

The Committee held its second meeting May 13, 1967 at which time material was available to each member of the Committee obtained from the American Bar Association and several State Bar Associations relating to the subject. The office of Executive Director

or administrative assistant is in effect in several states. In order to properly study the plan, it is necessary to examine the organization of the states having such an officer. There is a wide variance between the states, particularly those having a voluntary Bar Association and those having an integrated Bar Association. A good deal of material has been gathered relative to the budget necessary in order to implement and carry on such an office. There are nearly as many plans as there are associations using the plan.

The Committee was immediately confronted with the unique situation in Nebraska wherein the Clerk of the Supreme Court is ex-officio Secretary-Treasurer of the Nebraska State Bar Association. Our present Secretary has been the Secretary-Treasurer of the Nebraska State Bar Association ever since the integration of the Bar and for a number of years prior thereto. It becomes necessary therefore to make a study of the functions of the Clerk of the Supreme Court and of the office of Secretary-Treasurer of the Nebraska State Bar Association.

The Committee has undertaken to obtain information with reference to the duties, responsibilities and general function of an Executive Secretary. We are obtaining a good deal of material in this connection from the American Bar Association and we are advised that there is an organization of Executive Directors composed of persons now employed in such capacity in States where the plan is in operation. We are also obtaining information with reference to the type of person qualified for such a position and with reference to the training or education of persons who might be qualified and available.

The Committee is also studying the problem of separating the office of Clerk of the Supreme Court and the activities of an Executive Director should such office be created. This requires the gathering of information with reference to location and office accommodations. We are, in this connection, studying the possibility of temporary quarters and the possibility of constructing a Bar Association building either as a separate building or in connection with some other organization. These questions are presenting financial problems concerning which the Committee needs more information before being able to make a definite report to you.

Your president has just recently appointed a Special Committee to study the reorganization of the complete structure of the Nebraska State Bar Association. It would appear at this time that this Committee might well cooperate with the Committee on Reorganization or correlate some of our information and study in order to avoid conflict and to bring about the best possible result for the members of our Association.

We feel that we have made rapid progress with the problems presented to us in the short time the committee has been in existence. We expect to have further meetings in the very near future and to be able to make a definite recommendation to you at the annual meeting.

Ralph E. Svoboda
Wilber S. Aten
Leo Eisenstatt
Dale E. Fahrnbruch
Charles E. Wright
Claude E. Berreckman
William G. Campbell
Tyler B. Gaines
Murl M. Maupin—Ex-officio
member
George B. Boland—Ex-officio
member
Joseph C. Tye—Chairman

REPORT OF THE COMMITTEE ON RULES OF THE ROAD AND TRAFFIC COURTS

The primary work of the Committee has been the study and review of LB 71, which is a redraft and revision of motor vehicle laws of the State of Nebraska, including the laws relating to the Rules of the Road. This bill, prepared after an exhaustive study of the subject by a team under the direction of Professor Wallace Rudolph of the University of Nebraska College of Law, was extremely comprehensive and included revisions of laws relating to title, registration and licensing, financial responsibility laws, and other statutes, as well as revisions of the Rules of the Road. Each member of the Committee was assigned the responsibility of studying and reporting on particular areas of the statute, and the Committee then held a lengthy meeting in which problem areas were discussed at great length. Detailed recommendations were made to the Legislative Committee and Executive Council. Some areas of the statute were found to be objectionable, but it was the thinking of the Committee that the provisions of law respecting the Rules of the Road themselves were on the whole a substantial improvement over existing law.

The Bar Association's Legislative Representative appeared at the Committee hearing, along with many others, and LB 71 was indefinitely postponed.

It is the hope of the Committee that a separate bill incorporating the needed changes in the Rules of the Road themselves will

be prepared and introduced at the next session of the Legislature and with that thought in mind **we would recommend the continuation of the Committee.**

Patrick W. Healey, Chairman
John O. Anderson
Theodore J. Fraizer
Marvin L. Holscher
A. J. Luebs
E. Merle McDermott
George H. Moyer
Wallace Rudolph
Albert G. Schatz
David A. Svoboda
Fred J. Swihart

REPORT OF THE SPECIAL COMMITTEE ON OIL AND GAS LAW

The Special Committee on Oil and Gas Law of the Nebraska State Bar Association submits the following report:

With the able assistance of Edward F. Carter, Jr., and Senator Roland A. Luedtke, the five Legislative Bills recommended to the House of Delegates at the last annual meeting of the Association were introduced in the Legislature, passed, and were signed by the Governor. These acts were as follows:

LB 153. An act to amend sections 57-210, 57-211, 57-212, 57-401, and 57-402, Reissue Revised Statutes of Nebraska, 1943, relating to minerals, oil and gas; to provide that conservators as well as administrators, executors, trustees, and guardians may execute oil and gas leases and easements.

LB 154. An act to amend section 57-913, Revised Statutes Supplement, 1965, relating to oil and gas conservation; to reduce the time for appeals from the Oil and Gas Conservation Commission; to restrict appeals from the commission to the district court of the county or counties in which the affected real estate is situated.

LB 155. An act to amend section 57-911, Revised Statutes Supplement, 1965, relating to oil and gas conservation; to change the manner of service notice of hearings before the Oil and Gas Conservation Commission as prescribed.

LB 156. An act to amend section 57-910.04, Revised Statutes Supplement, 1965, relating to oil and gas conservation; to eliminate the consent of the owners of a tract for amendment of an order affecting unit or cooperative development.

LB 158. An act relating to minerals; to provide for the termination and extinguishment of severed mineral interests; to provide procedures; and to provide exceptions.

With the passage of this legislation it is the feeling of the Committee that the Statutes of Nebraska relative to Oil and Gas Law are in excellent condition and that there are no amendments that should be considered at this time.

While the activities of the Committee will be very limited in the future we do feel that the Committee should be continued to consider any advisable changes in the Statutes; and we therefore recommend that the Committee be continued for another year.

Paul L. Martin, Chairman
Robert J. Bulger
Kenneth Fritzler
Fred T. Hanson
P. J. Heaton, Sr.
Hans J. Holtorf
Jack R. Knicely
Bernard L. Packett
Ivan Van Steenberg
Floyd E. Wright

COMMITTEE ON AVAILABILITY OF LEGAL SERVICE

The Committee has undertaken the implementation of the approval at the October, 1966, meeting by the House of Delegates of a state-wide plan for providing free legal service for those who cannot afford to pay for it. Four procedures have been instituted:

1. The submission to the Advisory Committee of the Nebraska State Bar Association Questions of Ethics

The questions submitted are:

- a. May a nonprofit corporation, established under the auspices of the Nebraska State Bar Association and financed by the Office of Economic Opportunity and the Nebraska State Bar Association employ lawyers to provide free legal service to the poor without violating any prohibition or restriction on a corporation's practice of law?
- b. May such lawyers seek out the poor who are in need of advice and education respecting their legal rights and responsibilities and provide such advice and education without charge to the poor without violating any ethical prohibition or restriction on solicitation or advertisement?

By its opinion of March 30, 1967, the Advisory Committee answered both questions in the affirmative.

The same questions were submitted to the Committee on Professional Ethics of the American Bar Association on March 10, 1967. Although no direct answer has been provided by that committee, we have received from the committee sufficient information to indicate that the committee's answers to both questions are in the affirmative.

2. Personal Appearances Before the Local Bar Associations

We think an extensive personal appearance series is essential to winning the support of the local bar associations for a state-wide program. These presentations have been and will continue to be used also to urge the formation of local programs. If a community establishes a local program, the state plan will provide no more than supplementary services to that local community, and the primary control of the operation will be in local hands. John Gourlay of our committee has corresponded with all local bar associations, requesting an opportunity for one or more members of our committee to make a presentation. Responses which have resulted in or will result in meetings are as follows:

- a. Hall County Bar Association—Howard Tracy of our committee has been working on a local plan for providing legal services and a specific application for O.E.O. funds has been submitted but no agreement has been reached for the providing of funds. The plan has been tabled temporarily, at least.
- b. Custer, Sherman, Howard, Greeley, and Valley Counties—On April 20, 1967, the chairman of our committee and Philip J. Murphy, Field Director, National Legal Aid & Defender Association, met with representatives of the Bar Associations of these counties. A specific proposal for a local plan funded by O.E.O. money has been prepared by the director of the Central Nebraska Community Action Program, Inc. Some interest appeared, but the need for such a program in that area was questioned. By letter dated May 10, 1967, William C. Schaper, president of the Custer County Bar Association, informed us that his association had concluded that no need presently exists in that county for a legal services program but would cooperate with the Nebraska State and American Bar Associations in implementing a legal services program for Custer County if and when the need arises. We have no further information from the other counties.

- c. Saunders County Bar Association—On April 10, 1967, the chairman of our committee met with members of the bar in Wahoo, at the conclusion of which the members of the bar expressed willingness to enter into a legal services program, provided an adjoining area, sufficiently populous to warrant an autonomous local program when joined with Saunders County, would cooperate with Saunders County in the plan. Efforts to obtain the joining of Dodge County and Washington County with Saunders County have been made, as hereafter shown, and approaches to Platte County, Colfax County, and Butler County will be made shortly.
- d. Dodge and Washington Counties—On April 29, 1967, the chairman of our committee and John Gourlay, a member of our committee, met in Fremont with members of the Bar Associations of these counties. The reception accorded the members of the committee was cordial, but the enthusiasm for a legal services program was nil. Although the door was not firmly closed for future cooperation with a state-wide plan, it is expected that no initiative will be taken in establishing a local plan because of opposition to the idea of all federally financed plans and a conviction that no need exists in those counties for a legal services program.
- e. Fourteenth Judicial Bar Association—The chairman of our committee on May 17, 1967, met with a special committee of this association in Arapahoe and a specific plan for a local community program has been suggested by Leon Hines to be made through the Mid-Nebraska Community Action Program. At the close of the meeting the committee decided to make a careful survey through the welfare agencies of the several counties involved to determine the extent of the need for a legal services program. The survey now is being conducted.
- f. Jefferson County—A meeting now is scheduled for June 17, 1967, in Fairbury of members of the Jefferson County Bar Association and perhaps of other associations of adjoining counties and will be attended by at least one member of our committee, Don Biehn.
- g. Western Bar Association—On June 17, a meeting of that association will be held in Alliance. The chairman of our committee will attend to discuss the advisability of a legal services program.

- h. Adams County—Howard Tracy, a member of our committee, will meet with members of that association on a date not yet determined.
- i. Niobrara Area Service Center, Inc.—A letter on June 8, 1967, was received from this organization, stating that it wishes to participate in a legal services program, stating that there is a definite need in that area and that many of the low income people there are Indian. Our committee immediately will make specific plans for seeking the establishment, if feasible, for a local program in that area.

Previous to the approval by the House of Delegates of a state-wide plan last October, the chairman of our committee appeared at bar association meetings in Sidney and Scottsbluff. Responses from other bar associations also have been received, but no specific meetings with them have yet been scheduled.

We recognize that our undertaking to meet personally with the many local bar associations is a substantial one and probably will take quite a few months to complete, but we feel that it is absolutely essential.

Our committee was granted an allocation of \$500.00 by the Executive Council on April 23, 1967, to defray our committee's expenses in making these appearances.

3. The Establishment of a Nonprofit Corporation

Allen Overcash now is preparing the corporation papers for the establishment of a corporation to administer the future state-wide program.

4. Making of Application to Office of Economic Opportunity

Louis Finkelstein, a member of our committee, is the chairman of the subcommittee to make the application. It is expected, however, that substantial completion of the personal meetings with the local bar associations must precede the making of a formal application to the Office of Economic Opportunity, because until such meetings are completed, or nearly completed, we will have no clear idea of the specific areas of Nebraska which should be covered by the state-wide plan. Designation of specific areas to be covered is a requirement in any application to the O.E.O. Accordingly, several months undoubtedly will pass before a formal application is submitted.

Warren K. Urbom, Chairman
Donald L. Biehn
William D. Blue
Robert R. Camp
Robert B. Crosby
Alfred G. Ellick
Louis B. Finkelstein
Donald E. Girard
John C. Gourlay
Howard E. Tracy
Allen L. Overcash
Donald W. Pederson
Raymond J. Walowski

REPORT OF THE SPECIAL COMMITTEE ON LAWYER REFERRAL

Because I will be unable to be present at the mid-year meeting of the House of Delegates on June 9, I hope you will accept this letter as an informal report of the activities of the above committee. Our committee is continuing to cooperate with the Legal Aid Society of Omaha in connection with the operation of the Lawyer Referral Service operated by the Omaha Bar Association from the Legal Aid Office at 1805 Harney Street. There has been a steady increase in the number of referrals in Omaha, and we attribute a part of this increase to the greatly increased number of legal aid clients due to the grant from the Office of Economic Opportunity. Enclosed is a copy of the Lawyer Referral Bulletin for the month of April, 1967, of the American Bar Association standing committee on lawyer referral which contains an article by the undersigned on the effect of O.E.O. legal programs on referrals. Our committee sent a representative to the meeting of the 14th Judicial District Bar Association on March 1, 1967, for the purpose of speaking on the subject of legal aid and lawyer referral. Likewise, we have offered all possible help to the Lincoln Bar Association in connection with the establishment of a lawyer referral service to be operated in conjunction with its new legal aid office.

Alfred G. Ellick, Chairman

REPORT OF THE SPECIAL COMMITTEE RELATING TO CONSTITUTIONAL AMENDMENT NO. 7

Constitutional Amendment No. 7, which related to removal of judges, was initiated by the Judicial Council. It was adopted by the Legislature in 1965 without any organized promotion by the Bar Association. Under its terms, the proposition was to be submitted to the voters at the general election in November of 1966.

In July of 1966 the Executive Council of the State Bar Association became concerned because of the lack of understanding and interest in this amendment.

On July 14, 1966, the Special Committee for Promotion of Constitutional Amendment No. 7 was appointed by Herman Ginsburg, the then president of the Nebraska State Bar Association. The members of this committee were selected primarily because of their interest and work in connection with promotion of the merit plan of judicial selection.

The committee consisted of twelve individuals—three from Omaha, three from Lincoln and six from out-state.

The first meeting of the committee was held August 1, 1966, at Lincoln. At that time it was determined that employment of an advertising agency was essential and it was generally considered that because of its background with reference to the merit plan, Ayres & Associates, Inc. would be best qualified. Joyce Ayres was available at the time and joined the meeting. He estimated the fee in connection with handling the publicity would be \$2,500, which would include some printing costs. Ayres anticipated that he could get substantial publicity from news media without charge in most instances in view of the nature of the amendment. If the amendment became controversial he anticipated additional funds would be required for spot announcements and things of that type. It was agreed that he should proceed on the basis of a \$2,500 fee.

On this same date a subcommittee composed of the Omaha members of this committee was appointed to handle the Omaha campaign. Jim Haggart was appointed as chairman of that committee and was charged primarily with the responsibility of working through the Omaha Bar Association and promoting the amendment in the Omaha area.

Another subcommittee was appointed for Lincoln. This committee was headed by Jim Bruckner and was charged with the responsibility of working through the Lincoln Bar Association and promoting the amendment in the Lincoln area.

The balance of the state was assigned to other members of the committee who were authorized to appoint county chairman and were charged with the responsibility of promoting the amendment in their particular areas working through the local bar associations and the county chairmen.

It was considered advisable to engage the support of the District Judges Association, the County Judges Association, the Municipal Judges, Workmen's Compensation Court Judges, and the Supreme Court Judges.

Jim Bruckner agreed to contact the AFL-CIO group and enlist the support of that group. This was subsequently obtained. The Omaha group agreed to contact Dave Weinberg to enlist labor support through his efforts.

Other groups to be contacted were the League of Women Voters, Chambers of Commerce, PTA groups, Law Day Bar groups, League of Municipalities, Nebraska Bankers Association, Nebraska Livestock Association and various service organizations.

At the first meeting it was determined that one of the prime necessities was a pamphlet describing the amendment in brief and understandable language. Later a form of pamphlet was prepared, submitted to all committee members, revised and subsequently printed, and 50,000 copies were distributed.

It was also determined at this meeting that it was essential to educate the lawyers. Subsequently, a letter was mailed to all lawyers. This called attention to the amendment, described it in brief terms and urged support.

It was determined that the State Bar Journal which would be mailed to the lawyers sometime in October should contain an article relating to the amendment. This was prepared and published.

Finally, it was determined that the State Bar Meeting which was scheduled to be held in Omaha on October 13th and 14th provided a vehicle to get the message across to the lawyers, not only by way of education but also by way of enlisting active support.

Immediately after the August 1st meeting the Omaha subcommittee obtained the whole-hearted support of the Omaha Bar Association. Later the Lincoln Bar Association appointed a committee to promote the amendment. The out-state members of the committee also designated the various county and district chairmen and obtained support of various local bar associations.

The District Judges Association was contacted and arrangements were made for a representative of the committee to appear before the District Judges Association meeting during the State Bar meeting. Similar arrangements were made for an individual to appear before the County Judges Association at the State Bar meeting. The Municipal Judges, both in Lincoln and Omaha, were contacted but little developed from this contact. The Workmen's Compensation Court Judges were contacted and expressed willingness to cooperate in the program.

Arrangements were made with George Turner for a fifteen to thirty minute program to be presented on the first morning of the State Bar meeting in Omaha.

Consideration was given to development of a campaign button but this project was ultimately abandoned as not being worth the money involved. Consideration was also given to the name to be adopted for our committee and for use in connection with press releases, etc. After some consideration, the name "Nebraska Committee for Qualified Judges" was adopted and used throughout the campaign.

The **Reader's Digest** for July, 1966, published an article relating to judicial qualifications and removal. Reprints of this article (10,000) were obtained through the American Judicature Society at a cost of \$18.00 per 1,000. Most of these were distributed.

The months of August and September were spent primarily in preparing the necessary materials and outlining the areas of operation with the idea that the major push would begin with the State Bar meeting which was held about the middle of October.

The second meeting of the committee was held at the State Bar meeting on October 13th. Jim Evinger, who had been assigned by Ayres & Associates to handle this campaign for that organization, attended that meeting. Question and answer pamphlets and **Readers' Digest** reprints were mailed to all members of the committee and the county subchairmen in advance of the State Bar meeting and they were advised that additional supplies could be obtained from Ayres & Associates or at the State Bar meeting.

At the State Bar meeting the amendment and the campaign for its approval were explained at the initial morning session. At the final session of the House of Delegates a resolution approving this amendment was passed and this provided basis for press releases.

Representatives of the committee appeared before the County Judges meeting and the District Judges meeting. Unanimous approval was obtained from both the County and the District Judges Associations and these provided the basis for press releases. Supplies of the question and answer pamphlet were forwarded to each County Judge and District Judge. Some District Judges requested additional pamphlets for distribution and these were supplied.

Several lawyers volunteered their services. One lawyer wrote indicating that he was mailing campaign letters to approximately 1,800 Sherman County residents and requested 1,800 question and answer pamphlets to be enclosed. These were provided.

Late in October the president of the American Bar Association appeared in Omaha. At the suggestion of the Omaha committee chairman, he was contacted in advance of his appearance, the amendment was explained to him and his endorsement was solicited. He was able to provide favorable publicity for the amendment.

Certain key employers were contacted and asked to distribute literature throughout their plants. This was generally handled through attorneys for these employers.

A list of all of the newspapers in the state was obtained and lawyers in the area were urged to publish ads endorsing the amendment. Good cooperation was received over the state in this area and these ads were generally published by local bar associations, and in some instances, by the lawyers themselves at their own expense.

It was determined that letters to the editor in the World Herald and Lincoln papers would be helpful and these were written. In one instance, a letter written as a letter to the editor was published by the paper as a news release. Editors of the papers were contacted and generally the amendment received favorable editorial comment.

Working through Ayres & Associates, arrangements were made with service clubs for distribution of pamphlets at meetings late in October and for a brief announcement by a lawyer, usually a member of the club.

Effort was made late in October to make certain that all areas of the state were covered and in instances where it appeared no action was being taken, other individuals were contacted to take action in getting press releases, publishing ads, advising the news media of the approval by the District Judges Association, by both candidates for Governor, by the State Bar Association, the League of Women Voters, and the AFL-CIO groups. Both candidates for Governor were contacted in advance and their approval obtained. Press releases were obtained announcing this approval. All chairmen were urged to contact Rotary, PTA, church groups, farm groups, employees of plants in the area, banks, barber shops and other areas where the educational material could receive consideration.

Press releases prepared by Ayres & Associates were mailed to the presidents of all local bar associations, requesting that they endorse the amendment and provide the press release to their local paper. These generally were published under the heading "Local Lawyer or Local Bar Association Urges Amendment No. 7 Backing" or something of that type. In some instances these releases reflected the approval of the District Judge or the County Judge or both.

Before the election, ads were run in the Omaha World Herald, the Lincoln newspapers, the Sun newspapers both in Omaha and Lincoln, and all daily newspapers in the state and a few weekly newspapers in key areas.

The amendment carried overwhelmingly, receiving about 80% of the vote and a greater vote than was received by other constitutional amendments. The total cost of the campaign to the State Bar Association was the bill submitted by Ayres & Associates, which totaled \$4,024.35 with the various printing costs and publication costs which were incurred. Additional cost in time and expense was absorbed by the lawyers participating in the campaign and the local bar associations.

The overwhelming vote was a source of considerable satisfaction to all of those who worked on the campaign.

All Committee Reports approved as submitted except Report of Committee on the Judiciary which was amended as shown at conclusion of report.

REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE AGENCIES

The Administrative Agencies Committee has met on several occasions, the primary purpose of which has been to review legislation pertaining to administrative agencies. The Committee prepared and sponsored LB 728, which contains a number of procedural corrections pertaining to notice and hearings before the Railway Commission. The Committee is pleased to report that this Bill has been passed as proposed by this Committee.

The Committee has also been working with the Attorney General's office to assist in the preparation of rules of practice and procedure for all state administrative agencies which have not presently adopted the same.

Samuel Van Pelt, Chairman

REPORT OF THE COMMITTEE ON LEGAL EDUCATION AND CONTINUING LEGAL EDUCATION

The Committee on Legal Education and Continuing Legal Education this year has devoted most of its work to the Probate Manual to be distributed at the 1968 fall meeting of the Association. The Committee shares responsibility for the preparation of that Manual with the Section on Taxation and the Section on Real Estate, Probate and Trust Law.

The Committee has held two meetings, one in Omaha on March 24, 1967, and one in Lincoln on June 9, 1967. Both meetings were cooperative ventures with the Section on Taxation and the Section on Real Estate, Probate and Trust Law.

At the first meeting, a Sub-Committee under the chairmanship of Deryl Hamann, who is both a member of the Committee and the Chairman of the Section on Taxation, was appointed to recommend the contents of the Probate Manual. This Sub-Committee held separate meetings of its own, examined numerous other Probate Manuals from other states, and then made recommendations. These recommendations were furnished to all members of the Committee well in advance of the meeting on June 9, 1967.

At the latter meeting the contents of the Probate Manual were finalized. Also, decisions were made concerning who should be requested to prepare the text of the various chapters of the Probate Manual and these individuals will be contacted in the immediate future.

Our efforts on the Probate Manual in cooperation with the two Sections will continue, and at a later date we will commence work on the oral presentation for the 1968 State Meeting.

This report should, of course, be considered an interim report since there is much more work for the Committee to do.

Jerrold L. Strasheim, Chairman

REPORT OF THE COMMITTEE ON LEGAL AID

Your Committee on Legal Aid submits the following report:

On April 3, 1967, the Lincoln Legal Service Society opened its Legal Aid office at 404 Continental Building, Lincoln, Nebraska. The opening of the office on a full time basis was accomplished by the approval of the Society's Program by the Office of Economic Opportunity and the hiring of Dean L. Donoho as its full time Attorney-Director.

Type of cases to be handled are all civil matters where the applicant is indigent and criminal matters until the appointment of an attorney by the Court. Applicants, to qualify, must have incomes under \$1,500.00 for a single person; \$3,000.00 for a married couple with two children, and graduate steps of \$500.00 for each additional child.

The Blue Valley Community Action, Inc., which serves Jefferson, Thayer, Fillmore, and Saline Counties are planning on establishing a legal assistance program for the poor. Attorney George A. Skultety of Fairbury has been in contact with the legal aid committee, and further follow-ups are planned to render all necessary assistance.

It is apparent that in order to have local legal aid offices, it must be accomplished through several communities planning together, as the Blue Valley Community has done.

It is recommended to the House of Delegates that special committees be appointed in the respective judicial districts to plan and develop community action programs encompassing the counties of said judicial districts and the communities therein for the purpose of establishing legal assistance programs for the poor, and subsequent application to the Office of Economic Opportunity for the funding of said programs.

Robert R. Camp, Chairman
Allen J. Beermann
P. J. Heaton, Jr.
Fred J. Montag
Edwin C. Perry
A. P. Steinbock
Eleanor K. Swanson
Donald L. Wood

REPORT OF THE COMMITTEE ON PRACTICE AND PROCEDURE

I wish to report to you on the activities of the Committee on Practice and Procedure and its proposed plans for the balance of the year.

I am pleased to report that following approval by the House of Delegates concerning the adoption of a Long Arm Statute proposed by the Committee on Procedures, the Bar's Legislative Committee, succeeded in seeing this project through to completion. LB 368 has been adopted by the current session of the legislature and now provides Nebraska with a Long Arm Statute. The bill does not contain the emergency clause and, therefore, will not become effective until ninety days after the adjournment of the current legislature.

Your committee chose to concern itself with three specific areas which appear to require additional and more intensive study.

You will recall that the last meeting of the House of Delegates authorized an investigation into the Deadman's Statute. We should again like to make it clear that the committee at this point favors neither the repeal nor continued use of the Deadman's Statute, but simply feels that this doctrine deserves further study.

Therefore, to add in this study, preliminary discussion has been had with the Law College in regard to working with the Committee

on Procedure to investigate the historical background of this doctrine and determine what recommendations should now be made. Not only will the area of automobile accidents be involved, but the entire scope of the Deadman's Statute as it pertains to various transactions.

A second area is a matter which has been proposed by the committee before. This involved the matter of the settlement of claims involving minors and the requirement of creating guardianships. It appears that there is some feeling that the present Constitution of Nebraska prohibits any change in our present procedure. Therefore, a subcommittee will begin immediately to fully investigate and determine the background of the statute and what, if any, changes can be made. This involves not only the question of the guardianship itself but also includes the question of increasing the amount of a settlement in which no bond or guardianship proceeding is required. It is felt that the current statutory limitation is not realistic.

And finally, the committee will direct its attention to the issue of practice and procedure. You will recall that at the last Midyear Meeting, the committee suggested that a special committee be appointed to begin working on a total review of the Nebraska Rules of Civil Procedure. It is now the opinion of the committee that the preliminary work in this area can better be done by the Committee on Practice and Procedure. A number of states, including Kansas and Wisconsin, have completed extensive studies in this area and the material is available. The committee will, therefore, attempt during the coming year to get together preliminary material and make recommendations to the House of Delegates in regard to specific areas of procedure in the hopes that once the preliminary work has been completed, special committees can then be established to refine and complete the work.

We are hopeful that we will have some more specific details to report by the time the House of Delegates meet its next Annual Meeting.

REPORT OF THE SPECIAL COMMITTEE ON WORLD PEACE THROUGH LAW

The special committee on world peace through law has continued its contact with the ABA Committee. We have been supplied a good deal of information which has been made available to each of the members of this committee, as well as other attorneys who may be called upon to make addresses to various groups on this subject.

There has been a World Law Center established and many nations are taking a good deal of interest in this project which was instituted by the ABA. Most of the nations of the world, outside of the Iron Curtain, have indicated an interest and have sent representatives to world conferences.

There is to be a conference this summer in Geneva, Switzerland, and very shortly following that conference we will receive up to date information relative to the activity of the legal profession in this field. We are hoping to have this information in order to make a more complete report at the annual meeting this fall.

J. C. Tye, Chairman

NEBRASKA STATE BAR ASSOCIATION THURSDAY MORNING SESSION

October 19, 1967

The opening session of the Sixty-Eighth annual meeting of the Nebraska State Bar Association, convening in Hotel Sheraton-Fontenelle, Omaha, Nebraska, was called to order at ten-ten o'clock by President Murl M. Maupin of North Platte.

PRESIDENT MAUPIN: The Sixty-Eighth annual meeting of the Nebraska State Bar Association will now be in order.

We are fortunate and highly pleased to have with us this morning to deliver the invocation, the Very Reverend Henry W. Linn, President of Creighton University. Father Linn!

INVOCATION

Very Reverend Henry W. Linn

Incomprehensible Creator, true foundation of life and source of all knowledge, who makest eloquent the tongues of those that want utterance, vouchsafe, we beseech Thee, to enlighten our understanding, direct our tongues, and pour on our midst the grace of Thy blessings. Give us a diligent and obedient spirit, quickness of apprehension, capacity of retaining, and the powerful assistance of Thy holy grace. Grant that what we hear and learn we may apply to Thy honor and glory. Amen.

PRESIDENT MAUPIN: The Address of Welcome, as is customary, will be delivered by the President of the Omaha Bar Association, Harry L. Welch.

ADDRESS OF WELCOME

Harry L. Welch

Mr. President, Members of the Association, and our Distinguished Guests: It is my most pleasant task, on behalf of the Omaha Bar Association, to extend to you our most cordial welcome at this Sixty-Eighth annual meeting of the Nebraska State Bar Association.

My predecessor in office in his Address of Welcome last year, pointed out the various improvements that you observed when you came into the city. Let me add to his observations by pointing out that your driving convenience will be enhanced next year when the interstate gap will be closed.

We also look forward to the credibility gap being closed by the end of the following year.

I should also call your attention to several new nightclubs that have sprung up on what we call "The Strip" but I am sure that this announcement is entirely unnecessary, as most of you undoubtedly have found them and used their most respectable services. I perhaps ought to withdraw that remark because the people here apparently haven't been out to the nightclubs, it's the fellows who aren't here who probably used their services. (Laughter)

Last year you were told that the Omaha Bar Association had just purchased a professionally prepared film entitled "The True and the Just," a twenty-five minute documentary featuring E. G. Marshall as narrator and depicting the very important role the individual plays as a juror in our modern judicial system.

Since that time a special committee of the Omaha Bar Association has appeared before P.T.A. groups, luncheon clubs, and various associations. The Bar Association speaker narrates and gives a brief talk with the film, and then runs it for whatever group it is being shown to. This has been received most enthusiastically by these groups and we are continuing with this project.

I mention this because I would like to say to you that if any of your associations would like to borrow this film for similar presentation to groups in your community, we would be most pleased to lend it to you. It has been very successful and it is a very fine film. You will be surprised by the tremendous response you'll get from this documentary film. If this film does nothing more, it should enhance the public image of the lawyer. I think we are all somewhat surprised and embarrassed by a recent poll that pointed out that the legal profession in the public image was near the bottom of the heap and in the same category with the chiropractors. The chiropractors might have shown some displeasure and dissatisfaction with *that* placement. I believe we will all agree that one of the principle objectives of this Association is to improve that image to the general public and to our contemporary professional groups.

I should observe that the Omaha Bar Association has appointed a special committee also to assist any of our fellow members of the Association who might fall into the foils of the law. The Chairman has asked me, however, not to reveal his name and says that if any of you do get picked up by the gendarmes, don't call him; he'll call you. The Omaha Bar Association always stands ready to help.

Once again, a very, very cordial welcome to the city. May your short stay here be very pleasant. Thank you so much.

PRESIDENT MAUPIN: On this year of celebrating the Centennial of the State of Nebraska I felt it was appropriate to call upon one of our third generation members of this Association to make the response to the address of welcome. It is my pleasure to call upon the grandson of a former President of this Association, the son of a former President of this Association, and likewise a nephew of a former President of this Association. I now ask Charles Wright of Lincoln to respond.

RESPONSE TO WELCOME

Charles E. Wright

Thank you very much, Mr. President. It is an honor to respond to Harry Welch's fine address of welcome.

Back in the late '30s or early '40s one of the best methods by which Western Nebraska lawyers could come to Omaha for the annual meeting was on the passenger train.

On one such occasion when I was about ten years old my parents brought me with them. It was the custom of the lawyers riding on the train to gather in the men's lounge after dinner, and I still recall the old leather seats on the train and the cuspidor located near the center of the lounge, and the fact that the cigar smoke was so thick it burned my eyes. That is probably why I was allowed to remain there unnoticed well past my customary bedtime.

There were some excellent storytellers among the group, and the volume of their laughter increased as the evening wore on. About the only break in their storytelling would be when one of the gentlemen found it necessary to step up to the cold water faucet to obtain a little chaser for the after dinner medicine that they all seemed to be using. They were all eagerly looking forward to attending the annual Bar meeting in Omaha.

Today, as it must have been then, we all considered it a great privilege to be able to come to the fine City of Omaha for our Bar meeting and we all eagerly look forward to the friendship and hospitality that each year is extended by our fine Omaha Bar Association.

So on behalf of the out-state Bar members and their ladies, I want to acknowledge Mr. Welch's fine welcome and to thank each of you for making this meeting so enjoyable for all of us. Thank you.

PRESIDENT MAUPIN: On this occasion I ask that the visiting Bar Presidents from our sister states and the officers of this association assemble at this table because this will be, in fact, the only

formal session of the Nebraska State Bar Association in meeting assembled other than to close the meeting tomorrow evening after we've finished with the program. So at this time I should like to take occasion to introduce to you, and I am just going to take them in order, on my left Herman Ginsburg, our immediate Past President. I felt it is proper that we should have our immediate Past President in attendance on this occasion, principally, if for no other reason, so that we have an audience for the President's address that may come sometime later this morning.

Next is the new Chairman of the House of Delegates of the Nebraska State Bar Association, Leo Eisenstatt.

The next gentleman is the President of the Bar Association of the State of Kansas, Joe Balch of Chanute, Kansas.

Let me say that we are particularly happy to have each of these gentlemen from each of the surrounding states with us. It has been my pleasure this past year to meet in the annual meeting of each of these state associations.

Next I am going to introduce to you the incoming President, George Boland.

On the far right I will omit Mr. Turner for the moment because I think most of you know him, if not you will get acquainted with him during the day sometime, but sitting next to him is the President-Elect of the Missouri Bar, Mr. Martin Purcell of Kansas City, Missouri.

Then the gentleman from the Wyoming State Bar, from Sheridan, Wyoming, the President of that Association, Henry Burgess.

Then we have with us the President of the State Bar of South Dakota, Stan E. Siegel of Aberdeen.

I told a little story on him last night. I have one I can tell on him that he hasn't heard today and since he doesn't have an opportunity to respond I will make it very brief.

His firm happens to represent the Fischer family, the quintuplets of Aberdeen. I have been told that the firm is five times as busy as it was since they took on the representation of that group.

Next is our President-Elect, C. Russell Mattson of Lincoln.

Now because we have some matters that are not on your program this morning, I am therefore going to take the privilege of deviating a bit from the program that has been printed. But before doing that, and before introducing the next gentleman I wish to make two announcements.

...Announcement regarding Law School Luncheons...

The other announcement that I desire to make and wish to have repeated a time or two during the course of the meeting is one that has been prepared by Milt Abrahams, Chairman of the Public Service Committee.

He desires to have me announce that the Public Service Committee has arranged for the continuous showing of four important and highly practical film strips entitled "How to Package Your Product—Law; Lawyers, Laymen, and Legal Fees; Law Office Management; and Ethics—Your Professional Responsibility."

These films can be viewed on Friday between 10:00 A.M. and noon and between 2:00 P.M. and 4:00 P.M. in the Regal Room. The expense of presenting these films is defrayed by the Omaha National Bank as a service to the legal profession. These film strips I am told run an hour each and there will be a continuous showing of them. It is hoped that as many of you as have any interest at all will try to take the time to skip in to see at least one showing of these films.

We have with us today, and I am going to call on him at this time, a representative of the American Bar Association who will speak to us for a few minutes on "The Program of the American Bar Association in Relation to the State and Local Bar Associations"—Mr. William Kleindorfer of the American Bar Association home office in Chicago, Illinois.

THE PROGRAM OF THE AMERICAN BAR ASSOCIATION IN RELATION TO STATE AND LOCAL BAR ASSOCIATIONS

William Kleindorfer

To give you some idea of how anxious the American Bar Association, and certainly our Field Service Division, has been to get to the State of Nebraska, at the same time that Murl Maupin invited me to appear at your annual meeting I received, or had just received, another invitation which I declined. It was an invitation to attend a forthcoming wedding. The announcement simply stated that the man had been married seven times before and the woman had been married six times before. The invitation said, "Be sure to come early. Don't fail to show up. This is no amateur affair."

I was certain also that an annual meeting of the Nebraska State Bar Association would be no amateur affair. I have had the pleasure of visiting with your fine President, Murl Maupin, at a number of meetings around the country, and I certainly would like to assure you that he has extremely well represented the Bar of your state at every appearance which he has made.

You know, a man named Harrison Tweed has a statement which he made which now hangs up over one of the doorways or portals in the New York City Bar Association office. It reads something like this:

"I have a high opinion of lawyers. With all their faults, they stack up well against those in every other occupation or profession. They are better to work with, or play with, or fight with, or drink with than most other varieties of mankind."

I would say that although I arrived rather late last night and hadn't met too many of you yet, I did have the opportunity to immediately observe that you were of the best to drink with and play with, and I am certain in the next day and one-half I will have the opportunity to see that it will be an equal pleasure to see how you work, and I am certain that you do.

I would like to comment just a few minutes on some of the ways that we hope the American Bar Association can be helpful to you. Actually, the title of this speech might be "What Can the ABA Do For You?" As some of the people know who attended the Wyoming State Bar meeting, this is not the title I had originally planned for this speech but it was given me by the President of that Association. I had really suggested something simpler when it was initially suggested, something along the vein of "Think not what the ABA can do for you, but think what you can do for the ABA." Somebody told me that someone had said something very similar to that, so we changed the title and approached it from this point of view. It is rather a pleasure to deal with it.

Let me tell you just a little bit about some of the things that are going on now which we hope will be of interest and of some help to you.

We have some sixty-five committees in the American Bar Association. We feel that they are working fairly effectively in many areas. We have some of the same problems that you may have, although I understand you really don't here in Nebraska. Murl Maupin was telling me a little bit about the effectiveness of your committee work. You know, in most cases they say that one of the problems is that on most committees half the committee does all the work; the other half does nothing. Murl told me that in the case of the Nebraska committees just the opposite is true.

Among some of the activities of our committees is one working in the area, certainly, of personal grievances, one working in the area of legal economics. I am happy to say that we have, as you know, your Dick Tempere now who heads up our economics

program at the American Bar Association, and he is rapidly making an excellent reputation in that field throughout the entire country, as he already has in the State of Nebraska.

We have felt, and our committees feel, that we need to make constructive efforts in this field, that we can't really sit back and just hope that the procedures we are using in our offices will be effective. We can't really just leave it to good luck. Maybe you've had the same experience that I've had but I don't really feel I can leave things to "good luck."

A number of years ago when I was practicing back in Indiana, a partner of mine and I went to a neighboring county seat and we were going to do a little research in the library there. We parked our car right around the square where we just happened to find a spot which had no meter. Every place else had a meter. This was not marked in any way. There was no meter and we felt we were in great luck, so we parked there and went in and did our work in the court for about two hours. When we came back out they had built a parking meter and given us a ticket.

Well, with this kind of luck I never really felt I could leave anything just to good luck, and that certainly is not the attitude that our Economics Department is taking.

Many of you are acquainted with the work which our traffic courts program is engaged in, a program which comes to you in the states throughout the country. We feel they are doing an effective program with those conferences that they are holding. We feel that if any of you have attended them you will similarly agree that they are very good.

There was a little girl sometime ago who oddly enough had not met her grandmother until the little girl was six years old. They lived some distance apart. The little girl continued looking at her grandmother in rather amazement and she said finally, "Are you really my grandmother?"

The grandmother said, "Yes, I really am your grandmother—on your father's side."

The little girl said, "Well, you won't be around here very long before you find out that's the *wrong* side."

We feel that you won't be around our Traffic Court programs very long before you feel that they are being well done.

We have committees working in what we think are very important areas dealing with the matter of the availability of legal services, current evaluation of our ethical standards, looking into

the field of minimum standards for the administration of criminal justice—some of you have seen the preliminary report “Fair Trial—Free Press”—in the whole general area of legal aid, legal services for the poor, lawyer referral. We certainly feel that these are some of the most vital areas of interest to the legal profession today, and we don’t feel that it is an area that we can simply let develop as it may. We feel that we must anticipate what is going to happen in the field of legal services, in future expansion of legal services for the poor, and future expansion of legal services for the general masses of population.

You know, many of us, and I think perhaps this has been true of the legal profession as well as other fields, have really sort of responded or reacted to something as it developed in past years, rather than trying to anticipate these developments and prepare the approach that we would most desire to meet them with.

I like to refer to it as sort of responding from a “woodshed motivation.” I guess really today the woodshed is a bit outdated, but I am afraid that most of us still at least know what the woodshed meant; you know, what was meant when something was said that we might be heading for the woodshed.

A number of years ago when I was about six or seven years old, my parents left the house on one occasion one morning and left me with my two sisters, one of them five years and ten days older than I. If you’ve had a sister a few years older than you, you will remember and know why I remember the precise number of days. I was daily reminded of the exact number of days every time I wanted to tag along. Then there was my younger sister, about a year and one-half younger than I. My parents left the house just for a very short time. They had to go somewhere and thought they might be able safely to leave us alone twenty or thirty minutes.

Of course as soon as they left we engaged in that activity which is most common to children of those particular age groups—mortal combat. I recall that after some ten or fifteen minutes of this I had really become completely victorious.

We had then an icebox in our house. Young children today don’t like for you to use that term; it is “refrigerator” but I still like to call it an icebox once in while because that is what it was. It had an opening under the bottom. It wasn’t flush to the floor like they are now. There was an opening under there and I remember that after some minutes of combat I had both my sisters squeezed under this opening within this icebox and yelling at the top of their lungs. I had really accomplished total victory.

Then it occurred to me that I might have some problem. At this moment, as I anticipated a future problem, I dashed out to the back yard leaving my two sisters in there, and I remembered, wonderfully, that my father had asked me to rake the leaves some two weeks ago. I had not really been sufficiently motivated to take up that task as yet. At this point I seemed to feel a greater motivation. So I grabbed a rake and started raking those leaves.

I remember that a few moments later my Dad came in, walked up through the back yard where I happened to be doing my work, looked out and said, "Hi, Bill. Raking the leaves, huh?"

I said, "Yeh, Dad, I thought I ought to get this job done."

"Good work, boy!"

Then he walked in the back door. I would suppose that his entrance in the back door and his exit back out must have been the shortest time on recorded history. He came out and escorted me to the basement, where we engaged in the same activity that I had just previously engaged in—mortal combat—and victory was not to be had by *me*.

I have always thought of this in terms of the "woodshed motivation." Actually, when I took that rake in hand I was doing something because I was pretty certain I was headed for the woodshed, which even at that time happened to be the basement rather than the woodshed.

I don't think we have time today to wait for the "woodshed motivation." I think today we have to anticipate our problems and look forward to them.

We hope that our Lawyer Placement Service is of assistance to you. I'm certain that with the beauty of the land in the State of Nebraska, what little I have had a chance to see already, you probably would use it less than some others, because I imagine very few lawyers want to leave the State of Nebraska. Nevertheless, our Placement Service does also handle some service in between areas in the state, and we are happy to have you personally use it at any time.

You know, the whole approach to placement has changed considerably. You can sort of get that impression from a "Help Wanted" ad which I happened to look at just the other day. It simply said: "Wanted: Man to work on nuclear fissionable isotopes, molecular reactivity counters, and three-phase cyclotronic uranium photosynthesizers. No experience necessary."

With this operation we hope that we are of some assistance to you.

We have an Information Service where we try to answer inquiries of every general nature, and we invite you to ask us anything. We will try to give you the answers, and if we don't have them we will try to find them.

Of course our Ethics Opinions are available to you, as they are delivered or made available through your State Bar Association.

Our Client Security Fund is available to be of assistance to state and local Bars in any way in working with this field. Our Electronics Data Retrieval Committee is working in the area and developments in this field are going to have great, great prospects for the future.

We have a new Law Student Division where law students will now be more closely integrated into our National Association.

Our Peace Through Law Committee we hope is doing effective work and helpful work.

In the area of Public Relations many of you are acquainted with some of the films and tapes which we make available through that committee and that department. We have a newspaper column, "The Family Lawyer" which is distributed throughout the country and made available to all of your newspapers, hopefully that they may use them.

You are all acquainted with our Law Day program and the materials which we make available for that.

Our Washington office, the only branch office which we have, where we have several lawyers and other men working on a daily basis, has been successful in dealing with the recent constitutional amendment dealing with presidential inability.

Many of you are familiar with the Agency Practice Act, which we feel our Washington office was very helpful in accomplishing during last year, where it is no longer necessary for you to get a special permit or license to practice before the Internal Revenue Service or other administrative groups.

They are working in other fields. You are acquainted with their work on H.R. 10, the Keogh Bill, and they are presently hoping and trying to make some changes in some of the very low administrative fees in handling certain cases there, where for some \$300 or \$400 worth of work you are entitled to get a fee of about \$25.00 today. We feel that these services are helpful. We hope they are.

Our own Division, State and Local Bar Services, asks you in any of your work as an officer or committee chairman of any state or local Bar association to call upon us for any help that we can possibly give.

We operate an inquiry service. We maintain files of activities of similar associations around the country, and we cordially invite you to write to us, Division of State and Local Bar Services, for any question you may have in regard to Bar activities. Ask us for material and we will be glad to send it to you.

We hope that the American Bar Association is of direct help to you as an individual and as a member of your Association.

We feel that it is terribly important that we be strong as a National organization and that you be strong as a state organization, and that your local Bar associations are strong, and that you personally make a great effort in the achievement of the objectives of each.

To stress the importance of your doing so, to stress your individual importance, let me make the following observation. I would like to give you some figures. These figures are not completely accurate today because they are based on a population a little smaller than it is today but nevertheless proportionately I think they are about right. This stresses *your* importance with each of these local associations and to the accomplishment of our legal objective.

At this time the population was 135-million. Here is the breakdown: People sixty-five years or older, 37-million, so this left a balance to do the work of 98-million people.

People eighteen years or younger, 54-million; balance left to do the work, 44-million people.

People working for the government, 21-million, leaving a balance left to do the work, 23-million people.

People in the armed services, 10-million, leaving a balance left to do the work, 13-million people.

People in state and city offices, 12-million, leaving a balance left to do the work, 200,000 people.

People in hospitals and insane asylums, 126,000, leaving a balance left to do the work, 74,000 people.

Bums and others who can't or won't work, 62,000, leaving a balance left to do the work, 12,000 people.

Persons in jail, 11,988, leaving a balance left to do the work of two—you and I, and I am not too sure about you.

PRESIDENT MAUPIN: Thank you very much, Bill, for coming out here and giving us that message from the American Bar Association.

We have now come to the mandated portion of this program where, under the existing rules, the President of the Association is required to give what is referred to as an "address." In an attempted discharge of that duty, I shall briefly skim through some notes that I have.

ADDRESS OF THE PRESIDENT

Murl M. Maupin

On this occasion of our celebrating one hundred years of Nebraska Statehood, it seemed appropriate to survey the part that the legal profession had played in the development of the State of Nebraska, to attempt to evaluate the stability of our existing government, state and national, based upon the rule of law, and to give recognition to the known dangers confronting us today as a democratic society of free men; then to consider action that we of the legal profession may take to best afford the opportunity for this Association, or its then counterpart, to assemble, as in this meeting today, as free men under a government by rule of law in the year 2067.

One hundred years ago the sparsely settled territory of Nebraska was formally admitted to statehood. This was shortly after the conclusion of the Civil War. This state was literally created from the products of the horse-drawn plow and the running of livestock on the open range. The adversities of repeated wars, repeated depressions, and ever-existing hardships may have slowed, but never deterred, the determination of the citizens of Nebraska to build a great state within this Union of the United States and under the guiding principles of the Constitution of the United States.

Our hardy pioneers stemmed largely from the flow of immigration from the northern European nations where thrift, hard work, observance of law, and the performance of their religious obligations were the accepted and only way of life. With this background our forefathers in this state began the building and ever sought to create a sound system of democratic free government, a sound, if at first exceedingly meager, system of education and a well-founded

system of judicial administration. The objective then, and as it remains now, was to create, develop, and improve a truly democratic form of government looking ever to the preservation of the rights of the individual as free men and the preservation and protection of the individual's property rights.

Within this framework of one hundred years of ever-continuing struggle, achievement, and development, the lawyers of Nebraska have played a prominent and leading part in the three separate branches of our constitutional government. During this span of years we have created, developed, and now have a system of democratic government and a system providing for judicial administration to which we can all point with pride.

On this occasion it seems appropriate to dwell on our profession's role in the development of judicial administration within this state to the exclusion of many other innovations and accomplishments of government that have been created during this era.

Considerable effort in historic research of early day judicial administration and law enforcement within the state yielded little authentic information to embellish these remarks with authentic historical background. We do find that the first Supreme Court of Nebraska, consisting of three judges who likewise presided over the then three Judicial Districts of Nebraska, first met as a Supreme Court in Omaha just one hundred years ago—1867. The next session of the Supreme Court was held in Nebraska City the following year, and the third session was held in Lincoln in the year 1869.¹

Similar research failed to develop little of historical significance or interest of an authentic character as to the activities, as an organized group, of the members of the legal profession prior to the year 1900. A recorded history of the organization of the Nebraska State Bar Association exists, of course, from the year 1900. It is presumed, therefore, that the lawyers of Nebraska organized as a state-wide professional group first in that year. If records to the contrary exist, I have not had access to them. Starting with the year 1900 a review of the records of the Nebraska State Bar Association demonstrates a continuing and ever-increasing effort by the organized Bar to improve and develop our state and national government in the public interest.

Then in 1938 (parenthetically, as one of the first of the States of the Union after North Dakota) the Nebraska State Bar Association was integrated by Supreme Court rule. The matter of the integration of our Association had the thoughtful and careful con-

¹ Nebraska State Historical Society—historical papers—Page 145.

sideration for many years before its acceptance by outstanding lawyers of this state, several of whom were later to become distinguished members of the judiciary or to become recognized by their professional brethren as the great lawyers of Nebraska in their era.

Incidentally, the acceptance of the integrated Bar by the lawyers of Nebraska was by an overwhelming vote of a vast majority of the members of the Bar at that time. Our first President of the integrated Bar entitled his annual address to this Association "The Third Era Has Begun." He was referring, of course, first to the existence of the unorganized Bar, as such, in this state; secondly, to the era of the voluntary Bar Association, presumably from 1900 to 1938; and then to the beginning of the integrated Bar. Incidentally, every lawyer in Nebraska should take the time to search out and re-read that address of our first President of the integrated Bar.²

None can deny that the great strides in the improvements of this state's judicial administration have been accomplished under, and after, the integration of the Nebraska State Bar Association.

However, as members of a profession devoted to the administration of fair and equal justice and to the preservation of law and order in a free society, we as a profession find ourselves today subject to deep and severe criticism. Some of this criticism, we must acknowledge, is justified. Past President Herman Ginsburg in his annual address to this Association last year, entitled "The Legal Profession—An Evaluation and a Challenge," pointed to our professional deficiencies in a clear and convincing manner. Again, it is suggested that every member of this Association take the time and make the effort to review his address.³

Assertions of the poor public image of lawyers as a class, coming from devious sources and questionable statistics, to the contrary notwithstanding, the improvements and innovations in judicial administration and matters of law enforcement now referred to unquestionably demonstrate that the leadership furnished by the members of this Association has been accepted and followed by the lay public of this state.

The late Chief Justice Arthur Vanderbilt, an outstanding lawyer, teacher, and judge, described the responsibility of lawyers in this language:

² Vol. 7, No. 4, Nebraska Law Bulletin, 1938.

³ 46 Nebraska Law Review (2), Page 398.

"Lawyers above any other class have an obligation to use their influence in the molding of public opinion within their sphere, whether it be in the block upon which the lawyer lives or the election district of the ward or the city or the county or the state. In our complicated age, a sound public opinion is more indispensable than it ever was, and without it even courageous leadership fails."⁴

The records of this Association disclose, I suggest, that the individual members of the Bar of Nebraska and this Association, as an organization, have largely filled their duties and responsibilities as defined by Vanderbilt during the past one hundred years. Likewise, as a profession and as an organized Association of our profession, I confidently assert that we, as a profession, enjoy a public standing and a so-called public image in this state equal to, if not in excess of, that of any other State in this Union of States.

Under the leadership of the lawyers of this state and as a first step in the improvement of our judiciary, the voters of Nebraska saw fit to provide for the non-political nomination and election of the members of the judiciary. Incidentally, and thereafter, the voters provided for the non-political election of the members of the legislature. These steps and procedures, subject to the known criticisms of each, were nevertheless demonstrative of the efforts of our citizens to remove the personnel of the judiciary and of the legislature from partisan politics.

Historically, the records of the Association will show that it was in the year 1934 that a concerted movement of our Association was first begun for the improvement of the method of the selection and tenure of our judiciary. From that time forward to this date the matter of the tenure and of the general welfare of our professional brethren who elected to serve upon the judiciary has been a matter of our ever-present concern and an objective of this Association. This concern and this objective for the improvement of the judiciary has been a continuing process for the improvement of the judiciary for the public welfare of this state.

Still numbered among our membership today are those who were associated with the initial movement in 1934 referred to above. It is a matter of pleasure and pride to those members to have lived the necessary years to see an early day vision for the improvement of the judiciary transformed into reality.

Today we have the Merit Plan for the statewide selection of the members of our judiciary. We have been able to improve the initial plan and extend it from the Supreme and District Court levels to other levels of the judiciary.

⁴ ABA Journal, Vol. 52-9, Page 830.

A pension or retirement program for the members of the judiciary has been accepted in this state. While it is far from adequate at the present time, nevertheless our Association continues to do yeoman work for its improvement.

Then, and only last year, the voters of this state, by an overwhelming majority, adopted a constitutional amendment which has been implemented by appropriate legislation providing for the removal of the unqualified or unfit judge.

By reason of the acceptance of these three features by the voters of Nebraska, this State leads every other State in the Union in this field of judicial administration. Our leadership in this field is recognized nationally. A nation-wide effort to obtain these accomplishments finds other states turning to us for assistance and guidance. The latest information that I have is that only the State of Colorado, and that by most recent action, has all of the beneficent features that I have referred to for the improvement of the judiciary.

These accomplishments, all for the public good and for the preservation of our form of government, have been achieved only with the expenditure of countless hours of unselfish and uncompensated efforts on the part of hundreds of members of our Association in this state, together with the expenditure of literally multiple-thousands of dollars given or raised by members of the Nebraska State Bar Association.

For emphasis I repeat, the people of Nebraska, having accepted and adopted the leadership of the lawyers in the matters that I have just mentioned, certainly do not hold us as a profession in the lowly public image that has been asserted against us as a profession.

While accepting these self-conferred accolades for our own profession, it is important, I think, to recognize another group that has played just as important a role in the development of our government by rule of law in this state during the past century. I refer to the profession of Journalism and the Free Press. Our newspapers, in particular, and, more recently, other news media, have exerted a tremendous effort and played an outstanding role in the field of affording reliable public information, fair, impartial, and penetrating presentation of matters of public interest so that the citizen may have reliable information to form his own independent judgment. The Free Press of this state, generally speaking, has avoided the so-called "yellow journalism" and "molder of public opinion" approach in its presentation of news affecting the public interest.

Without exception, in every effort that our Association, as an organization, has projected for the improvement of the administra-

tion of justice in this state, we have had the wholehearted and liberal support of the news media and the newspapers of this state, in particular.

Now that mention has been made of one hundred years of progress in a free society, let's objectively look at our posture today as individuals and as citizens of one of the states, of one of the free governments of the free world. Again we find ourselves engaged in a great war—notwithstanding it is as of now an undeclared war. There exists the ever imminent possibility that this conflict will be historically reported as the beginning of World War III. But a greater danger confronts us here at home. This is the danger of the destruction of our free government by anarchy, riots, and criminality of our own citizens. We are witnessing, and participating in, a complete breakdown of the very principle and purpose of a government by rule of law; that is, our failure to guarantee and promote the primary right of each citizen under a government by rule of law, the citizen's right to be protected from criminal violence and invasion of his personal property rights.

Paraphrasing the substance of several statements of several men of recognized stature in the field of government and of law enforcement, as my concept of our posture today, I quote:

"Never in our history has the rule of law been as much in jeopardy as today. Not just from the left or right wing extremist, but from citizens in all walks of life and all levels of society. Many citizens regularly and openly disobey the laws they do not like. Changes in unpopular or distasteful laws by legislation seem to be old-fashioned. Discipline as a means of regulating human behavior has gone out of style. Police, when called upon to preserve order and perform their lawful duties are often jeered, insulted, and attacked by the very people that they are trying to protect.

There exists in America today a public tendency to blame organized society, and not the law-breaker, for the criminal act. A public attitude of extending sympathy for the law violator, even the malicious murder, and a complete forgetfulness of the victim of the crime."

The following is an exact quote, in part, from a resolution unanimously adopted this year by the National Conference of Chief Justices of the United States, with forty-five states represented, whereat it was resolved:

"Therefore, be it resolved by the Conference of Chief Justices:

1. That the strength and progress of our nation and the enjoyment of rights and liberties by all our citizens have always been and continue to be dependent in large meas-

ure upon the self-restraint and self-discipline of our citizens, as manifested by their belief in, respect for, and adherence to the rule of law;

* * *

4. That among the causes of the spreading disrespect for law and its enforcement are the publicly held views that it is inordinately difficult, and many times impossible, to convict those who are guilty of the gravest crimes against our society, and that there are unreasonable and unnecessary delays in the administration of justice; that to the extent these views are supported in logic and fact it requires that we, and all our judicial, executive, and legislative bodies and agencies, reappraise the laws and procedures which affect the task of the policeman, the prosecutor, and the courts in their effort to protect society, to the end that we will successfully meet the challenge of lawlessness."

I call your attention to some statistics concerning our own state:

For the five-year period from 1962 to 1966 the over-all population of our state has remained nearly static. The Federal Bureau of Investigation's Uniform Crime Reports undoubtedly furnishes the best and as nearly an accurate statistical review as is accessible. This report indicates that in the year 1962 the total of all reported major offenses in Nebraska was 8,739, or a per population rate per 100,000 citizens of 588.9 per cent; while in the year 1966 there were reported as major crimes in this state the total of 12,920, or a 100,000 per population percentage of 887.4 per cent. A recent new release of a comparison of the year 1966 with the first half year of 1967, from the same source, indicated an additional percentage increase in the major crimes reported in Nebraska. Nebraska, however, according to these statistics, has far less crime reported than many of our sister states.

Strenuous and dedicated efforts to improve the enforcement of law in this country, the protection and preservation of the personal interest of the criminal accused while seeking to protect the welfare of the criminal's victim, and, finally, to preserve and protect our form of free society has been and is now being taken by the legal profession on a state and national level. Many of the states, including Nebraska, are beginning to exert their best efforts in implementing such a program. The American Bar Association and our own State Association are exerting major efforts in these fields of activity. The President of the United States has created the National Commission on Law Enforcement and Administration of Justice which has had its first step in implementation by the American Bar Association sponsoring, in cooperation with the Attorney Gen-

eral, a Lawyers Conference on Crime Control. The Governor of Nebraska has recently appointed a Citizens Commission of a similar character to that of the President's Commission.

A pertinent example of the legal profession's efforts to implement the lawyer's role in aiding the enforcement of law under the rule of law of this country arose during, and after, the recent Detroit riots. There, at the call of the American Bar Association and the state and city Bar Associations, nearly 800 lawyers of that area volunteered their assistance on a round-the-clock basis to process the four thousand or more complaints that were necessarily filed growing out of that mass attack upon law and order. While a part of these lawyers aided the prosecution, a large number thereof volunteered for the defense of individuals, and for the preservation and protection of the constitutional rights of the accused, the very persons and individuals who were seeking to destroy all vestige of the rule of law.

We ask ourselves, then, as citizens and as lawyers, where to place our principal emphasis in counter-attacking lawlessness, as such, in our state and nation. As suggested by Judge Vanderbilt we must first attempt to change the thinking processes of the public, change the thinking from that of indifference to law violation to a public desire and demand for the strict enforcement of the rule of law.

This past year in our Law Day, U.S.A. program, we used Theodore Roosevelt's quotation: "No man is above the law and no man is below it." He further said: "Nor do we ask any man's permission when we require him to obey it."

All structures, governmental or physical, must have a foundation. The foundation for the support of rule of law by government exists in the police authority in seeking out and arresting the violators of the law, in the courts called upon to interpret, enforce, and punish the law violator, and in the officers of these courts, you and I, in aiding and assisting in the proper enforcement of the laws.

While I have pointed out with pride to the improvements in judicial administration from the standpoint of the judiciary in this state, I think that we must acknowledge that our efforts in the field of improvement of the profession of law enforcement has not been as good as it might be. Generally speaking, as citizens of this state we can point with pride to a development of an esprit de corps existing in the many dedicated individuals who today are serving as law enforcement officials, in the positions of village marshal, policeman on the beat, chiefs of police of our cities, county sheriffs, and the Nebraska Safety Patrol. All of these individuals or groups,

generally speaking, are making a conscientious and dedicated effort in this state to enforce the laws of this state. We have many police systems in our cities that are performing outstanding service. A case in point is the honor that was conferred upon the Omaha police system during the past year by that city for the police's efficient and conscientious efforts in law enforcement. The Nebraska Safety Patrol, as another example, has obtained a stature in the eyes of the citizens of this state in the short period of its existence that is highly commendable.

These law enforcement officers are entitled to the continuing assistance and support of the lawyers of this state as individuals and as an organized Association, for these are the officials of the law who implement the mandates of our judicial system and who attempt to enforce the law as written by our citizens. As the front-line soldiers of judicial administration and enforcement of the rule of law within the state, they are entitled to all of the support that can be given to them from the standpoint of guaranty of tenure of service, improvement of compensation, and public recognition of their stature and of their devotion to their assigned duties.

Confronted with the recognized dangers to our form of government we as a profession must lend our wholehearted and ever continuing support and effort to the maintenance of the rule of law in this free society of ours. As officers of the court and as members of a profession dedicated and sworn to the support and maintenance of law and order, we as individuals and as organized groups should afford the precept and example to the public.

First, I foresee a need to put our own house in order. Areas in which it occurs to me that improvement may be made in putting our own house in order are:

(a) To maintain and strengthen our professional Associations, such as this and such as the American Bar Association, to give us the organizational vehicle to operate from strength.

(b) To update and upgrade our canons of ethics and provisions for the enforcement of the same, and to thereafter see to a just and fair enforcement. We must have the fortitude and the continuing desire to police our own profession adequately, promptly, and justly in the discipline of the members of our profession who are derelict.

(c) We need to establish a better relationship with the news media to aid us in informing the public of the efforts that we are making for the public good.

(d) We must make greater efforts to provide legal services for our citizens of the middle-income and poverty-stricken groups to

the end that they will gain a recognition of the necessity of a rule of law, properly enforced, and a confidence in the form and stability of our government.

(e) We should promptly devise and implement a program with the objective of creating a public demand for the strict observance of law; and

(f) We must lend our ever-continuing and unceasing efforts to fair and just enforcement of our laws.

Whatever our image may be as a profession, nationally or state-wide, our concerted efforts are needed to improve our standing and our public image so as to be able to more effectively combat the present-day lawlessness in this country.

The very nature of our profession, the fact that we have been entrusted with a complete monopoly in the practice of law and the recognition that the legal rights of each citizen rests in our hands and in that of our fellow members who occupy judicial offices causes us, as a profession, to be sought out and held out by and to the public as a group or profession that should lead the way by our own precept and example.

Some, but not all, of our weaknesses as a profession leading to a lack of public confidence in us as officers of the law devoted to the enforcement of the rule of law, are to be found in the following areas:

(a) Our own failure to rigidly enforce, as against our own erring fellow lawyers, our own code of ethics.

(b) In permitting the besmirching of our professional standards by the few highly touted publicity-seeking, dollar-chasing members of the Bar who, in a single appearance before the TV camera or in a press conference destroy the public image of ethical lawyers gained through years of effort. Appropriate action should promptly be taken against all such violators of our code of ethics.

(c) In our own self-effacing modesty as lawyers and judges, but consistent with our Canons of Ethics on publicity, in failing to bring to the attention of the public the continuing efforts being made by the ethical and devoted members of our profession for the public good.

Profesor Wigmore concluded his monumental work, "A Panorama of the World's Legal Systems" with a discussion of the Anglican legal system, which includes that of our country, with this partial quotation:

"... And looking back on its history, it is possible to believe that the one most important thing that has enabled the Anglican legal system to survive and hold its own and expand has been its possession of a strong, fraternal, well-trained profession of the law.

And it seems fair to conclude, if we may generalize from this survey of the legal systems of the many races, that perpetuation of any legal system beyond the life of a particular political dynasty or of a particular race-stock can be guaranteed only by the development of a highly trained professional class."⁶

With a proper deference to modesty we, as individual members of the great profession of law and as members of our professional associations, may justly claim credit for great and ennobling accomplishments in the field of administration of justice under the rule of law, all for the public good.

Our efforts in the past will only preserve our present form of free government if we as individual lawyers and as members of this Association re-dedicate ourselves to renewed and re-invigorated determination to meet and overcome the existing present-day perils to our system of free government.

As Americans and as lawyers we have met every challenge to our state and to our Nation for the first one hundred years of our statehood. Let us resolve anew to meet and to overcome the challenges of the present and of the future to our government by rule of law, whatever these challenges may be.

At this time, while it is not scheduled on your program, I desire to call upon a past President of this Association, Mr. Ralph Svoboda, for some remarks that he has that he will now present to you. Ralph, will you come forward.

NEBRASKA STATE BAR FOUNDATION

Ralph E. Svoboda

Mr. Chairman, through the graciousness of our good President I am allowed to come before you brethren in our profession to call your attention to a recently formed organization within our Bar which I wish to assert to you deserves our wholehearted support. I am referring to the Nebraska State Bar Foundation.

While we are, of course, glad to have the Presidents of our sister state Bar associations with us, we do look upon them with envy.

⁶ Vol. III, Page 1108.

Missouri, for instance, has a magnificent Law Center. Iowa is not an integrated Bar, wholly a voluntary Bar Association with a membership of 98 per cent of their practicing Bar. So it goes. Down in Texas not too long ago they opened their Law Center down there, a magnificent building.

Some day we past Presidents of the Nebraska State Bar Association look forward to the day when we will have our Law Center. But there are immediate needs ahead of us.

For instance, we have all joyed in the Restatement of the law. But what has happened to the Annotations? They are not kept up to date. Some of the Restatements don't even have Nebraska Annotations. We have got to have funds with which to pay for the work that will make sure that those Annotations are not only prepared but that they are accurate.

We have also got to do something about the fact, mentioned both by the President of our own Omaha Bar Association and our President of the State Bar Association, that our image as a profession needs shoring up, and that will require money.

Now we have been in existence in a small way, the acorn was planted, the oak tree not very large, we have been in existence three or four years, as I recall. I think Jack Wilson made the motion before the closing session of the annual meeting some three or four years ago that started us. We had our annual meeting yesterday. We had a report of our treasurer. We already have some \$18,000 in the treasury. It is all invested. It is earning.

We want to start doing some of the things that our Association needs to have done. Scholarships: We are blessed with two wonderful law schools. What are we doing for them? What are we doing for aggrandizing those two law schools, assisting young, worthy men to become members of the profession? What are we doing on this matter of additions to Annotations of the Restatement? What are we doing to refurbish and enhance our public image?

There are so many things that need money, and ultimately, as I stated, we will need a Law Center.

Out in the lobby right next to the registration desk is a table manned by souls that are giving their free time out there to explain this to you in detail. They have blanks for your membership. The lowest cost of the membership is \$10.00 a year. We have memberships for those who want to contribute more to the profession that has sustained your working life and made a living for you.

We have out there, and by the way, I think I am looking at the real souls of this profession in this audience, there are several plaques out there to what we call the "Fellows" of this Foundation.

I wish you would pick them up so that Flav Wright doesn't have to haul them all the way back to Lincoln again. You will see a lot of them there and you should look at them to see what they look like. These are the Fellows, the men who agreed to give \$100 a year to the Foundation until they have given a total of \$1,000; and your estate, in case of your untimely demise, will of course be relieved of any claim in case you should not live out ten years.

We have several other memberships in between. Yesterday we amended the Articles and Bylaws so as to provide for sponsoring memberships for sustaining memberships. Please call at that table out there, if you haven't already. If you haven't already become a member, get acquainted with the Foundation and its purposes and become a member.

PRESIDENT MAUPIN: At this time I desire to call the roll of the Fifty Year Members of our Association, those members who have now completed fifty years of membership. As I call your name, those of you who are present, I would ask you to come forward:

Earl L. Meyer, Alliance
Virgil Falloon, Falls City
Virgil J. Haggart, Omaha
Carl D. Ganz, Lincoln
Thomas Stibal, Schuyler
Parker Wickstrum, Mesa, Arizona
Curtis O. Lyda, Gering
Virgil E. Skipton, Hastings
Ralph O. Canaday, Hastings
Earl M. Cline, Lincoln
William F. Spikes, St. Paul

Thank you very much for the first half century of service, from members of this Bar our heartiest congratulations, our hopes, well wishes, and prayers that you will be with us for many, many more years to come.

Now I should like to call on Judge Cater, if he is present, to give the report of the Judicial Council. The Honorable Edward F. Carter of the Supreme Court of Nebraska!

REPORT OF JUDICIAL COUNCIL

Edward F. Carter

Mr. President and Members of the State Bar Association: The Judicial Council had a busy year and met several times in the furtherance of its work. It being a year in which our legislature

was in session, all matters before us for which we determined that legislation was needed were submitted during the session. Ten proposed bills were submitted and all ten were enacted into law.

The bills proposed will be referred by their legislative bill number and are briefly described as follows:

1. L.B. 756, generally referred to as a Long Arm Statute, which confers additional jurisdiction on the courts of this state over specified acts performed in this state and for service of process in such cases outside the state.
2. L.B. 757, providing for a Commission on Judicial Qualifications and for the removal and retirement of disabled judges.
3. L.B. 758, providing that Workmen's Compensation Court judges shall be selected under the so-called Merit Plan.
4. L.B. 759, amending sections 25-812 and 25-813 to provide for the filing of cross-claims and the practice with reference thereto, subject to certain limitations specified in the act.
5. L.B. 760, amending section 38-109 providing that a guardian shall continue to act until the ward's age of majority instead of to age twenty-one.
6. L.B. 761, amending section 30-606 relating to the filing of claims against the estates of deceased persons. This bill provides that if a claim has not been barred by the statute of limitations at the time of the death of a deceased person, that the statute stops running upon death and the person having a claim may then assert the claim against the decedent's estate in the time and manner provided by law.
7. L.B. 762 amends section 30-402 to provide for one or more appraisers instead of two in appraising the personal and real property set out in the inventory of the estate of a deceased person.
8. L.B. 763, providing for third party practice.
9. L.B. 770, providing the manner of handling by the county court of funds of devisees, legatees, and creditors who cannot be found.
10. L.B. 771, providing the method of filing of certificates of the pendency of probate proceedings in the county of probate and the filing of certified copies of wills in counties where real estate is located other than the county in which the probate is pending.

Since the adjournment of the legislature, the following matters have been submitted and are now pending the action of the Council:

1. A proposal for a procedure for the destruction of court records authorized by L.B. 732 of the 1967 session of the legislature.

2. A proposal to expand the procedure in sections 29-822 to 29-827 to include pre-trial motions in the field of inculpatory statements and confessions and with respect to the legality of confrontations of the defendant and eyewitnesses.

3. A proposal for legislation containing a procedure for the issuance of search warrants in noncriminal matters in making fire, health, and housing inspections as required in **Camara v. Municipal Court of San Francisco** and **See v. Seattle** released by the Supreme Court of the United States on June 5, 1967.

4. A proposal to establish uniform rules of practice in the district courts where uniformity can properly be attained.

The Council has continued its policy of designating members of the Bar as a subcommittee with a member of the Council as Chairman to research and recommend to the Council the action to be taken. In this manner we have received very valuable assistance from members of the Bar having experience in the particular field. Not in a single instance has a member of the Bar refused to serve on these subcommittees. The work done by them has been excellent and necessarily very helpful. We commend these men for the assistance they have given us. It indicates the professional interest of the Bar in improving the procedural law of this state.

We again call upon the members of the Bar to point out deficiencies in our procedural law with which they come in contact and afford an opportunity to the Judicial Council to recommend needed changes to the legislature.

We have had excellent cooperation from the legislature, particularly its Committee on Judiciary. We sincerely hope that we have the confidence of the legislature based on the quality of our work and the fairness with which our proposals have been presented.

PRESIDENT MAUPIN: I now call on Mr. John J. Wilson to make the report of the American Bar Association Delegate to the House of Delegates. Mr. Wilson!

REPORT OF AMERICAN BAR ASSOCIATION DELEGATE

John J. Wilson

Mr. President, Ladies and Gentlemen: The American Bar Association House of Delegates is composed of several classes of members. Nebraska is represented by George Turner, who is the State Delegate who is elected by the members of the American Bar of

Nebraska. I am the representative of the State Bar Association, and I am elected by you members of the State Bar Association of Nebraska.

As of August 31 this year the American Bar had a membership of 126,000 people, and the Nebraska Association had a membership of 1,180, or 52 per cent of the members of the State Bar of Nebraska were members of the American Bar. We stand twenty-fifth in the forty-eight states on a percentage basis of the members.

I attended the American Bar meeting in Honolulu this year and so did George Turner. According to the reports there were 5,553 lawyers participating at the Honolulu meeting.

Some of the more interesting items in which you might be interested in the action of the House of Delegates are as follows:

By a vote of 90 to 87 the House of Delegates approved in principle the formation of a national Bar-related title assurance corporation. The House directed the special committee on Lawyers' Title Guaranty Funds to corroborate with the Board of Governors' subcommittee to draft a definite plan for such a fund for consideration at the October, 1967, meeting of the Board of Governors. There was quite a fight on this between the title companies and the ones who were not representing title companies.

The House approved the Section of Real Property, Probate and Trust Law recommendations so that the ABA favors legislation which would call for reimbursement of property owners for legal costs involved in eminent domain condemnation proceedings which subsequently are abandoned by the United States.

The House went further than the Section and supported legislation which would reimburse property owners for legal costs and suits which are not abandoned but which result in awards of higher amounts than offered by the United States before trial.

Two acts drafted by the National Conference of Commissioners on Uniform Laws were approved by the House. They were the Bail Offenders Act and the Uniform Certification of Questions of Law Act.

The special committee on Client Security Fund reported to the House that such funds are now in operation in twenty-six states. At the time of the meeting in Honolulu only the governor's signature was needed to add Oregon to the list, and the committee reported six other states were considering or reconsidering establishment of funds. In addition to the twenty-six states, there are six local Bars that have this Client Security Fund.

They created a Law Student Division of the Association.

The approved proposed legislation to prohibit discrimination of any sort in the selection of grand or petit jurors of federal and state courts.

They favored rules of court or legislation to permit law students to appear in court on behalf of indigents and asked for federal funds to train students in conducting such cases.

The House also favored federal government support for such programs over objection of delegates who were against the use of Health, Education and Welfare Funds in law school instruction.

They declined to go on record as approving recognition and certification of volunteer specialists, but adopted a resolution empowering the Board of Governors to further investigate the specialization.

That was about the same group of lawyers on both sides of the question as were on the formation of a Title Assurance Company.

The biggest debate was over the U.N. conventions. The debate on the three United Nations Human Rights Conventions occupied a substantial portion of two meetings of the House. It ended with approval of a section of International and Comparative Law substitute resolution calling for approval by the United States of the Supplementary Slavery Convention, but opposing any action now on the Convention on the Abolition of Forced Labor. The resolution opposed outright the Convention on the Political Rights of Women.

I think that the meetings were well attended, because we did have a large number of people there. Many took their wives and families and had a delightful vacation.

In talking with many of the Section chairmen I think every Section was well attended. They thought the class of material offered at these Section meetings was as great as they had been any time in the past.

Anyone who missed going to Honolulu to the American Bar meeting missed both a wonderful vacation and great training in law as presented by the American Bar Association.

PRESIDENT MAUPIN: I now call for the report of the House of Delegates by Leo Eisenstatt, Chairman of the House of Delegates of the Nebraska Bar Association.

REPORT OF THE HOUSE OF DELEGATES

Leo Eisenstatt

Mr. President, Honored Guests, and Members of the Nebraska Bar Association: It gives me great pleasure as your Chairman of the House of Delegates to present this report to you.

The annual meeting of the House of Delegates of the Nebraska State Bar Association was held yesterday, October 18, 1967, and the following is a summary of the matters transacted:

The report of the Secretary-Treasurer was presented and approved.

To conserve the time of the House and to provide more time for discussion of some important subjects treated later, twenty committee reports as they appeared in the printed program were covered by a blanket motion. Approval of this revised procedure had been secured from the respective committee chairmen and the members of the House of Delegates.

The remaining committee reports and the Section reports were presented by their chairmen or designated representatives, and such reports were approved and accepted.

At the afternoon session an extended discussion occurred on the report of the Committee on the Executive Director and of the Committee on the Reorganization of the Nebraska State Bar Association.

The report of the Executive Director Committee was presented by its Chairman, Mr. Joseph C. Tye, and on the Reorganization of the Bar by its Chairman, Mr. Herman Ginsburg. As I said, after an extended discussion of the matter and at the conclusion thereof a resolution was adopted directing the Executive Council to employ an Administrative Assistant with respect to the following areas of responsibility of our Bar:

- (a) The Public Relations program,
- (b) Act as Special Counsel,
- (c) The Continuing Legal Education program,

and

(d) Such other duties, responsibilities and functions as shall hereafter be given to him by the Executive Council.

Such official is to be an active member of the Nebraska State Bar Association, if possible, and would in addition cooperate with the Secretary-Treasurer in the administration of his duties and

responsibilities. The Executive Council was directed to provide the necessary office space, equipment, and secretarial and office help as needed.

With respect to the Committee on Reorganization of the Bar, the following motion was adopted:

RESOLVED that the report of the Special Committee on Reorganization of the Nebraska State Bar Association be adopted, and said Committee be continued as a Special Committee of this House with instructions to prepare a draft of Rules and By-Laws for the recommended reorganization of this Association, and thereupon to submit the same to this House at the earliest possible date for consideration and, if approved, to submit the same to the Supreme Court of the State of Nebraska for its approval.

The unanimous adoption of the foregoing resolutions and the nature of the discussions which occurred would indicate that these matters have the widespread support of the membership of the Association acting through their duly elected representatives. It is felt that the adoption of the foregoing constitutes a milestone and turning point in the affairs of this Association. Upon the implementation of these two motions it is expected the Association will experience a renewal of vigor and vitality for the betterment of all lawyers, the administration of justice, and the discharge of the duties of this Association and of its lawyers to the public.

The meeting concluded with a review of possible areas for a more active role to be taken by the House of Delegates in initiating and formulating policies of the Association.

PRESIDENT MAUPIN: As you have noted from the program, we have a very fine educational program scheduled for this afternoon and all day tomorrow. We have a program that should be of interest to a great, great many of the members of this Association.

To move this meeting along to use this room for the luncheon, and so we can keep on time or on schedule on these programs, I am going to omit two or three committee reports at this time and call for the report of the Committee on Memorials by Barlow Nye as Chairman.

REPORT OF THE COMMITTEE ON MEMORIALS

Barlow Nye

Mr. President, Members of the Nebraska State Bar Association: Mr. George B. Hastings has served as Chairman of this Committee for the past several years. Each year he wrote a very beautiful memorial report, paying tribute to those members of this Association who had passed on to their reward.

This year he, too, joined the ranks of our departed members, thereby paying his highest and finest tribute.

The remaining members of the Committee on Memorials are Robert H. Beatty, E. B. Chappell, Paul F. Good, Farley Young, and Barlow Nye acting as Chairman.

It is indeed most proper that at this time we pay our respects and tributes to our brothers whose names we now find inscribed upon that proud roster of those who were lately our associates and close friends but who have now passed on.

Those members of our Association whose names we now honor but whose loss we should not mourn, dedicated their lives to promote and uphold our system of government, and to demonstrate the concept that we live under a constitution and control of laws and not the rule of men.

Public service to all mankind and a steadfast devotion to God and country dedicated their lives. Their lives leave a monumental inspiration to those of us who remain to emulate their contribution to the profession. All were respected and distinguished lawyers.

Repeating an often quoted text of my predecessor, George B. Hastings, from Proverbs 22, verse 28: "Remove not the ancient landmarks which thy fathers have set out." While this referred to the corners and boundaries of land, he referred to the old traditions, ethics, and morals of the profession. And so we should not mourn the loss of our brothers with heavy hearts but should always thank a gracious God for letting them live among us as a constant reminder of the ties of loyalties and duty which we owe to our profession. This is but a suggestion of the quest sought by all of us. It is in all such matters that we now eulogize the noble members of our Association who have been taken from us this past year.

Let us all stand, then, in silent tribute to the lives of those fine lawyers as I read the roll:

John A. Anderson, Omaha
Penelope H. Anderson, Omaha
Frank F. Aplan, Rushville
Arthur O. Auserod, Bartlett
Edgar A. Baird, Jr., Omaha
Lee Basye, Burlingame, California
F. B. Baylor, Lincoln
James E. Bednar, Los Angeles, California
William J. Bowen, Omaha

Glenn W. Buck, Crete
John P. Dalton, Omaha
F. A. DesJardien, Omaha
L. A. Devoe, Ogallala
Robert R. Dickey, Jr., North Platte
Gerald M. Drew, Omaha
Frank A. Dutton, San Jose, California
Joseph M. Emmert, Omaha
Elton D. Frazier, Omaha
Leo Fried, Albuquerque, New Mexico
J. H. Getty, Aurora, Missouri
H. L. Giesecker, Lincoln
Emmett Hannon, Longview, Texas
George B. Hastings, Grant
J. A. Hayward, Lincoln
Neal H. Hilmes, Omaha
John W. Holoubek, Omaha
George E. Howard, Lincoln
L. D. Hurley, McCook
E. Melvin Kennedy, III, Omaha
Doane F. Kiechel, Lincoln
Charles C. Larsen, St. Paul
Robert H. Mathew, Loup City
Howard Mielenz, Wahoo
E. W. Moehnert, Loup City
Perry W. Morton, Springfield, Massachusetts
Lloyd D. Mundy, Omaha
James W. Murphy, Omaha
Robert D. Neely, Omaha
W. L. O'Malley, Omaha
Charles W. Peasinger, Omaha
Ernest M. Petersen, Omaha
Byron W. Reed, Columbus
Francis V. Robinson, Ashland
Robert H. Saxton, Omaha
Leon A. Sprague, Red Cloud
L. J. TePoel, Omaha
Norma Ver Maas, Lincoln
John W. Yeager, Lincoln
Casimir Zacek, West Point

Thank you, Mr. President.

PRESIDENT MAUPIN: I now call on our Secretary to announce the new Officers of the Association and any other announcements he may have.

ANNOUNCEMENT OF NEW OFFICERS**George H. Turner**

Mr. President and Members of the Association: Pursuant to the governing rules of this Association, the Executive Council met in July and nominated candidates for offices to be filled. A notice of such nominations was sent to every active member of this Association.

The nominees are:

For President-Elect, C. Russell Mattson, Lincoln.

For Member-at-Large of the Executive Council, Wendell E. Mumby.

There being no opposing candidates who filed, they are automatically, under our procedure, elected to the office indicated.

We will have a very fine luncheon tomorrow with the President of the American Bar Association as our guest and speaker. I urge you to purchase your tickets early.

Tickets are still on sale for the annual dinner tonight and our guest and speaker is retired Justice Tom Clark of the United States Supreme Court. I know you will all want to hear him.

PRESIDENT MAUPIN: By reason of the necessity of clearing this room and setting it up for this afternoon, I will omit further reports at this time. They will be presented at the final formal session of this Association to be held at the close of the program tomorrow afternoon at four-thirty o'clock.

This meeting stands adjourned at this time until four-thirty Friday afternoon.

...The session adjourned at eleven-fifty o'clock...

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NEBRASKA STATE BAR ASSOCIATION
TORTS SEMINAR

THURSDAY AFTERNOON SESSION

October 19, 1967

The Torts Seminar "New Vistas, Leading Cases, Trial Techniques" was called to order at one-fifty o'clock by President Maupin.

PRESIDENT MAUPIN: Ladies and Gentlemen of the Association: We regret that we are a few minutes late in opening what we conceive to be a highly interesting, informative, and educational seminar that has been arranged for this afternoon and all day tomorrow, through an arrangement that was worked out this year between the Nebraska Association of Trial Attorneys and the Tort Section of the Nebraska State Bar Association to co-sponsor this meeting as a joint meeting of the Tort Section and of the Nebraska Association of Trial Attorneys.

Without further ado, I should like to present to you Tom Walsh of Omaha who is the President of the Nebraska Association of Trial Attorneys, who will take charge of further introductions and further handling of the meeting. Mr. Walsh!

THOMAS A. WALSH, Jr., Omaha: Fellow Members of the Nebraska Bar Association: To me, introductions of this type have always been sort of like a coin flip at a football game. I can assure you they may be necessary but they should be brief, so I will follow that program.

As Murl has told you, I think this program is going to be something we are all going not only to enjoy but profit by. I think a good deal of the credit, in fact *all* of the credit, should go to Bernie Smith, who is the Chairman of the Tort Section of the Nebraska Bar, as well as Frank Morrison, Jr. and Jim Bruckner of Lincoln who were the Co-Chairmen on behalf of the Nebraska Association of Trial Attorneys. Their efforts have resulted in this program that you are all going to be seeing very shortly.

We've got a top-flight bunch of men who have spent a good deal of time. The lineups have already been announced, so I think it is about time for the kickoff. With that, I would like to introduce to you Mr. Jim Bruckner whom most all of you know, and he will introduce the first speaker.

M. J. BRUCKNER, Lincoln: When "Biff" Morrison and I were assigned the responsibility of formulating this program, we concluded that we should try to get an outstanding lead-off man of the Lou Brock variety, a man whose daring and imagination and articulation could truly inspire this group.

One name immediately came to mind, and that is the name of Tom Lambert. Our problem was, however, trying to find Tom available. Tom has graciously consented to come here today at some great inconvenience. He has a speaking engagement in New York tomorrow night and one in West Palm Beach, Florida, on Saturday, but nevertheless agreed to come.

Tom truly fills this bill. He is a Rhodes scholar. He was personally selected by our Dean Roscoe Pound as his successor in ATLA in 1955. Tom was a law school Dean at the age of twenty-five. He participated in the Nuremberg Trials as Trial Counsel to Justice Jackson.

I personally believe that Tom is the most interesting, imaginative, articulate, and entertaining speaker in the field of torts that I have ever heard. He is the spokesman for the American Trial Lawyers Association. He is probably the smartest man that I know who calls me by my first name. So it is with a great deal of pleasure that I present to you Tom Lambert, Editor-in-Chief of the American Trial Lawyers Association.

DAMAGES FOR WRONGFUL DEATH— UNSETTLED PROBLEMS

Thomas F. Lambert, Jr.

Mr. President, Mr. Chairman, my great and good friends, Frank and "Biff": Big Jim, after that lyrical introduction composed of equal parts of moonlight, mint julep, and hyacinth and hyperbole, I can hardly wait to hear what I have to say. But I will try to bear in mind that in order to be immortal, a speech need not be eternal.

I take consolation that this introduction was not like an experience I had a few years ago in Biloxi, Mississippi when I was debating a very formidable, not to say ferocious defense spokesman and receiving my wound stripes from him, and when our vigorous exchange was completed this little old lady walked up and she looked up and said, "Professor, I loved your speech! It was superfluous!"

I thought, what is this? A wise guy, or something? But she looked so fetching and disarming, like Whistler's mother, I said, "Thank you very much, Madam. I am thinking of having it published posthumously."

She looked up and said, "I can't wait!"

I always love to visit in the South, as I am sure many of you do, in those gracious latitudes where gracious living has not become an ineffectual ghost.

I think of what a Yankee friend of mine said about an inexperience he had when he made a little talk at the University of Virginia Law School. When he finished discussing the stirring subject of "The Law of the Medes and the Persians," a very fetching, appetizing coed came up and said, "Professor, I loved your lecture on 'The Law of the Medes and the Persians'. Mah Mama was a Mede."

Although it is a little alien to our subject which has a rather, wouldn't you agree, gruesome, grisly, grim sound to it, "Wrongful Death" that ends in an optimistic note "and Survivorship," I thought that in well chosen counterpoint I would tell you a very brief little story about products liability, because of course that is the most yeasty, expansive area in accident law today.

This is about the astronaut who was perched on the launching pad ready to be hurled up into blue nights and white stars, and somebody at the bottom said, "How is it up there?"

He yelled down and said, "How would you like to be resting on 150,000 components, all purchased from the lowest bidder?"

It kind of brings out the importance of quality control and periodic audits in safety.

Jim mentioned or implied that this is about the fourth time in the last ten years that I have been privileged to visit with Nebraska lawyers about current trends in accident law and the things more excellent, the fourth time in ten years recalling Dr. Johnson's observation on the fourth marriage of a friend. He said, "It was the triumph of hope over experience."

While I continue to be baffled at your graciousness in inviting me back, I rejoice in the mystery and I hope when I have done that you will deal with me with the measured compassion of the same Dr. Johnson who, with his landlady, saw a dog walking on its hind legs and the landlady exclaimed, "How grotesque!" and Dr. Johnson said, "Madam, the notable thing is not that he does it so poorly, but that he can do it at all."

And surely that is true when a mere school teacher who smells of the lamp, and I remember once when the Mayor of Minneapolis had the thankless task of introducing me to a group of lawyers and he said, "I give you Professor Lambert." He said, "A professor is a man who would look like a foreigner in any country." And as if being a school teacher weren't bad enough, I am also a clumsy conjunction of a school teacher and an Editor, who has been defined as "A man who approaches all questions with an open mouth."

So we turn to this subject of "Wrongful Death." It is a subject, of course, of universal interest, is it not? As Mark Twain said, "Life is a losing proposition; nobody ever came out of it alive." So, you know, in a sense you sometimes run into this argument in personal injury cases—"Well, the victim wasn't very healthy to begin with. He had a fine future behind him." I think the technical term is "pre-existing disability."

Well, of course we have learned that when you kill a man, all you ever do is accelerate death. We are all going to die. The salutary principle, of course, is that the tortfeasor is not entitled to a one hundred per cent healthy victim. We take our plaintiffs as we find them, and it is no defense to a hemophiliac death case, you know, that he didn't have a hale and hearty future.

It is like when you broadside the farmer's horse-drawn wagon loaded down with a cargo of eggs headed for market and you have an informal omelet scattered all over the crossing. It would hardly be a defense to say, "Well, if it had been loaded down with golf balls it would have minimized the loss." We take our victims as they are. It is no defense to a claim for a cracked skull that the claimant had an unusually thin one. I think lawyers call this the "egg-shell skull" rule, and it is one of the best that I think we get in the academies.

Now I think especially since we have a few ladies ornamenting the gathering today we ought to have just a little bit of history on this subject of "Wrongful Death". I know apprehension chills you when you hear about that invocation of history. My Chief, a great lawyer's lawyer, Justice Robert H. Jackson, used to say, "Don't try to prove your case by an invocation of ancient history." He said, "That's too much like oxtail soup. It's going too far back to find something good." Strike the jugular, not the capillaries. Get right with the subject.

But I think in this one we need a little bit of history because, would you believe, those of you who are not involved in Defenders and bumpers in the great field of accident law, you know seventy-five to eighty per cent of all reported appellate opinions are in the field of accident law. Had you ever thought of that? And that is why it is a wonderful thing to meet and visit with a Bar Association where the whole conversation does not sound like an enlarged capital gains conversation, but actually discussing the law, the living law, where people live.

Well, would you believe, then, in the history of our subject, and this strains credulity, that in common law there was no civil liability for wrongful death? Credit, if that is the right word for

this rule of immunity, goes to Lord Ellenborough, whose forte was not common sense. Lord Abinger once began the disposition of an appeal from an opinion of Lord Ellenborough by saying, "This is an appeal from a judgment of Lord Ellenborough, but there are *other* reasons for reversal." He continued, "To have a judgment of Lord Ellenborough in your favor is a handicap, but not necessarily a fatal one."

It was the same Lord Ellenborough of whom it was said that his love letters to his wife, "Dear Betsy", read like the charging part of a bill in equity.

He had this case of *Baker v. Bolton* back in 1809. The stage coach driver so negligently managed the horse-pulled coach that it overturned, and the wife was fatally injured, and after surviving in some discomfort, died. This was a suit by the surviving husband for loss of her services. He simply reared back and laid it down. He said, "Death cannot be complained of as a cause of action in a civil court." He was a puisne judge. He was a trial judge. He didn't cite any authority whatsoever, just his mere ipse dixit.

It reminds me of the ancient Hindu cosmogony, which held that all the world rested on an elephant, the elephant rested on a turtle, and the turtle rested on—whatever it rested. He cited no authority whatsoever.

Well, that was the beginning. Of course, in the old days where death was a felony and all felons were executed and their estates were forfeited, I don't suppose there was so much hardship in a rule that for the ultimate trauma of death there was no civil remedy, but later on, of course, forfeiture for felony, escheat propter delictum tenentis disappeared and you didn't have that justification for it.

This rule of no civil liability for wrongful death, of course, became intolerable with the invention of the steam engine, because it was no respecter of persons. It ground up the lives of not only wandering cows and troubadours and ministers of states, but Englishmen generally. So this rule of *Baker v. Bolton* became intolerable with the invention of the steam engine, and Lord Campbell's Act was passed. That is granddaddy of most statutes in the United States today. It is the protagonist of the Nebraska statute.

The statutory pattern is measuring recovery by loss to the family survivors, by and large a pecuniary loss statute, and in effect it said, "Whosoever"—that is fairly inclusive, is it not?—"by wrongful act, neglect, or default causes death, and the circumstances are such that the deceased, had he *lived*, could have recovered, then

his personal representative would have a cause of action in behalf of certain listed statutory beneficiaries"—How much? What's the quantum of damages? How are we going to measure it by pounds, shillings, and pence? How much?—"and he shall pay," mark me now, "that sum which the *jury* finds is proportional to the injury suffered." No word about "pecuniary loss" but "that sum which the jury finds is proportional to the injury suffered", nothing about the King's shilling being the only reality.

To see the thrust of this thing before and after Lord Campbell's Act, as the lawyer's say, "Let's put a case." Lawyers love to put cases, concretize it, get it out of the stratosphere. So let's put a case.

This is the case of a thirty-two year old switchman, with a wife and three children, five, seven, and nine, who has a stomach ailment and goes to the hospital. While he is there they get ready to do certain tests. A nurse is told to lavage, wash him out with a saline solution. So she goes over to the cabinet, which is low—that is interesting, isn't it?—reaches down, you can't quite see in there, and there are two jugs, one the saline solution, the other, sodium hydroxide—you're ahead of me—a highly corrosive substance. She reaches down. She's tired. It has been a long day. I find that credible, don't you? She's tired and it has been a long day. She gets the sodium hydroxide, administers it to him. Of course he is overwhelmed with terrible pain.

To make a long story short, he survives for six weeks in excruciating pain. Maybe another word would be better than "excruciating"; I can't think of it offhand. You know, beware the power of the invocatory phrase. Lawyers learn not to use adjectives. Use *nouns* and let the adjective come from the jury or the audience. Don't *you* say "outrageous!" You say, "This is what she did," and let the audience say, "How outrageous, intolerable, unconscionable!" So let's say "in considerable discomfort for six weeks, and dies."

They have to dilate his esophagus, they have to do a resection of about three-quarters of his stomach, burning of the linings of the digestive tract, et cetera, et cetera, et cetera—a highly *disagreeable* experience. After six weeks he dies.

You don't have to *invent* cases in the field of accident law. What romance can compare to the reality of the decided cases! *Truth* is stranger than fiction, because fiction has to stick to the *possibilities* and truth doesn't. You work in the field of accident law and you don't have to read "Whodunits" or horror stories, shilling shockers. We read the Bible to find out what we *ought* to do, and Tort Law to see what we have been doing.

Let's look at this thing here now, and calling a spade a spade and not an agricultural implement, on these simple operative facts I suggest to you that two interests have been invaded. Draw a straight line between them. First, our thirty-two year old switchman. His interest in freedom from bodily harm, zealously protected by our law, has been, as the Twelvers can find, negligently invaded here by the orderly or nurse. Oh, I know, you are not going to be suing her, but you are going to be suing the hospital and they are going to be invoking charitable immunity. But *not* in the great State of Nebraska, *Meyer v. Drozda-Hospital*, 141 N.W.2d, 852 Supreme Court of Nebraska, 1966.

In Nebraska your law is that the good Samaritan, whether he rides an ass, a T-model Ford, or a Rolls-Royce he must ride with reasonable prudence, and then when he does good in the wrong way, he must pay. The charity must be just before it is charitable. I think there is infinite good sense in this ruling: "Immunity breeds irresponsibility; liability imposes an inducement to preventive vigilance" which prevents the accident. And that is what we are after—accident prevention. I call this the prophylactic purpose of tort law. Minimize or reduce the staggering accident toll.

Well, now, two interests have been invaded, the interest of this young man in freedom from bodily harm, but now he is gone, the breadwinner is gone, good old Dad is gone and we have left the widow and the brood. Their income, the pay checks are cut off. So, obviously, their interests in the economic support, their right to contributions from the breadwinner has been tortiously terminated.

Now, what was the response of the early common law to a claim for the interference with these two interests? First, as to the interest of our young switchman. He had a cause of action in his bosom at the time he died, of course he did, for pain and suffering, for disability, for loss of taste and smell. As a great philosopher said, "Don't worry, don't hurry, and don't forget to smell the flowers." These are the intangibles of life, the precious intangibles.

Suppose every meal you ate from now on tasted like sawdust—no more meatballs and spaghetti for you! Life is like an artichoke; you pull off a leaf and only the tip is edible. We've got twenty-four hours a day, and only in a few fugitive moments do we really live, when we are doing the things we love. It doesn't matter whether it is painting a picture, playing a sonata, playing golf, going fishing, going sailing on the rivers or the lakes. Usually it is our embezzled heaven, it's our little vacations, rather than our vacation. This is

the joy of living, you see. And his interest is freedom from pain, and his enjoyment of life has been violated.

Now as to his cause of action there, they stopped him cold with a Latin maxim. Whenever a law gets really harsh and hardboiled it frequently takes refuge in a Latin maxim: "*Actio personalis moritur cum persona*," a personal action died with the person. His cause of action for the interference of his interests went to the grave with him. And of course if it is a defendant who throws acid in your face and then is killed by a lightning bolt or commits suicide, his liability went to the grave with him.

Now, a cause of action that this young fellow had for his own interest, namely has pain and suffering and for the medical expenses paid and incurred between the date of the tortious interference and the date of his death, that interest today is protected by what we call "survival statutes"—not wrongful death, "survival statute." All causes of action vested in a person or subsisting against him—that takes care of the defendant—at the time of his death survives in favor of or, as the case may be, against the decedent. That is the survival statute.

Now let us look at the widow and the brood, termination of their pay checks. Well, there's the rule of *Baker v. Bolton*. You can kill him with immunity. You don't even have to bury him. This was an intolerable rule and it was met by what we call Lord Campbell's Act in England, and remember, when it came to quantum it said, "such sum as the jury finds proportional to the injury."

All fifty states in America now have in effect a survival statute or a wrongful death statute. Nebraska has one. These statutory patterns are three in kind: One is what we call "recovery measured by pecuniary loss to the survivors." Generally these are pecuniary loss statutes, so Lord Campbell is typical. You figure out the person's age at the time of death. You project his earning capacity over—watch this—over his *working* life expectancy, not over his *life* expectancy. He may come from a family of extreme longevity. You know, they are all ninety-year olds. They grow them well and truly in the Midwest, do they not? But this fellow may be a longshoreman and it is going to be hard to visualize him with "tote that barge, lift that bale" when he is ninety-five. So it is his *working* life expectancy.

That is the great thing about being a professional man. You may be at the summit of your powers when you are sixty-five or seventy, rather than like the longshoreman or the ditch digger. Recovery measured by pecuniary loss to survivor.

The second statutory pattern is "recovery measured by the loss to the estate." Here we have three subsidiary rules: One is the net income rule where you figure out what the fellow's future earnings would be, subtract from that the cost of his own upkeep, his net earning, and that is what the widow and the brood would get. So, in effect, that is a lot like Lord Campbell's Act itself, isn't it, pecuniary loss to the survivors. It can be more, because he may have no dependents, or there may be nobody who has a reasonable expectation of pecuniary gain from his continued existence, but you still get his net earnings, and it could be more. Or it could be gross earnings; in other words, project all the earnings this fellow would make for the balance of his working life expectancy, always reduced to present worth. Don't even subtract from that the cost of his own upkeep. Well, that could give you more than under Lord Campbell's Act, obviously when you don't even subtract the cost of his own upkeep.

The third would be, you estimate what he would earn and save. Now think about that just briefly—what he would earn and save. What do we mean by savings? He might be, as most people are, a wage earner and save very little. His pay check goes to maintaining the family tribe. He doesn't save very much, and at his death he is not going to have a swollen bank account or an investment portfolio. So this third sub-species of measuring damages by loss to the estate seems to me, I suggest, grossly unjust and represents a minority view.

The third statutory pattern in my State, Massachusetts, and also in Alabama, is you have a punitive statute where damages are assessed in accordance with the degree of culpability of the wrongdoer. It is not compensatory. It isn't designed to achieve reparation, to give back what was lost or taken from the widow and the kids; it is in accordance with the degree of culpability of the wrongdoer. See what that means, what the thrust of that is? You could have a CPA in the prime of life, age forty-five, and the wrongdoer could just barely be negligent, just visibly fall below the standard of conduct—why, he was almost using due care! The damages could be catastrophic, the loss to the widow and the children because, in the Dickensian phrase, our CPA had "Great Expectations." It didn't mean as it does in some states, the CPA can't practice anything; the Bar of his state was somewhat more inert than they are in other places, and get nothing, or virtually nothing.

On the other hand, you could have a wrongdoer, quite gross in aggravated wrongdoing, cut down a victim who happened to be a ne'er-do-well, a bum. He was born a bum, lived a bum, and would have died a bum. He was an itinerant humanist at best, an economic

liability, always putting the paw on people, don't you know. But you kill him off by gross or aggravated wrongdoing and it could be the ceiling would be the limit. Damages in accordance with the degree of culpability of the wrongdoer.

So this is not a triumph of reasoning, is it? Of course in my State, Massachusetts, you have a ceiling. I'm going to talk a little bit about ceilings as we move along here. The ceiling in my state used to be \$5,000. Then they raised it to the munificent level of \$15,000, then up to \$20,000, and now it is \$50,000. In my State, ponder this, it *pays* to kill. It pays to kill.

You can almost visualize the train dispatcher calling the engineers around in the morning and saying, "Now, men, we've been having these grade crossing accidents. Be sure you kill them off. I don't want any leg-off cases. They're expensive!" You know, it's cheaper to kill them than it is to maim them or scratch them. This approach gave rise to what I am sure is an unfounded canard, and that is why the Pullman Company made their berths lengthwise so that in event of derailment there would be fatal injuries, and the conductor would pass through the car with a fireman's ax and dispose of any who providentially survived. I say that is an unfounded, groundless canard.

So now we are trying in your state that action for wrongful death of this thirty-two year old fellow with a wife and three kids, and you are under Lord Campbell's Act, pecuniary law statute measuring recovery by loss to the family survivors. What are some of the recurring practical problems, because we do like to be practical in our discussions, do we not? You learn that when you live with trial men very long. When you talk about the top ten Tort cases I think of the great band maestro who was celebrating his tenth anniversary and someone came up to him and said, "What have you had most requests for?"

He said, "Where's the Men's Room?" Practical!

Or this fellow who had a speech impediment. He went to this school of speech therapy and a friend saw him walking down the street not long thereafter and he said, "How's it working out?"

He said, "Well, I can say Peter Piper picked a peck of pickled peppers, and how many pickled peppers Peter Piper picked, bu-bu-but it se-se-seldom occ-cc-curr in conversation." So you've got to be practical.

What then are some of the practical problems? It seems to me one thing is your whole address to the jury, your whole stance. You have to say something, you know, to get off dead center. How

about, "Now we come to the sad bookkeeping and audit of death"—
"Now we come to the sad bookkeeping and audit of death."

What kind of a man was this? There is no point in starting out thinking he was a pillar of church society. He may have been a gambler, a drunk, a ne'er-do-well. He was known to have said, "I was on the wagon for two weeks and lost fourteen days." He may have had so much on the cuff that he had lost his shirt long before. There are all kinds of people, as we know. He might be the kind of man who takes the pay check home to the little woman. You have *seen* people like that. You might even have had the good fortune of being reared in a family like that—or the kind where the old man will subtract \$50.00 and say, "Well, dear, here is all the rest of it." But there is the first kind, you know, who says, "Dear, can I have a little car fare?" She says, "I gave you two tokens with your sandwich and your apple in the morning." So you get all kinds, from the kind who gives them nothing to the man who gives them his pay check. What kind of a man was he?

We are also concerned with the distrust that I think people on the face of it have for death actions. After all, old Dad is dead, and we can't recall him from the grave. This makes a very powerful suggestion to the jury. "If I had the power of miracles, we wouldn't be in this courtroom asking for money. We'd just want that little girl back here so she could walk out of this courtroom with her mother and father on both sides," or "We'd bring that thirty-two year old switchman back to take these children out sailing on the lake, take them to church, teach the boys how the quarterback fades back and gives it to the tight end, if we had our way. We can't do that. All we can ask you for is money."

See, people think. This is part of the history of it, this stigmata, as it were, of suing for damages for wrongful death. The railroad companies did very effective propoganda on this.

So the concept here is that the widow and kids are trying to make money out of dear old Dad's death. In other words, the damages are bloodstained. You've got to face it. This is part of your confrontation. The little child has been killed. He darted out in the street and he got hit by a two and one-half ton truck. We can't bring him back. This mother and father trying to make money out of the sudden death of that little child! Especially if they've got *eight* other children—especially if they've got eight others and she was an *adopted* child.

Now, what have you got on the other side? All you've got is words, that's all you've got. The engineer has his theodolite, the surgeon has his scalpel; all you've got is *words*. But words are

tremendous. They can shake the dead in their shrouds. "So it *was* a little adopted child!" You tell that jury the mother didn't *have* to adopt her. There is no law that *made* her. She had *eight*. "Not blood of my blood, nor bone of my bone, but nevertheless my very own. All the others grew under my heart—and you grew *in* it." Sudden the worst can turn the best to the brave, where resourcefulness is added to and intensifies valor itself.

The tough cases, of course, are not the switchman who gets wrongfully killed by blatant wrongdoing, survived by a widow and kids. Those aren't the tough ones. It's like an old trial lawyer I knew from St. Louis who once said, "Lambert, a leg-off case tries itself." In a very real sense this is true. The jury, you know, haven't got degrees from MIT or in logic from Cambridge or "Oxbridge" or even a red-brick university, but they know a thing or two. That's why they are there. They are a cross sectional slice of the neighborhood—the Colonel's lady and Judy O'Grady, a garage mechanic, the liquor salesman, the cross sectional slice to give you the perfect point of view of the average man. Now, isn't this what we're trying to do? We are trying to arrive at fair and reasoned values in accordance with the community's notion of fair play. If that is what it is all about, who is better fitted to come up with that figure and hammer it out by the dynamics of small group discussion?

The single judge, a panel of Platonic commissioners, even if they were professors, or the cross sectional slice of the neighborhood? Somebody said, "When our world wants to figure out the trajectory of a star or catalogue a learned library, it uses up its specialists; but when it is concerned with something that is *really* important, in terms of the adventure of life, it goes out in the street and collects twelve men and true, twelve average men. It has been said that this is what the founder of Christianity did. As Chesterfield said, "I would trust *twelve* ordinary men, but not *one* ordinary man."

I think there is this concept, I say, in confronting these hard problems, there is the concept that if you have wrongfully caused a death, you owe this family something. So don't talk about damages. That is a dirty word nowadays—"Compensationitis." He wants to be cured by a greenback poultice. He has got gold fever. "Damage" is a dirty word. You don't talk it. He owes a *debt*. Society, speaking through the Twelvers, "We're out to collect that debt." I am told Americans believe in debt collection. They say we like Finland. They pay their debts. You know what Cal Coolidge said, "They hired the money," didn't they? They get the idea that if you can kill with impunity, you'll be killing more. So let's give an incentive to vigilance and to take appropriate precautions

and safety procedures by imposing the debt and collecting it. "Forgive us our debts." Americans believe in collecting debts.

Now when you come to the death of the housewife, for a long time in our country there was sort of an axiom that you could kill mothers, young or old, for trifling insubstantial sums because what good were housewives anyway? They didn't earn anything. They were just consumers, a "Maw." Ma was a "Maw."

There is one time when every husband, especially if there are young children in the family, knows how much a good wife is worth, and that is when he stands by the graveside and prays that it is a door and not a pit—"Til death or sorrow or sadness must marry by body to that dust it so much loves, stay for me there."

Well, his bleak education is about to begin. He is going to find out now all the things a good wife does. He is going to discover that somebody has got to buy the food. You say, "Well, that's not simple, man, that's primitive." Well, you don't *buy* it until you *plan* the meals as a dietitian. Mother was a dietitian. We didn't give it a fancy name, but somebody *planned* those meals. You can't buy the peanut butter and jelly until you calibrate the number of lunches you are going to pack at the supermarket. A dietitian, a food buyer, the cook, the dishwasher.

He has got a cut finger; he was out there playing football and he got tackled and he hit his arm on a sewer clock. Now, who is going to kiss it and put a bandage on it? Are you going to hire a maid to do that?

I am trying to make a point here, that the mother is more valuable than the maid you can hire because she can give you *nest warmth* that the Kelly Girls can't give you in that sense—nest warmth.

A little-girl is cross-eyed. Watch the mother take her under her sheltering wings the way that no maid or tutrix can do.

So she is the nursemaid, she is the seamstress, she is the chauffeur. The modern American housewife with small children in suburbia, the bedroom of America, is a Centaur, half wife and half station wagon. Car pools—she's the chauffeur, she's the handy man. Some one has got to fix the window sashes and the storm windows. Not old Dad—he's all tired out. He has got to read that WALL STREET JOURNAL to see about the bears and the bulls and the pigs, and he's sucking on his third martini. Mother! Mother's the handy man.

In other words, with a slight exercise of imagination you can put down twelve categories of work that the housewife, the mother, performs.

“M’ is for the million things she gave me;
‘O’ means only that she’s growing old;
‘T’ is for the tears she shed to save me;
‘H’ is for her heart as pure as gold;
‘E’ is for her eyes with lovelight shining;
‘R’ means right, and right she’ll always be.
Put them all together they spell “Mother”,
A word that means the world to me.”

Now, test it in yourself. There are many men in this room who will make the same testament I will. I never saw my mother go to bed once. The first one up! Your brother has got a big day at the Junior Prom tomorrow and someone is ironing his shirts with starch in them, darning the socks. Last year when I was home I stayed with my mother and I thought, “Gee, I’ve been making these speeches, they were true as I saw the truth. I wonder if she will still be the last one up?” Oh, I had to get to bed in order to get that early flight in the morning. The last sight I saw, the old gray hair under the bright lamp, sewing away. The work of a mother is like the railroad tracks, the end seems in sight but never is.

So if you’ve got the death of a young mother with young children, what you are doing is, you’ve got to buy in the hard-boiled open market round-the-clock substitute mother care, and you are going to find out you can’t just replace her with one employee. An employee says, “I do the *light* housekeeping. I don’t do the dirty work. Someone has to clean the toilets.” You are going to have to hire so many people! Man, you are going to be paying workmen’s compensation premium unless you have an exclusion for domestic employment in your state. This is when you’ll find out what a good wife is worth.

Now, please don’t believe this is watery sentimentality. Take the case of *Legare v. U.S.A.*, 195 Federal Supplement, 557, Southern District of Florida, 1958 by strong Judge Bryan Simpson, since elevated to the Fifth Circuit Court of Appeals. I knew a little bit about that case.

The husband was an Annapolis man in the submarine service. I think that is important, because it meant he spent an awful lot of time away underneath the Polar Cap in the atomic subs, which meant that the mother was doing double duty. She was the mother and father all rolled into one, living a double life without duplicity. They had been childhood sweethearts, playmates, married, and they had five kids.

She went into the VA hospital to have the sixth, taken by Caesarian section. It is what they laconically call an incompatible blood transfusion, a gross mismatching of blood. She lived in excruciating pain for seventeen days and died. She knew that she was staring into the grinning skull of death because in extremis, extreme unction, was administered. She knew that she was leaving this motherless brood behind. What about psychic injury? Is every grieving mother an accident faker? Some of you have been in St. Peter's. You enter and you look to the right and there is a statue, "The Pieta", the universal symbol of the sorrowing mother. Not all grieving mothers are accident fakers.

So she died, and there was a question of how much was a good wife worth. Now, you know, some of these claims anyway are well grounded. Uncle Sam admitted liability. "We goofed. It is a question of how much."

Since you are suing under the Federal Tort Claims Act there is no jury. This was interesting, I think, because Judge Bryan Simpson said, "No one man should have to decide this awesome question of how much is a good wife worth any more than any one judge should have to decide guilt or innocence in a capital case. What man born of woman wants to take a poison chalice and hand it to the accused? This is an act of shared community responsibility." Judge Simpson said, "I shouldn't have to decide this."

He pointed out that the surviving husband had taken half the kids and put them with a brother and half with a sister-in-law. He said, "This is not the way I want it, but it is the only way I can afford it." He paid each of them \$400 a month to look after these children. He said, "I want them to grow up together, to know each other, love each other in a little family unit. I want to be there as much as I can. I don't want them scattered on the community."

Then expert testimony was put in. You see, you get the man who works with fraternal and benevolent organizations in charge of broken homes. What does it cost to hire the maid, light housekeeping, heavy housekeeping, the dishwasher, the nursemaid? What does all of this cost on the open market, cold figures? Tabulated up you are talking about big money. He awarded \$125,000 for the loss of this mother.

Then in Florida, under their statute, not under most, the surviving spouse can recover for loss of conjugal fellowship and other intangibles of that nature, and he cited distinguished authority. He said, "The love of a good wife is more precious than rubies," and he awarded \$25,000 for that, a total of \$150,000.

Now that is the young wife. But you are asking, "Yes, but how about the old wife?" I've got a case for you: *Fred Bussey v. Griffin Bros.*, 162 Federal Supplement 276, the Western District of Pennsylvania, 1958, by a strong judge, Chief Judge Wallace Gourley, subsequently, briefly, and forthrightly affirmed by the Third Circuit a prestige laid in court, 261 Federal 2d 594.

The case is very simple on its facts: Old wife, worked together all these years with her husband. They ran a little restaurant. She was very frugal, helpful. She was killed in a car-truck collision. A simple question: How much is the old wife worth? The jury brought in \$80,000. Post-trial motion to set it aside on the grounds it was excessive.

We have it on high authority. Chief Judge Gourley himself told me one night at a banquet, he said, "Lambert, I took the post-trial motion under advisement. I went home and I made a list of all the things Mrs. Gourley had done for me that week." He said, "I thought I had a big list. It was a laundry list. I discovered I needed two lists."

This was the substance of his language. He said, "The love of a young wife for a young husband is the elixir of life," but he said, "The love of that old wife for the old husband when on the sunset slopes of life together, they had been close companions all these years, the love of the old wife is the very *oxygen* of life itself."

So you test it. You ask a man, "What is your most important dollar?" His last dollar. "And what is your most important minute?" It's your last minute.

You see, it's the poets who know these things. I say that trial lawyers should love poetry. What is poetry? Robert Frost says it is immediately indefinable, but eventually unmistakable. It begins with beauty and it ends with truth. Prose is proper words in the proper place; and poetry the *most* proper words in the *most* proper place."

So you think of what the poets say about the old wife. Remember, some of you have seen this and what an experience it must have been, "Knickerbocker Holiday" when Walter Huston sang "September Song". That is the way the poets tell us these things. They tell us the same things the actuaries do, and just as an actuary is better than any mortality table that has ever been written, so the poet is better than the actuary. He is an extension of the interior life of the actuary's mathematics. So Walter Huston says, "In the autumn of life the leaves are falling; there is no time for the waiting game." So Judge Gourley held that the post-trial motion should be set aside on the grounds of excessiveness.

I want to say a couple of words and then close on the case of a child, because that is the tough one, not the thirty-two year old switchman with the widow and three kids. How much is the worthless child worth, because I know there are a lot of places where they sell children cheaply. I am familiar with the Hoover case out of the Eighth Circuit. Of course I noticed the other day in *Clark v. Zimmer*, 374 Federal 2d 924, Eighth Circuit, 1967, a splendid opinion by Circuit Judge Lay. There was an award of nearly \$13,000 for the death of a twelve year old boy, and I don't believe it was challenged on appeal on the ground of excessiveness. Sometimes our jurisprudence moves with glacial slowness, but it moves. About the only thing I can say for my state is that your punitive death statute helps you out in two cases, old people and very young people. They can get mad at the defendant and express it in accordance with the degree of his culpability.

I want to put to you a case of a four year old boy. This is an actual case, just down out of California: *Schwartz v. Helms Bakery*, 430 Pacific 2d 68, Supreme Court of California, which is a fortress, it seems to me, of sound and reasoned jurisprudence these days, a lamp light, a lighthouse for the rest of our courts.

The case is very simple on its facts. It was twilight time, the colored wall that divides the night and day, dusk was coming on. This is important. Winter time—what is winter in Los Angeles? The case says it was wintry weather.

A little four year old boy saw the bakery truck. What is he going to do? He is going to dart out. There are the goodies! He only darts for one reason—he can't fly. He darts out. He *nearly* got hit by an oncoming car. Lucky! And the driver of the pastry wagon raised cain with him and said, "Now, don't do that! You go home, because you haven't got your dime anyway. I can't sell you any pastry. You go home and get the dime. I know where you live. I stop there all the time."

His house was in the middle of the block. I think that is relevant; as a lawyer would say, "an effective fact." "I'll drive down there and then we will have a transaction and title will pass." Oh, it's fun to go to the supermarket. Don't you love to go down there and watch the Commercial Code, see all of these transactions operate, title is passing, it's on its way, and so on? A very clinical free study of the thing!

Well, seven minutes later he is down opposite the kid's house and the little boy comes flying out, just like a hummingbird. He's not looking where he is going and he gets clobbered by a second vehicle.

Now, as to the liability of the second driver, who cares? He may have been free from fault. He may have been as innocent as the unborn child himself, or he may have been judgment-proof. He may have gone over the hill. He may be financially irresponsible. Who is going to bother suing the unknown soldier? In any event he may have given a covenant not to sue. We are interested in the liability of the pastry truck.

Now try to visualize it in our town. I don't know how it was in yours but in our town after dinner at night, when it was dark, you would hear that most beautiful music in the world—the Good Humor Man has come to your neighborhood. You know how they do it now. It is all designed, just like the modern Pied Piper, lure them out of their homes. You get the flashing lights and the music, the colored lights and the display. And even if the little kid has put away an eight course meal, now he has got the Good Humor, the trophy, the prize! It may have been eskimo pies when you were little, but whatever it was, you know, it was “divine right”, it was yours! So you would take off in all directions, and you may get hit by an oncoming car.

Now I would simply argue that that territory here little boys live—the church yard isn't the only sacred pad, you know, the only sacred turf—that territory where they live, where they have their school, that belongs to them.

Now I know they should be more responsible, but little boys since the world began, the world's slow stain will soon get them, you know, but for a while these are the prerogatives of childhood. You are as irresponsible as a bee, as slippery as an eel, as heedless as a tatterdemalion tadpole. And when you hear that seductive siren's call, you just take off. That is your pad, your sacred turf, and you only dart because you cannot fly.

Now, the driver of the Good Humor truck, as a reasonably prudent man, the standardized man with his knowledge, intelligence, discretion, and judgment knows many things. He knows that when little kids are around to expect the unexpected. He knows they are heedless in spades. He knows he is not dealing with Dean Prosser or with the Director of Public Safety. They are going to tear out in an irresponsible fashion, and that is why he is there, he is sucking them into the zone of danger. The specific risk is that they will be hit by an oncoming car. When that specific risk that antecedently ordains and mandates that he shall use care proportioned to the peril and in ratio to the foreseeable risk, when that specific risk comes to pass, when he has taken them to the guillotine, it is hardly a triumph of logic to say that the fact another car would run you down is highly extraordinary.

Now, especially for the ladies who are present, go back to the old rule—no civil liability for killing anybody, man or boy; then we get Lord Campbell's Act that says "damages in proportion to the injury, such damages as the jury thinks are proportioned to the injury. Don't blame Parliament for what the judges did to Lord Campbell's Act because that statutory language said nothing about pecuniary loss. The great Bishop once said, "I care not who writes the laws, so long as I can construe them." The words of the statute are empty vessels into which judges can pour the wine of meaning or, as the case may be, empty it. There is leeway there. And what the English judges did in *Blake v. Midland Railway*, they said, "Damages in proportion to injury" means pecuniary loss.

Now, think of the time in the Nineteenth Century. To kill a young child was a serious economic harm to the family. Because why? Because we didn't have public education, and these little kids, five, six, seven, would go down to the factories, the foundries, the fields and peddle the skill of their hands and the strength of their little backs. England, the face of it was disfigured by the dark satanic mills of child labor. "The golf links lie so near the mill that almost every day the little children hard at work look out on the men at play."

Now, you get a nine year old boy who has been working in a cotton mill in Leeds or Liverpool, or in the coal mines and the slag heaps of Wales and cut that boy down, you are causing substantial economic loss to the family.

But the preservation of this child labor formula into the Twentieth Century is an appalling and indefensible mechanism. You know as well as I do, you know what the score is. We have virtually eliminated child labor in this country and universally raised the school leaving age so that when a child is killed, if the *only* formula, if the only yardstick is pecuniary loss to the survivors, what you are doing is you are reading children out of the death act; that's what you're doing.

Imagine a trial judge charging a jury with a perfectly straight face, "Now, ladies and gentlemen of the jury, a truck ran down a little boy three years old. They admit liability. He is so young he is incapable of contributory negligence. It is a matter of law. So the only question is, "What is the life of a worthless three year old child worth?"

Now I give you a simple formula. What you will do is you will figure out the sum total of his probable contributions between the date of the accident when he was three and his majority, twenty-one. Figure out all the moneys that he would have contributed

to the family exchequer from his little lemonade stand, his paper route, and then—oh, what you can do with a look—and subtract from that the cost of upkeep, food, clothing, shelter, medical expenses, education, and remember, ladies and gentlemen of the jury, to be college bred is a four-year loaf, and it is getting more expensive all the time. The jury may know it will cost \$3,000 to send a young girl to a private school a year. So what does it all boil down to?

A child is a liability, a blessed liability perhaps, but still a liability. And if you are going to have what I call the "child labor formula" of foreseeable contributions minus the cost of upkeep, you've read him out of the death act. You are saying that the King's shilling is the only reality. And that is the way they have held since Lord Campbell's Act in this country—until a great decision came down in Michigan—and you'll be happy to hear, as Lady Godiva said as she neared the end of her ride, "At last I am nearing my 'clothes'"—*Wyco v. Gnutke*, 105 N.W.2d 118, September 16, 1960, by a superb Justice, Justice Talbot Smith, who has never confused the doctrine of *stare decisis* with the doctrine of mortmain. And as your own great Dean Pound said, the last great generalist of the American Bar, the school teacher of the American Bar, "The law must be stable, and yet it cannot stand still."

So that is the mission of the judge, to mediate and moderate between these conflicting ideologies and hold in creative tension heresy and heritage in our law. Our law is not a cadaver or machine; it is a living thing. It owes more to Darwin than it does to Newton, always in the process of becoming. Parliament didn't say "pecuniary loss"; the judges said it. It is a judicial gloss, it is a judicial amendment. And then when the legislatures added pecuniary loss they didn't define it as the power of judicial construction, and no rule is settled until it is settled *right*. There is no more arrogance involved in reviewing without fear and correcting without fear a prior mistaken view than making it in the first place. Our judges have never gone with that English doctrine of the disability at self-correction, and even in the House of Lords, *mirabile dictu*, in 1966 finally decided it could review and reverse itself. *Stare decisis* doesn't mean stagnation even in England any more.

When that case came down of the little three year old boy, the jury—you know, sometimes they pay attention—listened to the trial judge give out the child labor formula, and do you know what they did? They brought in a verdict of \$700, the amount of the stipulated funeral bill. All you've got to do when you kill 'em is bury 'em. That's what they said under the child labor formula.

There was this impassioned dissent by Talbot Smith. Like Chief Justice Jackson used to say, it is better for a court to be divided than wrong. And as a great Nevada Judge once said, "I dissent for the reasons stated by the majority."

Ladies and gentlemen, every truth begins as a minority vote, as a broken custom. In 1491 the world was flat—Columbus, J. dissenting. So with biting animadversion, with Old Testament wrath, Talbot Smith dissented. He pointed out Rembrandt's Portrait of Aristotle Contemplating the Bust of Homer that sold for over two million dollars. A masterpiece, and so it was. But he pointed out that a little boy is something of a masterpiece too.

"What is man?" the Phalmist asked of Jehovah? "What is man that thou art mindful of him, and the son of man that Thou visitest him? For Thou hast made him but little lower than the angels and crowned him with honor and glory." A child is God's opinion that the world should go on.

When we are stripped to the ultimate we know that the real gold reserves of this nation are not in Fort Knox; they are the children of this country. Why is it that parents, as Santayana said, "consign the faded manuscript of life more willingly to the flames when they see the immortal text half embossed in a fairer copy?"

Talbot Smith developed this concept, and I must try to say it in about two sentences, namely: The investment value of a child. Now, by that I mean, have you ever been, as I have, in small towns where the old folks go the last mile? You know what I mean. They put them in the Old Folks Home. Now, they've got pretty names for them. They call them Isles Green; they call them Sheltering Arms. But you know what they are. They are charnel houses. They are full of the stench of malignancy and suppuration and you can hear the rattle of death. Then after a while they go cater-cornered across the street to the funeral parlor.

Now, there are an awful lot of people that don't want to go that last mile. So in a very real sense they look after their children. That's what it means. You cast your bread upon the water and you have an expectation that by-and-by they will help you, if it is necessary, sweeten up your social security pittance. I put it to you that this is not watery sentimentality, this is not mythology; this describes social fact in America in 1967. I put it to you, this is our motivation, so that by-and-by the children help them so they won't have to go to that old home with the stench of the wrappings and the bandages, the detritus of life.

This is the investment value of a child, just as a piece of machinery. You see it in the showcase. It has a cost of acquisition. Right

then you've got to transport it from the factory, you've got to install it, then you maintain it, you inspect it, you repair it, you amortize it. The same way with a child! There is the cost of acquisition—don't think there isn't. The wife that was just back from Richardson House, our big lying-in hospital in Boston stood there with the bill for the little baby. It said \$300, and her husband looked shocked. She said, "Well, dear, we get to have him for so long!"

My mother tells me that I cost \$35.00 at home—usually in accents of complaint over a bad bargain.

In Boston, \$500 prenatal, postnatal care, the cost of acquisition. Then you feed him, you clothe him, you shelter him, you send him to the university. You lavish a warehouse full of creature comforts upon him so that by-and-by he will make the return. This is the investment value of a child.

So in *Wyco v. Gnutke*, 105 N.W.2d 118, Michigan Supreme Court. Smith had been the dissenting judge. There had been some changes in the personnel of the court. As somebody said, it takes a few first-class funerals sometimes to improve. It was transformed and he adopted this Boston investment value of a child with a right to compensation for loss of companionship, and in 426 Pacific 2d 625 the Washington Supreme Court is now looking in the same direction.

So I close, that this is the wonderful thing about our great common law, even when statute is involved, its most precious part is its line of growth. Our common law is not a pond, it is a stream! As Holmes taught us, "In stagnant pools there is decay and death; in moving waters there is life and health." Common law is not a harbor, it is a voyage. And our great judges always say of the Bar, "Fare forward, voyageur!"

So to those who have a reverence for life and for this adaptability, this line of growth of our law, you look at these developments for wrongful death and I suggest the proper mood is not to look backward in anger or nostalgia. As Peter DeVries said, "Nostalgia isn't what it used to be." Go forward in fear, but around us, with awareness, because our great judges teach, as they have taught us, we can't walk backward into the future.

Thank you very much.

CHAIRMAN BRUCKNER: How do you like that for openers?

CHAIRMAN BRUCKNER: Without taking any more of your time I would like to present to you Frank Winner from Scottsbluff.

TECHNIQUES IN HANDLING A PRODUCTS LIABILITY CASE— GATHERING AND PRESENTING EVIDENCE

Frank Winner

Following Tom Lambert is a little bit like following the Pope in Rome. I hasten to say that I am not an expert on products liability. Who is? But I have all the qualifications of an expert: I come from more than two hundred miles away from home and I'm a lawyer.

I got first involved in this products liability problem when a fellow walked into the office and said that he had found a mouse in a coke that he had drunk.

I said, "Did they make you an offer of settlement?"

He said, "Yes, they offered me my dime back, but they did want fifteen cents for the meat course."

I'll tell you this: You won't make much money on mice in coke bottles but you will make a lot of law, and that is the only consolation you get, because as a matter of fact the Coca Cola Company will establish, I am sure—well, Pepsi Cola, I don't want to pick on Coke or Mr. Goodbar or anybody else—but I am sure these people will establish to your satisfaction that if the thing was dangerous when it got in the bottle, the coke will sure as hell kill it and it won't be dangerous after that.

I am going to talk, and I won't talk as long as scheduled because I think we should get the thing back on schedule if possible, but I am going to principally from the *plaintiff's* point of view in figuring out his products liability case. I will be followed by someone else, a delegate from the insurance trust who will go ahead and present the defendant's side, figuring his products liability case out, principally toward getting your hooks on the evidence and some of the theories that may befall you and befriend you.

First of all, I want to limit my remarks to the strict product liability case. There are a lot of negligence cases that involve products, but they are not product liability cases. If some guy leaves the gas valve on at the plant and propane gas or whatever leaks out later—boom!—that involves a product, sure, propane, and it is an inherently dangerous product, but that is not strictly a products liability case; that is a straight negligence case.

In a products liability case we are talking about a product that is either inherently dangerous, meaning it is designed to fulfill a particular purpose that it cannot fulfill unless it is dangerous—the household poisons, Drano, the agricultural sprays and insecticides—

these are inherently dangerous substances. They are *designed* usually to kill something, and they will kill something chemical, they will kill protoplasm, they will ordinarily kill human protoplasm, human beings as well. These are inherently dangerous. That's one part of products liability. But the problem isn't exactly that it's inherently dangerous; the problem there is warning—labeling, ordinarily. Everybody knows the thing is dangerous. The question is, Does the warning, the label, the labeling, or whatever, adequately apprise the user of the techniques he has to have to use this thing safely?

The other part of products liability is the imminently dangerous product. This is something that is theoretically harmless when it leaves the hands of the manufacturer but somehow in the manufacturing process or perhaps between the manufacturing process and the receipt of this product by the user, something went wrong. It isn't a harmless product any more, either during or after the manufacturing process. This is the typical mouse-in-the-bottle case, the cigar-butt-in-the-Mr. Goodbar, the formaldehyde-in-the-hair oil—whatever. It was something you are supposed to use on your hair, something you are supposed to eat but it didn't come out that way. This is the imminently dangerous product.

Now the plaintiff you pick ordinarily will be a customer. I am only going to talk about the plaintiff for a minute to decide when we can get to these two or three various theories of recovery for the plaintiff in a products liability case, what differences there will be.

You've all heard of privity of contract. You know, for years and years in some of the products liability cases no privity of contract was a defense. This means that the plaintiff and defendant had to be the buyer and seller. If I sold you something defective and it didn't hurt you but you took it home and it hurt somebody else, or some bystander, some person not the customer was injured by that defective product, the defendant was entitled to invoke privity—"Well, I didn't make a deal with you. You cannot sue me in warranty." Well, of course if this event were foreseeable you could sue him in negligence.

The Restatement uses the term "user"; it does not use the term "customer" or "buyer" or the "vendee", and I think the cases which have adopted the Restatement use the term "user", which I do not believe would contemplate what we would ordinarily understand as a bystander, someone not in the chain of commerce but a bystander, someone not in the chain of commerce but a bystander. He, I believe, will be limited in his theories of recovery to negligence

without regard to warranty. That may change when the more strict policy of liability is adopted by the courts in the dangerous products case.

The theories are implied warranty, express warranty, negligence, either specific or *res ipsa loquitur*. *Res ipsa loquitur* will apply ordinarily in the beverage case, the food case, or you open a can of beans and there is a rock in there. Well, you really don't have to prove—where you eat your rock, too, you've got no case—you really don't have to prove that something went wrong in that plant, where back in the plant some guy dropped a rock in, or some fellow didn't inspect that can of beans properly and he should have caught that rock. You don't have to go back and prove that, as you know. That is a *res ipsa* case. All you have got to prove is that the rock was in there.

Now the strict liability is in the Restatement. I don't think it has been adopted expressly in Nebraska. Some people disagree with me, but that is neither here nor there. I don't think it, as set out in the Restatement in Section 402, has been expressly adopted in this state. That is the theory of strict liability.

I think I can explain the theory of strict liability, which I think will eventually come in this state and every other, best by an example. Say that a company wants to put a drug on the market. As you know, it has to go through certain tests, certain procedures with the federal government in order to get that drug on the market. Let us say that the company subjects that drug to every conceivable test to determine that it will not have any deleterious side effects to its users. Then it gives that drug to Uncle Sam and the Food and Drug Department of the federal government subjects that same drug to its tests. Then it says, "Well, boys, that drug is all right." The company says, "We know it is all right, we tested it. Let's put it on the market."

Well, of course, those tests cannot duplicate exactly the market. There is going to be ten, twenty, one hundred times more people using that particular product that did so in the tests.

Let's say, then, that this drug goes out on the market and it does have some harmful side effects to somebody which could not have been foreseen at the time of its testing by the manufacturer or its testing by the government.

If that manufacturer were sued for putting that bum product on the market and these people were mad about the side effects, they might very well have the defense, say, "Well, we did our best. You come in here and show me that we didn't use due care. The only

thing that we warranted to you would be that we would do everything humanly possible, we would do everything we could to see that we were putting a product on the market that would not have side effects."

If the theory of strict liability had not been adopted, that might very well be a successful defensive gesture.

However, I believe that under strict liability this defense would not inure to the benefit of the defendant. Strict liability says "If you get hurt because somebody made it bad or somebody knew it was bad but didn't properly warn you, you get paid without regard to, or much regard to foreseeability.

Now what defendant should you pick in a product case? Most of the cases are against the manufacturer; some of them are against the retailer. I think the law in Nebraska has not changed much. I believe if the retailer get a product, although there is some indication in the opinions to the contrary, if the retailer gets a product that he cannot tell will be defective when he markets it, then he is very likely out.

What about the restaurant that sells you a bum bottle of coke? Your customer comes in. He gets a bottle of coke from the restaurant, or say, from a vending machine, or, say, from a filling station, wherever, bottles of Pepsi or Coke, whatever, he takes that out of there and he drinks it and there is a foreign body in it which injures him.

Well, can't he then say, "Well, what am I supposed to do? In commercial practice here I cannot inspect every bottle of coke. I don't even see them. A guy comes around from the vending company, he puts them in there." Nonetheless, he is the guy who took your dime. He is the guy who sold it to you. He is the buyer, and you are the seller, the vendor-vendee relationship. You have a contract with him.

The *Rose Case* I think implies that the retailer or the person in immediate contact with—*Rose v. Hair Spray Company* in Nebraska—I can't think of the name of it, implies at least that the person in most immediate contact with the plaintiff, that is the customer, would be held liable. I think in that *Rose Case* there were some overtones of negligence as well. But I believe that if the defect is latent and not patent, and not one that would be apparent to the retailer, to the seller, that you are going to have a hard time keeping him in the case.

Now what about getting the evidence? You've got a products liability case, the best piece of evidence is the product. Sometimes

it will have been consumed, all of it, sometimes not. You also have to get the deal. Now, the deal is very important if there has been an intervening event or series of events between the time of manufacture and the time of receipt.

Let me go again now to the bottled beverage case. The bottled beverage comes to the restaurant. The customer buys it there. The manufacturer says, "All I know is, when it left my place it was all right." So what about the period of time, the events intervening between the time the goods left the manufacturer and the time your plaintiff picked them up.

I believe under the implication of the *Asher* decision and a lot of other cases from the various jurisdictions on similar cases that the question of tampering, the question of custody, the question of what happened to that product in between the time it left the manufacturer and the time the plaintiff got his hands on it and was injured, is a question for the jury, and it can go either way. But the warranty does not stop *there*—that is, the manufacturer's warranty—does not stop there at the time it leaves the manufacturer, *unless* there has been some vitiating circumstance, an intervening cause which will say, "O.K., your warranty stopped here because somebody tampered with it, or somebody altered its character, or somebody did this or that." The mere fact that there is a hiatus, a break in the chain between the manufacturer and the plaintiff surely is not going to destroy your case, but it is going to make more work for the plaintiff's lawyer in reconstructing those events following the product between the time it left the manufacturer and the plaintiff got his hands on it.

Of course in every products liability case you've got to get your grips on some experts, almost always in the imminently dangerous case. In the inherently dangerous products case usually—this is the case, now, of the gas, the explosive substances, the poisons—usually the defendant in that case will quite properly admit that he does have an inherently dangerous substance, and you are not going to have to round up some expert to prove that it is inherently dangerous, but you are going to need an expert if it is an imminently dangerous case where the product in its original inception was harmless but somehow or other it has now become harmful. You are going to have to have a laboratory, a professor, some expert to establish that that is now an imminently dangerous product.

Getting back to the bottled beverage case, there are a lot of cases in the reports where the Pepsi Cola people, or whatever, will come into court and say, "Well, I know, even if there is a cigar butt in that Pepsi Cola or a bottle in that Mr. Goodbar, that is not

going to hurt anybody. He can eat that cigar butt and it shouldn't hurt him." He'll have a chemist there who will testify that cigar butts don't taste too bad. He'll have another chemist there who very likely has eaten a beetle. I am sure you've read that case about the entomologist where he put on a courtroom demonstration and ate some beetles for the defendant.

Well, again the implication in the *Asher Case* in Nebraska is that even though it may not be poisonous, just because of the nature of the beast there is, in that particular case, an imminently dangerous product, but it may oftentimes take an expert to establish it.

In some cases that are not otherwise explainable in the usual practical course of events an expert can help you here. Let me give you an example, and this is something that is growing more and more in the products liability field, if you read about it.

There have been reported cases where people will use a harmful product and will use it properly, nonetheless it will make them sick. I am not talking now about susceptible consumers. I am talking about a phenomenon which involves more than one product. This is a natural scientific phenomenon that has been discovered maybe in the last ten or fifteen years. But if you get yourself a good expert he may be able to reconstruct a case like this for you.

If you take one product, say on agricultural spray, you are a farmer or a farm laborer and you use that on your crop and you absorb a subclinical amount of it, an amount that ordinarily wouldn't hurt you. Then the next day you go out on a different crop and you use another insecticide or fungicide, whatever you are using, and you put that on that crop, and you absorb a subclinical, that is to say, a harmless amount of that particular product. Then the effect of these two poisons in the body will not be additive, that is, you take in so many milligrams of this and so many milligrams of that, the effect on the human body will not be merely the addition, the sum of the milligrams or the micro-milligrams, or whatever it was of that substance you ingested; it will be potentiated, it will be magnified a hundred times, a thousand times, and there is yet no real good scientific explanation for this phenomenon, but there is a lot of agreement that this phenomenon does take place. Many, many cases where a man is injured by a very tiny amount, a minuscule amount of some poison, some household poison, say, that is not explainable, it may be explainable by the plaintiff's lawyer, the investigator rooting around and finding *another* product that he may have used the day before or a week before. Some of these products are stored in the tissues and they will not potentiate

until the second product is ingested into the system. Then the prudent investigator will start rooting around in the kitchen cupboard or in the barn or in the garage, or wherever, and he will find this other product and he will say, "When did your husband use this?" The plaintiff is usually gone, he can't talk. "When did your husband use this?"

"Well, we used it a week ago."

"What is it?"

"It's Paris green"—whatever. Then the expert can put two and two together, or one and three, whatever it takes, and he will tell you if you have a case of potentiation. This will explain a lot of injuries.

Well, of what value is the potentiation to the plaintiff's lawyer? "Gee, this is something we just couldn't help." The manufacturer says, "I sure couldn't foresee this guy using Paris green today and my product tomorrow." Well, now, he can. Maybe ten years ago or fifteen years ago he could not, but now that this potentiation is becoming fairly well an established scientific phenomenon or a scientific fact, now he can.

And what must he do if he markets an agricultural poison, an inherently dangerous substance? He must *warn*. He must warn on his label against the hazards of potentiation.

Some of them have started to do that. I read one agricultural label that said, "Do not reformulate this product with any other substance." So here you are, a plain old dirt farmer out in western Nebraska and you've got your sack of spray out there in the field and a can of spray and you look at it and it says, "Do not reformulate this product with any other substance," and he says, "Maw, what the hell does that mean?" She says, "I don't know." So that very likely is an inadequate label. If he said, "Don't mix this with anything," or "Don't use some other substance the same week you use this one," then he is getting toward an adequate label. Right now I haven't seen so many of them.

The point is, as science advances, as our colleagues in the scientific community establish the phenomenon of potentiation, the law has got to go right with it and require these manufacturers who are marketing substances amenable to that thing, to so label their product.

That potentiation brings up the susceptible consumer. If it is a potentiation case but you also have a case of a plaintiff ingesting a subclinical amount of this product, you may have a susceptible

consumer. This is a question that there isn't any good answer for. There is certainly equity and verity on both sides of the case. The poor guy got hurt. He is susceptible to this particular product. The manufacturer says, "Well, by God, I can't warn everybody. I can't warn the odd-ball case."

This rule of strict liability, now, will make that manufacturer pay just everybody. But in the opinions and in the authorities where the court has said, "Now, we are going to put it on the basis of foreseeability, and if it is an odd-ball case we are not going to make this manufacturer pay because he shouldn't foresee one in a million, one in five hundred thousand, or whatever, being injured when all the rest of humanity, if using this substance properly, would not." The cases use words like "a substantial number of susceptible consumers"; another case uses the term "appreciable." I don't know the difference between substantial and appreciable but I suppose substantial is more than appreciable. That's a curbstone view.

Those adopting the Restatement view have said, "This allergic or susceptible consumer has got to be paid because he should have known about it, and you have to take your customer as you find him. If he is the odd-ball case, susceptible, the eccentric case, you have still got to pay him.

Now, labeling: In the product liability case in the inherently dangerous substances there will almost always be a label. It is a dangerous substance. We know it. It is supposed to be, so the fellow is supposed to tell you on his label how to use it.

How do you get the label? Hopefully you will still have the label on the self-same product that injured the plaintiff, or that you think injured the plaintiff. If you are not able to get that self-same label, then of course you trot over to the retailer to see if he has got any more labels. You've got to be a little careful about this. The fellow, or his family, may not have come into your office until some time after this injury occurred. These people change their labels, as the people know that have been in these cases, from time to time. It is not a rare occurrence. They do change them. You have to be danged sure when you go back you've got the same label, because they do change them materially. You've got to be danged sure you get the same label that was on the product at the time it was peddled to the guy who got hurt.

If you cannot find a label, or you are not certain that the label you are after from that retailer is the right one, then Uncle Sam will help you. Uncle Sam requires that all of the agricultural insecticides, pesticides, sprays, most of the household poisons, drugs be registered with him under the various federal statutes, and he

approved the label! Uncle Sam, that is, approved the label before that product goes on the market. He will, on request, furnish you the label that was approved for such-and-such a date. If you can figure out the date your guy got hurt, or figure it out from the day he got sick or first started to show symptoms, you write to Uncle Sam and say, "This product was on the market this date. Can you send me the label?" And Uncle Sam will send you the label. In fact, he will send you three copies.

Now I want to say a word or two about the ignorant user. This has come up in some of the cases in some of the states. I don't know of one in Nebraska. I suppose it gets to be a problem. There was a case out in California where a couple of itinerant laborers were using a farm insecticide and they got poisoned. One of them died and one of them got hurt pretty badly. They weren't using it right.

The manufacturer came into court and he said, "Look at all the stuff I put on this label. I've told those guys how to use this stuff, and if they had read that label and did it, by golly, they would have been all right."

The guy in there, the other guy's successor, stood up and said, "O.K., you've got a great label. We can't read."

Now what do you do? Well, the judge didn't know what to do either. He said, "By golly even if you *could* read, this label wouldn't be any good." So he went ahead and held for the plaintiff. That was a good way for him to get out of the case. I don't know what I would have done, but isn't that really the same question as the susceptible consumer? If this manufacturer is going to put out a product that he knows, or should know, is going to be used by a lot of itinerant laborers, a lot of people who are not literate, people who can't read that label, then what can he do? Well, he can put a great big red skull and cross-bones on there. Or he can go buy the right kind of mask to use with that particular spray or insecticide and send that right along with it rather than depend on somebody illiterate to read that label.

So if he is going to market a product, I suggest to you that the same rule will apply as to the susceptible consumer, if there is a substantial or appreciable, take either word, number of people who are going to use that product and are, because of their particular station in life, unable to absorb his warning, then he has got to put a better warning on the bag or he hasn't lived up to what the law requires of him.

The question you should ask yourself is, "What could the defendant have done in regard to these labels and warnings?" We

have seen insecticide labels, farm spray labels out in Scottsbluff County that say, "Now, this stuff is very dangerous. Don't get any on you, and when you get out in the field to use it, be certain to wear a mask." And it says, "For the proper type of mask consult the United States Department of Agriculture." And they *still* say it.

Well, that farmer gets out there with his spray for his potatoes, or whatever it is going to be, and he unloads it off the truck and he is going to put on his mask. Then he picks up the bag and reads it. Well, now, he cannot call Orville Freeman from the farmstead there to figure out what kind of a mask he is going to put on. And it makes a big difference, because in the various families of farm chemicals there are some masks that are good for this particular family of chemicals and are *worse than nothing* for this other particular family of chemicals.

So what burden does the manufacturer have there? He has the burden of knowing that that farmer isn't going to read the label until he gets out in the field. That is just a fact of life. I don't believe that farmer, or most of them, is going to read the label until he gets out in the field. He isn't going to read it when he buys it. He throws it on the truck and takes it home. Then he gets home and he doesn't get the proper type of mask, and he isn't going to go back to the retailer. The manufacturer is bound to know the orthodox practices of a farmer. What could the manufacturer have done in that case? He could say, "Mask So-and-So manufactured by So-and-So, No. So-and-So is a good mask to use with this chemical." Or better yet, he can sell them a mask right along with that bag of insecticide. Why not? Some of them have even started to do that now. Or the literature they put out with the chemical will say, "This mask of such-and-such manufacturer should be used with this insecticide." This is the better way. The best way, of course, is to furnish the mask right along with it, but there are still manufacturers of those chemicals that will say, "Be sure to use a mask. Consult the U.S. Department of Agriculture."

Just a word on getting your hooks on medical records. There is no difference there between the products liability case or any other case, but there is one thing that will help you in products liability on medical records because so many of these chemicals or household poison products require a specific remedy. The hospital record therefore will be appropriate in helping you establish proximate cause.

The woman who is working in the house is using maybe six or a dozen poisonous substances. The farmer who is out spraying three or four different kinds of crops is using maybe half a dozen

different types of insecticides and pesticides. If he is flat on his back in the hospital and not competent, he cannot reconstruct for you just exactly which insecticide he used, so in order to pinpoint that one and get the proximate cause on that guy and say, "You did it," that the doctor and the hospital records are going to help you out because symptoms vary between one family of poisons to another, and the remedies vary.

The organic phosphate compounds, which so many farmers use—there are just two of the big ones—organic phosphates and chlorinated hydrocarbons. All the doctors take a history. If they decide this guy used organic phosphates they will give him atropine sulphate. If the hospital records show he got atropine sulphate and had a period of improvement, that is a pretty good indicator that the particular insecticide or poison that felled him was from the organic phosphate family.

If it wasn't from the organic phosphate family and the doctor gave him atropine sulphate, you've got a helluva good case against the doctor for getting the insecticide wrong.

Most of these poisons are regulated by federal statute. I'll say just one thing about them—I'm getting crowded on the time here. The cases under this federal statute are essential to read because they don't read quite like the statute does. The federal insecticide, fungicide, rodenticide—all the "cide" statutes—and its companion statutes, the drugs and other harmful substances, say what the label has got to have on it. Now, they don't say what the label has got to have on it word for word, but what they have said is what the label has to do in general terms. The cases under that particular act in 7 U.S. Code say that in labeling that product the manufacturer must be certain that he labels a warning on there sufficient for "safe and effective use." So he has not only got to be safe, he also has got to be able to use it, which means that you are not going to dress that farmer up in a man-from-Mars costume to insulate him perfectly for any risk or harm from that product. You have got to take into account the fact that he is not going to do that.

The cases say that the guy labeling this product must take into the account the "orthodox practices of the consumer." So he is bound to know what the farmer in eastern Nebraska or western Nebraska will do when he gets out there. This, again, is where I say that that label, if it says "For the proper type of mask, consult the U.S. Department of Agriculture" is not going to do the job because that guy knows, or is bound to know the orthodox practices of farmers and he is just not going to do anything until he hits the

field, and then he is not going to call Orville Freeman or anyone else in that Department to find out about that mask. He is going to use no mask or his handkerchief or a paper mask, or whatever, and the chances are he is not going to use the right one.

Also those statutes provide criminal penalties which may help you, if there has been a violation, to get to the jury. But the "orthodox use," the big factor in those statutes, will help you get the case ready. Check the orthodox use. If the warning is not consistent with the foreseeing of that orthodox use, you've got something going.

You will find on many of these household poisons, particularly on the agricultural poisons, disclaimers of warranty. Now, my colleague here from the insurance lobby, as I say, may disagree with me on this but I don't think that a disclaimer of warranty should cause you much alarm. But they say it, and they say it in damn small print. In very small print they say, "We are not warranting any thing. If you use this, or somebody else uses it, we are not guaranteeing 'nothin'." And then they come in and try to say, "Well, look here. There is no warranty here. Look here! Read that print." You get out your magnifying glass or your grandma's bifocals and you say, "Yes, that's right. There is a disclaimer warranty there."

Well, most of the cases, on the ground of public policy, have denied a defense in that regard on a disclaimer of warranty. The advertising of the product extolling its virtues, trying to get the housewife or the farmer or whoever to buy it, ordinarily will extol how safely and handily it can be applied which, in effect, will cancel out this disclaimer of warranty.

If your man was contributorily negligent—I am going pretty fast now and I'm not going to be able to cover it all—but if your man was contributorily negligent, this, as you know, will be helpful to the other side in the negligence case. The problem comes in the case where you have sued, not only in negligence but in warranty, or in warranty only. The courts now are having a helluva time deciding whether or not contributory negligence is a defense in a strict warranty case. If a guy was negligent as could be in a warranty case, he will ordinarily say, "He shouldn't have anything," but they put it on the basis of proximate cause saying, "This breach of warranty wasn't the proximate cause of his trouble; his damn fool carelessness was the proximate cause of his trouble." So as a practical matter, if there is contributory negligence I really believe, despite many opinions to the contrary, that it is not a defense in a negligence case, that it will be but it won't be called "contribu-

tory negligence," it will merely be a shifting of the place where the proximate cause occurred.

On this question of contributory negligence we get into something very interesting which has arisen in the products liability cases. This is what I call the "prudent man's negligence." The rule generally stated is this: If a man's carelessness discovers a breach of warranty by the manufacturer of the product, that particular act of carelessness will not be a defense in an action against the manufacturer in warranty.

There are some examples in the reports. Let's say a fellow hits the curb with his car and his tire blows out, or something happens and he is able to establish that the tire shouldn't have blown out. It was a bum tire. The tire manufacturer comes in and says, "Well, if you hadn't been driving recklessly over that curb this wouldn't have happened." It doesn't stand up. Is he still entitled to his warranty claim against that tire manufacturer?

The same thing happened in a classic case where a girl was smoking in bed. This is a case against Sears Roebuck. Sears Roebuck had not warned her that the nightgown she was wearing was highly inflammable. She fell asleep smoking in bed and—poof!—up went the nightgown, and part of her. She sued Sears Roebuck claiming, "You should have told me by label or by something that this thing was inflammable."

Sears Roebuck said, "Why, *you* shouldn't smoke in bed." They said, "This is contributory negligence!"

The court said, "I believe that it is not."

So if it is an act of negligence or carelessness which leads to a discovery of the breach of warranty, I do not believe that is a defense to the manufacturer.

A word or two on discovery. You are permitted under several federal rules, decisions, to discover the sum and substance of the tests made by the defendant manufacturer. You are permitted to discover the complaints of other users who were injured by the same product at about the same time, or at any time, for that matter. What relevance do other complaints have? Well, it has relevance first of all as to due care, if the other complaints preceded yours and it has relevance also to proximate cause, there is surely the type of case where if all four of the people die of insecticide poisoning and the fifth one dies, it is a very good bet that he died of insecticide poisoning too, if they are all there together. This is an extreme example but it points up what I am saying, so other complaints are material in two respects—due care and proximate cause.

I am going to stop merely by mentioning two late developments. This products liability is expanding so fast, and you read cases now where if the plaintiff's lawyer can't figure out anybody else to sue or any theory, he will think up some products liability case. I read about one in *TIME* Magazine that was decided later in the Second Circuit where a young man was driving his Impala Chevrolet down the road and he rear-ended something, I don't know if it was an abutment or a tree or another car, but anyhow the action was sure as hell his fault because he was going 120 miles an hour. He got hurt and he got mad at General Motors for making a car that would go 120 miles an hour, saying "It was foreseeable I would kill myself because you made a car going 120 miles an hour," and sued them. Well, he didn't win, but he got a dissenting opinion. It was very interesting. It was in the last three or four months. I went ahead and read the opinion, it was pretty good, after I had read *TIME* Magazine.

There was another one which started out as a slip-and-fall in the supermarket. Nobody likes a slip-and-fall case if there is nothing she slipped or fell over, there is no dent there in the floor, it wasn't too slippery, the floor wasn't, no gravel, no nothing, nothing to trip over, so they sued the shoe manufacturer for not warning her about those slippery shoes she wore into that supermarket—and recovered.

With that, I will close. I thank you very much for your attention.

CO-CHAIRMAN FRANK B. MORRISON, Jr.: Our next speaker has been referred to by our distinguished speaker immediately before him as a "delegate of the insurance trust and a representative of the insurance lobby," and I think in all fairness I ought to say that isn't quite accurate.

Bob Mullin is a very fine defense lawyer but he is also one of the state's best plaintiff lawyers. He is equally effective from either side of the table. Since I do only plaintiff's work, my experience with him is in his role as a defense lawyer, and I can personally attest to the fact that in this role he is effective.

I don't want to bore you but I would tell you just one short story about an experience I had with Bob in court about a year ago.

I was trying a case for a young lady from Minneapolis down in federal court. She was injured in an automobile accident. There were some facts surrounding the accident which made the trial of her case a little bit difficult. She was, at the time of the accident, out with two fellows who were not her husband. She had a hus-

band. She had small children. They had been drinking. They went off the road and she injured her back. It was a guest case.

I prepared for the trial, I dressed this young lady right, I thought. I went about preparing her case in such a way that I might re-create her image.

She, incidentally, had come down the night before the trial from Minneapolis. Bob, being the thorough investigator he is, sent his scouts after her to watch her nocturnal activities the night before. He found that once she had checked into her hotel she immediately checked out and went to the local á Go-Go. Mind you, this was a back injury! I was claiming limitation of motion in the middle of the back.

Well, all of this was unbeknown to me. I had my lady on the stand and I had tried to re-create her image and tell about what a devoted lady she was. I thought that the impression had been made.

Mr. Mullin started in on cross-examination, and he asked her if she had been dancing. She denied it. She compounded the felony, but he kept after her, and so eventually she admitted it. She admitted that she had gone into the hotel, that she had checked out and gone over to Mickey's á Go-Go.

He said, "How many times did you dance?"

Well, she couldn't recollect how many times.

Mr. Mullin said, "You danced so many times you just can't remember how many times. Well, what was the name of the fellow you danced with?"

She couldn't recollect what the name of the fellow was.

He said, "You didn't bother to find out the name of the fellow you were dancing with." He said, "At Mickey's á Go-Go I'm not too sure about what kind of dancing they do there. In don't get out on the town very often. Mrs. Smith, was it the two-step or the waltz or the fox trot?" He said, "Oh, it wouldn't have been one of those modern dances like the Frug?"

She said, "It was one of those, Mr. Mullin."

And on and on it went! I was about ready to crawl out of the courtroom. Needless to say, Mr. Mullin was victorious and got a defendant's verdict. He shattered the image that I had worked so hard to create.

He is, as most of you know, a very experienced trial lawyer. He is a former President of the Omaha Bar Association, a former State

Committeeman to the American Trial Lawyers Association, he is an Associate Editor of the American Trial Lawyers Association. He has had a very distinguished career in the State of Nebraska as a trial advocate, both as a defense lawyer and as a plaintiff's lawyer. He is one of the most able advocates that I have met in the courtroom and one of the real fine gentlemen that I have had the privilege of being associated with in the law practice.

I introduce to you Mr. Bob Mullin of Omaha, Nebraska.

THE DEFENSE OF A PRODUCTS LIABILITY CASE A DRAMA IN THREE ACTS

Robert D. Mullin

PROLOGUE

The products liability case is definitely "in" among the members of the trial bar.

Already it is a favorite subject in the trial seminar. The volume of litigated cases has multiplied faster than in any other field of trial law. The size of verdicts has increased more, proportionately, that those in all other types of cases.

Why all this? Perhaps because the number of manufactured items is always on the increase. Perhaps because the number of persons who use these products continues to grow. Perhaps because the products themselves have become more advanced, more complex and, unfortunately, more apt to fail. Perhaps because the products liability case offers more than its share of "target" defendants.

Whatever the causes, it is here to stay. This is a fact of life which offers trial lawyers, plaintiff and defendant alike, a new opportunity for service in a field which is both interesting and profitable.

Legal concepts in this area of law are changing by the day. The ancient citadel of privity is under frontal assault. Negligence is supplemented by express and implied warranty. Warranty is supplemented by the doctrine of "strict liability." And the sweet scent of victory seems to hover ever more often over the plaintiff's side of the counsel table.

These, too, are facts of life. But while the fortunes of the defense lawyer grow increasingly precarious, they are by no means hopeless. So it must be if the scales of justice are to remain in reasonable balance. To this end, an attempt will now be made to analyze the anatomy of a products liability case through the eyes of defense counsel.

For our vehicle, the play is the thing. The stage is ready, the theater lights have dimmed and the curtain rises upon our players.

ACT ONE

Our principal actor, the hard-working defense lawyer, is seated behind his office desk. Across from him sits the client. The client clutches a piece of blue paper in his trembling hands, a paper which recites the large dollar amounts which some total stranger wishes to take from him. The paper is a summons and the client is both afraid and angry. Afraid because of the size of the prayer and angry because a total stranger would seek to vilify the product which he, the client, has so carefully manufactured, wholesaled or retailed for so many years.

Such is the beginning of the average products liability case. And unlike the average automobile accident or industrial mishap, it frequently happens that only the plaintiff and perhaps his relatives or close friends were present when the alleged incident occurred. Seldom, if ever, is the defendant present. He, the defendant, frequently receives his first notice of the incident when the summons is served at his office by a stern-faced deputy sheriff or deputy U.S. marshal.

In this informational void, the lawyer can initially do little more in that first interview than obtain background information about his client and the client's product.

Is the client a reputable firm, perhaps a leader in its field? What is the client's reputation in the community? If the defense was not referred by an insurance carrier, does the client perhaps have insurance coverage which would afford adequate protection and provide a defense as well? Is the client being sued as a manufacturer, distributor, retailer, or in some other capacity? What are the express and implied warranties concerning the product? What warnings were given concerning its use? Were the warranties and warnings effectively communicated to the plaintiff?

Having educated himself about his client as fully as possible, the lawyer must now direct his inquiries to the product which is the subject of the litigation. Where and how was it manufactured? When and by whom? How was it distributed and by whom? When, where and by whom was it retailed? Did it come to your client in a container which was never opened before sale? Is there anything imminently or inherently dangerous about the product itself or its recommended usage? Have there been prior similar claims by other persons or, hopefully, has the product been on the market for years without prior claims or suits?

Having exhausted all available sources of information about the client and his product during this first interview, and having gently explained the mechanics of a retainer fee while re-assuring the client that he is not faced with near-term bankruptcy, the lawyer accompanies the client to his office door, bids him well and tells him not to worry. He then returns to his desk and begins to ponder the problems ahead. Once again, as in all products liability cases, the defense must be negative in character. The nature of the claimed defect and its possible causes will probably be obscure at best. And the legal principles which control these problems are in a constant state of flux and liberalization.

The curtain falls as our friend purses his lips, scratches his head and starts the thought processes in motion.

ACT TWO

The curtain again rises upon the lawyer's office. Unlike before, the scene is now one of activity, not contemplation.

The Petition in State Court, or the Complaint in Federal Court, has been dissected word by word. It has already been ascertained whether plaintiff's counsel is basing his claim on negligence, *res ipsa loquitur*, express or implied warranty, strict liability or a combination of several of these concepts.

Sections 12 and 15 of the Uniform Sales Act and Sections 2-313, 314 and 315 of the Uniform Commercial Code have been examined to the extent they may apply to the issues of express warranty and implied warranty under the facts of our case.

Such texts as American Jurisprudence, *Corpus Juris Secundum* and ALR have been researched. Likewise helpful because of its detailed treatment is *The American Law of Products Liability*, a four-volume work by Robert D. Hursh. Finally, particular care must be taken to locate and analyze every products liability case in the applicable State or Federal Court. In every instance a search is made for cases involving identical or similar products with identical or similar claimed defects. While all of this legal research is going forward, the investigation of the facts has already been placed in motion.

Wherever possible, every available witness to the incident must be interviewed concerning every detail of the occurrence.

Next must come the investigation of the plaintiff, his background, his employment history and economic status, his prior state of health and his propensity for filing claims and suits.

Above all, if the product itself is still in existence, the defense lawyer must gain access to it, acquaint himself with it and employ a competent expert to determine its strengths and weaknesses.

Next must come the depositions, the interrogatories and the requests for admission.

The extent to which the defense lawyer is successful in this intensive investigation of the incident, the plaintiff and the product is limited only by the degree of imagination and inquisitiveness which he brings to the problem.

Other techniques are also available. Perhaps a scale model should be constructed. Perhaps an assembly line should be stored intact until time of trial. Perhaps a written warning should be blown up to many times its size for court room use. Perhaps the product itself will be photographed from every angle, with life-size enlargements of key photographs.

And finally, almost suddenly, the strategy of the defense begins to evolve.

Join me in a brief look at some of these possible defenses in the various situations most frequently encountered.

Where the plaintiff claims negligence by defendant, the first line of battle will probably be the "I'm from Missouri" or "Show Me" defense. As in all other damage cases, the burden of proof here is on the plaintiff. And in a products liability case, this burden can be a heavy one.

The plaintiff must first prove that the product itself was defective. This is sometimes easier said than done. But even assuming the plaintiff is able to prove a defect in the product, it must then be proven that the defect existed at the time the product left the defendant's possession. But assuming that the product has already been shown to be defective when it left the defendant's possession, the plaintiff must next prove causation between defect and damage. It is axiomatic that the defect is not actionable unless it was the proximate cause of plaintiff's injury. While the enterprising plaintiff's attorney will probably utilize an expert witness in this attempt to prove causation, the equally enterprising defense lawyer will compile a long list of other possible and equally plausible causes which might also produce the same injury. And he will be-devil the plaintiff's experts at great length concerning each and all of these other possible causes. Simply stated, the plaintiff must convincingly rule out all other causes with reasonable certainty while the defendant need find but one other potential cause which would produce the result without negligence by the defendant.

By now, it is hoped, plaintiff's counsel and his experts are huffing and puffing from their struggle to prove the existence of the defect and satisfy the requirement of causation. But defense counsel has by no means yet emptied his arsenal of available defenses.

Next comes the defense of "abnormal or unintended usage" of the product. Did the plaintiff subject an otherwise safe product to a usage for which it was never intended or adapted? Like the hippies who sniff glue for "kick-ums" instead of using it for "stick-ums?"

And last but not least in the defense of negligence cases, the defendant may find it possible to use those old favorite defenses of "contributory negligence" and "assumption of risk" to great advantage.

So much for those suits which sound in negligence. Admittedly, it is more difficult to defend a breach of warranty suit, or one which seeks to impose strict liability for putting a defective product on the market. But here again, the plaintiff must prove the existence of a defect which was present when the product left the defendant's possession. Here again, plaintiff must prove a causal relationship between the defect and the damage, to the exclusion of all other equally probably causes or intervening causes. Here again, the plaintiff is exposed to the defenses of abnormal or unintended usage of the product. And in some jurisdictions, the defenses of contributory negligence and assumption of risk will still be available if it can first be shown that the plaintiff had prior actual knowledge of the defect and nevertheless elected to use the product.

Perhaps the most popular defense tool in breach of warranty suits is the "privity" defense. While some jurisdictions have abrogated this requirement, others still require privity as a prerequisite to recovery. Still other jurisdictions still recognize the privity defense unless it be shown that the product itself was inherently dangerous or that the defendant worked a fraud upon the plaintiff.

Equally effective is the defense that the plaintiff sustained injury and damage because of a peculiar susceptibility or personal idiosyncrasy or allergy which the defendant could not reasonably anticipate.

Defense counsel should also explore the possibility that the client may have specifically disclaimed liability or inserted express warnings in labels or advertisements. Such express disclaimers are every bit as admissible in evidence as express warranties.

And finally, perhaps the warranty itself, express or implied, may have been so restricted as to offer no protection from subsequent injury to health, e.g., cigarette advertisements.

And so it is that the defense attorney has prepared himself for the conflict. The hours of investigation and legal research are now behind him. The battle plan is drawn. As the curtain falls on Act Two, he is ready for the show-down at high noon.

ACT THREE

The curtain rises upon a court room. The trial has been in session for perhaps two or three days. Throughout voir dire examination of the jury and opening statement, the defense lawyer has tried to avoid head-on involvement with such technical legal concepts as breach of warranty or strict liability. While these theories may furnish a basis for plaintiff's claims, our defense attorney prefers to use everyday business terms to explain the relationship between his client and the plaintiff. He prefers to sell "perfect justice" in contrast to the complicated legalistic theories offered by his opponent.

He is now in the final stages of his closing argument to the jury. Perhaps it might go something like this:

"... As yet in our land it has never been illegal to manufacture, distribute or sell a legitimate product for the use of others.

Many of you will still recall the popular ditty about people who need people. But people also need products. And if we are to continue our quest for a better life, people like us need other people who are willing to gamble talent, time and money to bring imaginative and useful products to the public market place.

But unfortunately, the product has never been invented which does not possess at least some potential for harm. The miracle drug will occasionally produce a fatal reaction in the allergic patient. The harmless cream puff can become a deadly poison if left in the sun. A car in reckless hands can be the instrument of death. And yet who would suggest that we banish the drug, the cream puff or the auto, or punish those who make them?

The test, you see, is not whether a product has failed or injury has occurred. The only fair test must be whether or not this defendant failed to use reasonable care toward the plaintiff. In simple terms, did the defendant or its employees do something wrong or fail to do something right, and did that something cause the plaintiff's injuries? If not, no matter how badly the product may have failed or how tragic the plaintiff's injuries, one verdict and one alone will do justice under law.

Please allow me one final word in behalf of my client. William Shakespeare once wrote that "the purest treasure

.....is a spotless reputation." And a poet named Charles Lamb reminded us that "Reputation lost comes not again." Like people, products can earn and lose their good reputations. In your hands for judgment and decision I now deliver the integrity of my client and the good name of our product.

May you always look back upon your verdict as a just one."

CO-CHAIRMAN MORRISON: Our next speaker it is a real pleasure for me to have the opportunity to introduce because I once worked for him. William P. Mueller, or "Rocky" Mueller as he is better known to all of us, is a very fine trial lawyer out in western Nebraska.

As many of you know, "Rocky" was formerly in Omaha with the Kennedy, Holland, DeLacy, Svoboda firm. He trained under the great George L. "Skip" DeLacy and rose to become one of the real fine trial lawyers in Omaha. He went out where all the money is, in the country, to practice law and he has taken with him the ability that was cultivated here.

I know first-hand when I was there that Omaha counsel came out to try a case against "Rocky", and "Rocky" defended. The jury returned a verdict for the plaintiff for less than what the specials were. And then he goes around to North Platte on the plaintiff's side and Omaha counsel comes out to defend and he gets a \$200,000 verdict for the plaintiff. So he didn't leave any of that ability in Omaha that he developed here.

"Rocky" is one of the real fine defense lawyers *and* plaintiff's lawyers in the state, and it gives me real pleasure to introduce him at this time. "Rocky" Mueller!

THE EXPANDING DUTY OF THE HOSPITAL TO THE PATIENT

William P. Mueller

Thank you, Biff, and on behalf of out-state Nebraska I assure all of you Omaha lawyers that we love to have you come out, so come again.

After listening to the introduction of Bob Mullin, and then after listening to Bob's speech, originally I had the idea that possibly young Morrison reshaped the image of the client, but after Bob's wonderful speech perhaps he was doing a little reshaping himself that evening. I don't know.

Apparently my talk is to consider the "Expanding Duty of the Hospital to the Patient." I'll try to limit it to the original closing time, as I think that under the law of Nebraska as we have it now

you can sum it up in several very short phrases, and primarily it is that there is a duty whether it be a charitable institution or whether it be a private hospital.

It would appear that whether we are willing to accept it or not, we are practicing in an age of expanding liability, and this is true whether we are talking about the legal profession, the medical profession, the government, or charitable organizations.

We are all familiar with the developments of the law in the area of products liability. You've heard about the products liability concept for the last hour or so, and primarily this is what the publicity has been devoted to.

In the same manner, it would appear that this doctrine of immunity from tort liability of charitable institutions is rapidly receding into the background. Originally this doctrine was first enunciated in this country in 1876, and it was a Massachusetts case holding that a charitable hospital was not liable for injuries which were caused by the negligence of its agents and employees. This case was based upon English law, and the strange thing is that the English did not stay with their original decision; they did depart from that doctrine.

However, at the time when it was first adopted and thereafter, primarily it was based on the idea that it would be difficult to discern that a private gift in public aid would not be long contributed; in other words, that the charity institution would not be able to survive the hungry maw of litigation. However, I think we can all see that time has not verified this dire prediction. Charitable institutions themselves have changed since the old rule was initiated. Originally, of course, they were small. Many were connected with churches and they were of limited means. Today in many instances they are big business, they handle large funds, they manage and own large properties, and they are set up and supported by large trusts or foundations. I think that it is idle to argue that donations for them would dry up if the charity was held to responsible for its torts the same as other institutions, or that the donors who were giving the funds were setting up the large foundations for charitable purposes, that they would not benefit, that they should not be responsible like other institutions for negligent injury.

At least five theories were used as a basis for upholding this immunity doctrine: There is the trust fund theory, the inapplicability of respondeat superior, governmental immunity, implied waiver, the public policy theory.

Back in 1955 there were three cases that came before the Supreme Court of Nebraska where a test was made of the old rule.

One of them was brought against Methodist Hospital, *Muller v. Nebraska Methodist Hospital*. The lady claimed she received injuries when the operating table collapsed when she was on the table.

Another action was brought against *Clarkson Hospital*. In this one the plaintiff claimed to have received burns upon her buttocks as a result of a student nurse spilling an excessive amount of ether, or I should say, spilling ether in her bed.

The other action was brought against *Holy Angels Church*.

As you know, at that time this doctrine was held to be in full force and effect. It is rather interesting to me to note that it would appear that the Supreme Court primarily based their decision upon the trust fund theory. Justice Winkle wrote the opinion of the court. I think it is rather interesting, particularly when we compare it with the decision that came down by our present court this past year. Judge Winkle states, "We recognize that in recent years some courts have abandoned a previous declaration of absolute or qualified immunity and adopted the doctrine of liability. However, we cannot agree with some of the reasons given by these courts for making such change. These opinions suggest that the hardships and burdens of maintaining charitable organizations that existed in the past have, to a large extent, ceased to exist; that these institutions have, in many instances, grown into enormous businesses handling large funds, managing and owning vast properties, much of which is tax free; that in many instances they are set up by large trusts or foundations enjoying endowments and resources beyond anything thought of when the matter of immunity was first considered and that they now have a capacity for absorbing losses which did not exist even a few decades ago."

Judge Winkle said, "Such may be the general situation in those states where opinions were adopted using this as a background to justify the change, but we do not believe such to be true in Nebraska when we consider the varied institutions to which this doctrine has application, such as churches, YMCAs, YWCAs, Salvation Army, Boy Scouts, and other organizations falling within this classification. From our observation we believe most of these organizations still have plenty of hardships and burdens in connection with their efforts to carry out the charitable purposes for which they are organized."

That was in 1955. Then we move forward to 1966. We do have practically a new court since that time, since 1955 and the entire philosophy has changed. I think it is rather interesting that in the opinion by Judge Smith, where he held that a non-profit, charitable hospital was not exempt from tort liability with respect to causes

of action arising after April 22, 1966, as to cases prior to that date he said they could recover but only if the hospital was insured against liability on the claim of the patient, and then only to the extent of the maximum applicable amount of its insurance coverage.

When Judge Smith, in his opinion, discusses the situation and the financial status of charitable institutions he quotes from a case, *President and Directors of Georgetown College v. Hughes*, which is a federal case decided in 1942, he states, "No statistical evidence has been presented to show that the mortality or crippling of charities has been greater in states which impose full or partial liability than where complete or substantially full immunity is given. Nor is there evidence that deterrence of donation has been greater in the former. Charities seem to survive and increase in both, with little apparent heed to whether they are liable for torts or difference in survival capacity. What is at stake so far as the charity is concerned is the cost of reasonable protection. The amount of the insurance premium is an added burden on its finances, not the awarding over in damages of its entire assets. Whether immunity be found on the trust fund theory, the rule of respondeat superior, so-called public policy, or the more indefensible doctrine of implied waiver is not for us a controlling consideration. They are mainly different ideas for the same idea, cast according to the predilection of the user. The differences in foundation do not affect even the extent of the departure. If this exemption formerly met a need, it has had its day."

I think that we would all have to agree to that as a practical matter as we look at it. These hospitals are all, I would say almost all of them, large. They do have tremendous funds. They get funds from the government. I think personally that this is a very practical solution. I think the need for this non-liability of the charitable institution has passed into the darkness.

I think it is rather interesting to note the difference in the court on their philosophy to the whole matter, but I think that this generally speaks of our present day outlook as to legal responsibilities for all. So at the present time the law is clear in Nebraska that a hospital, whether it is charitable or private, has a legal duty to its patients to see that they do receive proper care and treatment, and in the event that it doesn't conform to that standard, legal liability is imposed upon them.

Generally speaking, the hospital's liability is governed by the same principles as apply to all other employers. It can be held liable for the negligence of its nurses, torts of its executive officers, the negligence of the interns that are committed within the general scope of their authority. It has a duty to use reasonable care in

the selection and maintenance of the equipment and facilities furnished for a patient's use and can be held liable for its failure to do so.

As we look back and we think of the case of *Muller v. Nebraska Methodist Hospital*, the operating table collapsed. Under the laws that exist now a recovery probably would be had. The same thing would be true in the case against *Clarkson Hospital* where the student nurse spilled ether in the bed. The lady claimed to have received burns. Under the present philosophy and theory she, too, probably would have been entitled to recover.

I think that rather than merely relating these abstract principles of the law concerning the duty of the hospital to its patient, I think it probably would be more beneficial and perhaps a little more interesting to discuss various cases.

I will cut this short because the time is about up, but I do have several cases which at least to me were of a very interesting nature because of the duty that it imposed upon the hospital. In several cases the question has arisen concerning the extent of the hospital's duty to review a physician's work or even to require consultation; in other words, to bring in a specialist. In effect, an extension of this philosophy would, it would seem to me, place the hospital in a position where it must assume control over the practice of medicine by the physicians on its staff in order to avoid liability, and would also result in the encouraging control of the practice of medicine by persons who are not licensed physicians.

There is a recent case, *Darling v. Charleston Community Hospital*, an Illinois case where a judgment for \$110,000 was awarded to the plaintiff against the hospital in a case arising out of the amputation of a young lad's leg following treatment of a fracture received in a college football game. In that case the Supreme Court of Illinois held that the standard of care prevailing in hospitals in the community was not the only basis for judging the hospital's liability. It approved of considerations given to the standards for hospital accreditation, to the joint commission on accreditation of hospitals, the regulations of the State Department of Public Health under the Hospital Licensing Act, and the bylaws of the medical staff of the hospital.

The court said, "On the basis of these standards the evidence was sufficient to support a verdict against the hospital on either of two grounds: One of them, that the nursing attention was not sufficient to promptly recognize and remedy impairment of circulation in the patient's leg—it would almost appear that they are requiring the nurse to make a medical differentiation, a medical opinion;

and the second, that the hospital failed to review the physician's work or to require consultation."

This case was affirmed by the Illinois Supreme Court and apparently it is good law in Illinois. It seems to me that this most certainly is requiring a great deal of the hospital, of the administrator of the hospital or of the administrative body. But be that as it may, this is a possible theory of recovery and it is something that at least should give us some concern or at least cause us to give some thought to it.

There was another case, a New York case, and the question was unorthodox surgery. In that case they tried to impose liability on the hospital on the basis that they didn't get informed consent of the patient's parents. In that case they held that even though the surgery was unorthodox, even though the hospital did not get this additional consent, there was no duty on the hospital to go ahead and do so. This was true, even though the hospital knew that this doctor had apparently been barred from one other hospital because of this surgery. They called it a spinal-jack operation on the spine to correct a scoliosis of the back. They said even though the hospital knew that the surgeon no longer performed the operation at another hospital, that he had been barred from their staff, still they were under no duty, No. 1, either to give additional information, the informed consent of the parents, nor were they under any obligation to prevent the doctor from going ahead and following this surgical procedure.

In another case where an individual lost an eye they claimed that the nurse was derelict in her duty. In that case they held that there was no liability because there was nothing in the record to support the patient's cause of action against the hospital unless it was inferred that the hospital or its employees had a duty, when the doctor was unavailable, to call another ophthalmologist staff member or intern. The patient's expert witness testified that the hospital not only had no duty to call another doctor, but also had no prerogative to do so. There you have two different jurisdictions. This last case was a Kansas case, 393 Pacific 2d 982.

On the other hand, you have the Illinois case where, in effect, they said the hospital *did* have the duty to bring in a consultant, to bring in a specialist.

As I say, to me this is stretching the legal responsibility, the function of the hospital to a ridiculous position. In effect, I think you are calling upon the hospital itself to practice medicine, and this most certainly is not proper.

There are other cases which have arisen, and this is not particularly unusual, I think we are all aware of them, but there are many times where a dispute has arisen when the individual has either had difficulty getting into the hospital or upon the doctor's releasing him, being able to get away from the hospital, because of his financial status. And there are other cases where they wouldn't let him in because either an intern or a doctor didn't think it was necessary.

After looking at the cases, it would appear to me, in any event, that this is something that all of the hospitals, and I think this applies in Omaha as well as outstate, I think we are all familiar with many of the administrators, that they require people in effect to practically sign their life away before they let them in, and most certainly they won't let them out unless there is a check in the mail or on their desk, or unless they have insurance. Well, obviously, the insurance, I think, has given rise to this problem primarily.

Nevertheless there are situations where the person does not have insurance, where they do let them into the hospital, and then comes the question, "Should the hospital go ahead and care for them or should they just send them on their way?"

There is an interesting case, a Florida case, where an eleven-year old patient was held to be entitled to recover damages in a lawsuit against the hospital for injuries sustained when the hospital, after admitting him for an appendectomy, required him to leave two hours later because his mother couldn't come up with \$200. In that case they did hold the hospital liable, and primarily it was based on the idea that the hospital had gone ahead and started to care and treat for the boy. In effect, it would appear to me that if he had come in and the hospital had said, "Go on your way," and not have done anything, it would be questionable whether there would have been liability, because obviously the hospital, or so they held in this case, had the right to pick and choose who it cared to treat. In any event, in this case they held that the child was entitled to recover.

There are other cases where the patient has come in pursuant to his own doctor's request and yet the hospital refuses to admit, and if something occurs and they can tie it in from a proximate cause basis, even there the hospital was negligent, that it did not comply with its duty and therefore was responsible.

There is another case that I thought was rather interesting, and this has to do with the discharge from the hospital, a false imprisonment action was brought against the hospital for an eight-year old child. The hospital apparently kept him there for several hours

while the mother went home trying to raise the money, trying to make the arrangements, but in that case the court did not award damages to the child because the child didn't realize that he was not allowed to go. Therefore they couldn't show any damage insofar as the child.

As I have said, I think that the hospitals and the administrators are losing sight, really, of their duty to the public, to the patients. They are very interested, of course, in collecting their money, which is most certainly understandable, nevertheless they should realize that they do have this duty and that they can be held responsible, obviously, in certain situations.

To me, in any event, it is something that the hospitals, at least from this time forward, should exercise more care, and perhaps the administrators should be urged to not be so critical of these people where there is some question about the financial funds.

There is one situation where a man gave the hospital a check and the check bounced and the hospital administrator files an action against him or causes a criminal complaint to be filed against him. The man brings a malicious prosecution charge against him. When the hospital collected they dismissed the suit. But they held that this man was entitled to recover for malicious prosecution. Most of the cases, of course, that do arise are situations where it is based upon the negligence of the nurses or of the interns in their care and treatment. I think it is rather interesting to note that the "captain-of-the-ship" doctrine, wherein primarily they hold whoever the operating surgeon is to be responsible for the negligence of the nurses or whoever is in the operating room on the theory that he is the captain of the ship, that he is responsible for what goes on in the operating room.

But this liability appears to be being extended back to the hospital. And this is true even in cases where it is under the direct control of the physician in the operating room. The hospital was held liable for the negligence of a nurse anesthetist in a California case and in a Washington case; on the other hand, there was a case in Vermont where the obstetrician ordered the nurse to press on the patient's chest in order to obtain increased pressure within the abdomen and in doing so she broke several ribs. In that case they held the hospital was absolved from liability on the grounds that the nurse was under the control of the physician.

Then there was a Louisiana case where they held that the patient was entitled to recover damages against the hospital for injuries caused by a gauze laparotomy pad that was left in the patient's abdomen. The evidence supported the jury's finding that

the pad had been left in the abdomen as the result of an incorrect lap count by two nurses employed by the hospital, and that they were not acting as the surgeon's borrowed servants when they made the count. The court held that a hospital is liable for its employees' negligent performance of administrative acts, but not for their negligent performance of *medical* acts. The making of the lap count did not require the exercise of any skill developed through special training or of any professional judgment, and it could have been made by an unskilled and untrained employee.

I would most certainly hate to think that they would merely call in some young lady off the street and expect her, in surgery, to go into my anatomy and pull out these sponges and laparotomy pads, and if that doesn't require skill—well, I just can't imagine this—but in any event they did hold that this lap count could have been made by anybody, skilled or unskilled, and the incorrect count was an administrative mistake for which the hospital could be held liable. This is true even though the record established that these nurses were under the supervision of the surgeon who was performing the operation, they were operating under this direction and supervision, yet in that case they went back and they looked at the hospital and held the hospital responsible.

The same thing applies on injections, where the nurses give injections, even pursuant to the orders of the doctor and yet they have held that this is something that, after all, the physician tells them what to do, but giving an injection, once again, does not require particular skill and training!

I was really quite amazed at the cases in going through this where it appears to me that the courts are actually bending over backwards to more or less take the monkey off the surgeon's back and putting it onto the hospital. When they are in the surgical room, to me this captain-of-the-ship doctrine does make sense. He is in charge of it. Yet the courts and the trend, at least from what I have been able to see, it would appear that the trend is reversing and they are attempting to point the finger back at the hospital.

There was an interesting case, and perhaps you have noticed it, there were three separate trials and one time they got a \$187,000 verdict and another time \$158,000, and they got a \$282,000 verdict, and they finally settled it for \$100,000. This was in New York City. This child was eight years old, couldn't walk or talk, was incapable of learning, and it was claimed that the hospital nurse had delayed the child's birth by pressing a towel against his head until a physician arrived. There was expert testimony that the repressed birth was the cause of that condition. It took them three trials, but they finally did negotiate a settlement for \$100,000.

I think that there are many instances where the people come into the OB room and they have to call the doctor, and sometimes there is a delay from the time he receives the call until he gets to the hospital, and, personally I don't believe that this is particularly unusual, where the nurses do try to hold back the birth until the doctor does get there. But here was a situation where they held that because of her action the hospital was responsible for not allowing and permitting a normal birth.

Gentlemen, I have many more cases. It is twenty minutes to five. I know you have been here a long time. After listening to Tom Lambert, Bob Mullin, and Franklin Winner, the "Bard of the West", I am sure that this is rather a dry topic.

I do believe that under Nebraska law, and particularly this is true since they've removed the charitable immunity, hospital litigation is on the rise. A lot of this, I am sure, has arisen because of the size of the hospitals and the lack of personal care. We have medical insurance, Medicare, and to me perhaps this is what is giving rise to many of these claims—I don't know. It has been said that the same thing is responsible for a lot of the malpractice litigation that is now being brought against the medical profession, that no longer do they have the personal approach, the personal touch, that you are just a body, so to speak, and you are lucky if the doctor sees you before he starts to cut. I think possibly this is responsible for a lot of the increase in this litigation, and there is no question in my mind but that it is going to continue and increase further.

When we talk about the expanding duty, I don't think this is necessarily an expanding duty, as such; I think it is more just a recognition of reality.

CHAIRMAN BRUCKNER: We want to have you all back here tomorrow morning because we have an outstanding program. We have some outstanding speakers coming in from New York, St. Louis, and Minneapolis.

Also you have all received a copy of a facts situation which will be the basis for the final arguments tomorrow afternoon. We did not want to bore you with a trial sequence. These things can get to be very boring, but we have two of the best advocates in the country coming in here to argue tomorrow afternoon, and it would behoove you to read this ahead of time so you have some idea of what they are talking about.

...The session adjourned at four forty-five o'clock...

**ANNUAL ASSOCIATION DINNER
THURSDAY EVENING SESSION**

October 19, 1967

The annual Association dinner, held in the Hotel Sheraton-Fontenelle Ball Room, was presided over by President Murl M. Maupin.

PRESIDENT MAUPIN: Distinguished Guests, Ladies and Gentlemen of this Association: Your Officers and the Executive Council are highly pleased to see this gathering of our members, this turnout on this occasion this evening.

Before I start the introduction of the guests, I should like to extend my personal thanks and the thanks of the Association to a fellow member of our Association, Mr. Priesman, for the lovely organ music he has furnished to us.

At this time I desire to introduce to you the guests at the head tables. I would ask you, if you will, please, to withhold your applause until the table in its entirety is introduced, and then we will have one round of applause for all of those who have been introduced.

On my far right, and at the table to my immediate rear, is the Honorable Herbert A. Ronin, Judge of the District Court of Lancaster County, representing the District Judges Association. Judge Ronin!

Next is the Honorable John E. Newton, Associate Justice of the Supreme Court of Nebraska. Judge Newton!

Honorable Robert L. Smith, Associate Justice of the Supreme Court of Nebraska. Judge Smith!

Honorable Harry A. Spencer, Associate Justice of the Supreme Court of Nebraska. Judge Spencer!

Next, the Honorable Richard E. Robinson, Chief Judge of the United States District Court for the District of Nebraska. Judge Robinson!

Then at my far left is the Honorable George Stanley, the President of the County Judges Association of Nebraska.

Next is the Honorable Hale McCown, Associate Justice of the Supreme Court of Nebraska.

The Honorable Leslie Boslaugh, Associate Justice of the Supreme Court of Nebraska.

The Honorable Edward F. Carter, Associate Justice of the Supreme Court of Nebraska.

The Honorable Paul W. White, Chief Justice of the Supreme Court of Nebraska.

Now will you join me! (Applause)

At the table where I am standing, at my far right I am very happy to present to you Mr. Moe Levine of New York City, who will be a speaker at the seminar tomorrow afternoon. Mr. Levine!

If you will please withhold your applause until we make the entire introductions we may be able to leave a little earlier.

Next is Mr. Joe F. Balch, President of the Bar Association of the State of Kansas. Mr. Balch!

Next is Mr. Henry Burgess, President of the Wyoming State Bar Association. Mr. Burgess!

I most inadvertently, and I am very sorry I did it, I skipped over Mr. S. David Peshkin, who is a representative of the Iowa Bar Association and who has been with us here many years. Mr. Peshkin!

Mr. John J. Wilson of Lincoln, Nebraska, Delegate of the Nebraska State Bar Association of the House of Delegates of the American Bar Association.

Next is Mr. Clarence A. Davis, member of the Board of Governors of the American Bar Association.

Next is Mr. Leo Eisenstatt, the newly elected Chairman of the House of Delegates of the Nebraska State Bar Association, of Omaha.

The next two gentlemen I shall for the moment pass by.

On my far left is Mr. Martin Purcell, President of the Missouri Bar.

Next to him is Mr. Stanley E. Siegel, President of the State Bar of South Dakota.

We are very happy to have with us tonight the next gentleman, Dr. Robert J. Morgan, who is President of the Nebraska State Medical Association.

Seated next to Dr. Morgan is Mr. Roy E. Willy, Past Chairman of the House of Delegates of the American Bar Association, of South Dakota, who has been a long time visitor of ours in these Association meetings.

Mr. Herman Ginsburg, immediate Past President of the Nebraska State Bar Association.

Mr. George H. Turner, State Delegate to the House of Delegates of the American Bar Association and Secretary-Treasurer of the Nebraska State Bar Association.

The next gentleman is Mr. Harry L. Welch of Omaha, President of the Omaha Bar Association, who has helped us so much in arranging this program.

Then I will present the next two gentlemen to you a moment later.

At this time we have with us, and I hope that they are each here though I have not been able to identify them out in the audience, certain of our members who have passed the half century mark as members of this Association. In our formal meeting this morning we conferred Certificates of Membership recognition of their fifty-year membership in the Association to a group of them, all of whom are not here tonight, but I think that we have with us tonight, and if so I desire to have the members and their ladies to stand, and if you would withhold applause, and if they will remain standing until I call the roll to see if they are all here:

Judge Meyer and Mrs. Meyer of Alliance
Mr. and Mrs. Carl D. Ganz of Lincoln
Mr. and Mrs. Curtis O. Lyda of Gering
Mr. and Mrs. Ralph O. Canaday of Hastings

Have I omitted any other fifty-year member that was recognized this morning but was not here? These gentlemen and their delightful ladies are all entitled to your warmest applause. May I say that we are extremely happy that the four couples of you can attend upon this gathering with us tonight, and may I wish to each of you, on behalf of this Association, that you can and will be with us on many, many more occasions similar to this.

At this time I should like to call on a gentleman who represents the National Association of Trial Attorneys to make a presentation. You may know, those of you at least who have examined our program, that at this annual meeting of ours the Tort Section of the Bar Association and the Nebraska Association of Trial Attorneys have put on and have jointly sponsored the seminar that we conducted this afternoon and will be conducting throughout the meeting tomorrow.

At this time and on this occasion for a presentation, I call on Mr. Charles E. Kirchner, representing the National Association of Trial Attorneys, for a presentation.

PRESENTATION**Charles E. Kirchner**

Thank you, Mr. President. Honored Justices and Judges, Guests at the Head Table: My assignment is to make the presentation of the first of the Dean Pound Memorial Plaques.

If I were to tell you the reasons for the admiration of the Trial Attorneys for Dean Pound I would really be gilding the lily. Five years ago this Association took the project of rewarding a worthy student at each of the two state law schools in the art of oral advocacy. The student from each school is chosen by the faculty, and we have here tonight, first, the prerepresentative of the Creighton University School of Law, Professor in Trusts and Wills, William A. Donaher. Would you stand, please? Thank you, sir.

The honoree from Creighton University is a Senior. We are pleased to learn that he will enter the general practice but probably not in his home town of Emerson, Iowa. We would like to have him come forward—Mark Laughlin.

Mark, first as perhaps the more tangible evidence of our esteem for what you have achieved in your years at Creighton and to encourage you further in the art of oral advocacy, we present you with this check from the Nebraska Association of Trial Attorneys, and it is in the amount of \$100.

Now I would like to present you as the fifth honoree of the school, and I'll read from this plaque: "Dean Roscoe Pound Memorial Award—Nebraska Association of Trial Attorneys, awarded annually to the student who best excels in the art of oral advocacy."

I'll read you the names of the four previous honorees: 1963—Theodore J. Tierney; 1964—James P. Green; 1965—David E. Pavel; 1966—David J. Vickers; 1967—Mark Laughlin. Congratulations, Mark!

MARK LAUGHLIN, Emerson, Iowa: Thank you very much.

MR. KIRCHNER: The Nebraska School of Law honoree is not with us. He was a Senior in the School of Law last year. I am informed that he is in the service of the United States. I am wondering if any members of the family may be here. I believe he is the son of Dr. McWhorter of Omaha. So the honoree from the University of Nebraska is Stephen McWhorter. I have the check and the appropriate label for the plaque will be affixed at the School of Law in Lincoln. Let's give a hand to Stephen McWhorter in his absence.

During the day today, those of you who have attended the program have noticed one certain gentleman going around with a kind of set, fixed, sometimes grim look on his face until the program began to fall in place, and as the day went on the seriousness changed into a smile. I see that his wife has the usual very pleasant smile on her face today.

I would say that during his year as the Persident of the Nebraska Association of Trial Attorneys long strides have been taken toward the goal of excellence in the trial field, in the interest of a fuller measure of justice to the litigants, and to enable the practicing trial lawyer to achieve a measure of expertise regardless of which side of the table he may sit on. So at this time I would like to call forward Tom Walsh. Tom! Congratulations, Tom. I bid you welcome to the happy company of past Presidents of the Nebraska Association of Trial Attorneys.

PRESIDENT MAUPIN: Thank you very much, Mr. Kirchner.

At this particular point in our presentation of persons, but by reason of decisions taken without individually identifying the same, we have seated immediately in front of us the wives of the various members who have been introduced from the two tables before you, and may I ask you ladies at least without my attempting to identify each of you individually to please stand so we may give you a round of applause.

By virtue of the privilege of occupying this particular spot tonight, there seems to have grown up a custom of personal privilege that I desire to avail myself of by introducing my family.

I have with me tonight my son, Murl Maupin, who is a chemical engineer of New York City. I should like to have Murl stand. Please withhold your applause.

With him is the father and mother of Murl's wife, who is detained in the vicinity of New York City doing a job of babysitting of the three children. She could not come out but her father and mother are here. Her father was a classmate of mine in law school and of course a friend of forty or more years. So I should like to introduce Mr. and Mrs. John P. Stanton of Stromsburg, Nebraska.

Likewise my daughter, by reason of baby problems, not only of baby sitting but, if her forecast and prediction is right, I shall become a grandfather again next month, or very shortly. She is not able to be with us for that reason, but her husband, my son-in-law and my law partner, Dick Satterfield, is here and would he please stand. Dick!

For the past year or more we have been struggling out in the City of North Platte to do the thing that we have been trying to do in the practice of law for a great many years, and that is to meet the monthly rental payments. During the past year I haven't been participating very much in that effort, but the other boys in the office have been. Suddenly I discover they are all here tonight, so it indicates to me that we have lost the battle and they have closed the shop! But I do wish to present to you the men who have carried on the work as my partners and associates during the year that I have been occupying this position: George B. Dent, Jr. of North Platte; Harold W. Kay; Clinton J. Goetz; Donald E. Girard; and Gary L. Skritsmeyer. I've already introduced Dick.

On this occasion I was requested to convey to this gathering tonight the regrets of Mr. Justice Vogal of the Circuit Court of Appeals, Eighth Circuit, who by reason of the fact that the court is in session could not attend and asked me to extend on his behalf his greetings to this group and his regrets for inability to be here.

Likewise, our own fellow Nebraskan, Judge Donald P. Lay, made the same request, and by the same reason of other commitments.

Judge Robert Van Pelt of the United States District Court could not be here and extends regrets that he could not attend this meeting.

At this time and as a part of the program that we always conduct upon this occasion, it becomes my duty and my obligation to present to you the President-Elect of the Nebraska State Bar Association, George Boland.

George Boland is a graduate of Creighton's Prep School. He obtained his A.B. degree at Creighton University in 1920, his LL.B. degree from Creighton Law School in 1923, and in that year he was admitted to the Nebraska Bar, and thereafter to the United States District Circuit Court and Supreme Court of the United States.

He has always been active in Bar Association activities, serving on various committees and in various positions with the Nebraska Bar. He is a past President of the Omaha Bar Association. He served as a lecturer on law at Creighton University. He has been a member of the Lay Board of Regents of Creighton University. He has been a member of the Board of Directors or of the Friends of Duchesne College, a member of Alpha Sigma Nu, the National Jesuit Honor Society, and a Knight of St. Gregory.

He has been overly active in Veteran organizations of the United States, having served as Commander of Post No. 1 of the

American Legion, as Chef de Gare of the Omaha Forty and Eight Society, as Grand Chef de Gare of the State organization of Forty and Eight, Chef de Chemin, National President, as it were, of Forty and Eight, and he has also been National Attorney or Advocate General of the National Association of Forty and Eight for a number of years.

George Boland has been recognized and accepted by his professional brethren as one of the outstanding trial lawyers of Nebraska, and he is a Fellow of the American College of Trial Lawyers.

At this time I would like to have George stand and I would like to have Helen stand also.

...The audience arose and applauded...

George, by virtue of action taken in your nomination by the Executive Council of this Association and the subsequent submission of your name to the membership for a vote, you were duly elected President of the Nebraska Bar Association. I know of no one to whom I would have greater pleasure and greater privilege in handing the token of office than to you.

This occasion is a sad one, as it were, for me, and sad, I believe, for a great number of the intimate and personal friends of George Boland. On this occasion, and by reason of an occurrence, George has submitted to the Executive Council a communication which has been acted upon by the Executive Council to become effective as of the time upon completion of the reading of this document.

The document is addressed to me as President of the Association and it reads: "With sincere regret I must inform you that I will be unable to serve as President of our Association during the coming year. While I have made much progress since last February, my doctors now advise me that I should avoid the pressure of heavy responsibility until my recovery is further along.

"This decision has been a difficult one, for I have been looking forward to the opportunity and privilege of serving our Association in the year ahead. The presidency, however, carries with it an ever-increasing obligation to devote hours, weeks, and months in order that our program may continue to move forward. This you have done, and this I am presently unable to do.

"Kindly express my gratitude to the Executive Council for proposing my name as President-Elect. This is an honor which I shall forever cherish.

"It is also my hope that you will convey my warmest greetings to all of the members of our Association and thank them for their prayers and friendly wishes during my period of serious illness.

"Most sincerely, George B. Boland."

With the filing of that letter with the Executive Council, the Executive Council, with the greatest of reluctance and with ever-continued hope that it might be possible for George to assume the duties of the office and go forward, deferred taking action thereon until the time that the letter was read to you tonight, and in a duly called meeting as of yesterday this letter of resignation of George's was accepted to become effective as of my reading it upon this occasion.

George, may I say to you and Helen, our heartfelt wishes go with you for a long and a healthy and a happy future. We are extremely sorry that you cannot go forward with the honor that we were all so anxious to see you have.

Now, then, with that action having been taken, and under our rules and bylaws the President-Elect of the Nebraska State Bar Association, upon the acceptance of the resignation of George, immediately and automatically succeeds to the office of President of this Association.

So tonight I present to you your duly elected President-Elect, C. Russell Mattson of Lincoln, Nebraska, who had his preparatory education at the University of Omaha, attained his LL.B. at Nebraska Law School in 1930, and was admitted to the Nebraska Bar in that year.

Russ has always been active in Bar Association affairs. He is a past President of the Lancaster County Bar Association. He served upon numerous committees of this Association, including the Executive Council, and has been diligent in the work of the American Bar Association. He has held the office of Deputy County Attorney of Lancaster County and Deputy City Attorney and City Attorney of Lincoln, Nebraska.

He has been active in fraternal affairs, particularly in Shrine organizations as the Potentate of the Lincoln Shrine and as the present President of the Central States Shrine Association. He is General Counsel of the Shrine Bowl of Nebraska. He is a past President of the Lincoln Lions Club and a member of the Presbyterian Church in Lincoln.

I am indeed, on this occasion, happy to be able to present to you as the incoming President of this Association the token of your office with well wishes of the members of this Association and with our knowledge and desire that you will carry on for us.

Would you like to say a word, Russ?

C. RUSSELL MATTSON: First, for the lawyers present, you *know* that this is a rare occasion, because I think it is the first time in my career that I have spoken with the court to my *back*. And if it were Friday morning I would be expecting a knife in the back.

I will assume a prerogative that I think belongs to Mr. Maupin, however, and introduce his wife, Mrs. Maupin, who is a member of his family. I have seen that happen before, so I wanted to take it away from him.

I am sincere in my expression to you of the honor which has become mine in assuming the presidency of the Association. My sincere hope, along with that of all of us, is for a complete and happy recovery for George Boland. All I can say to you and the members of the Bar Association is that I sincerely hope that I can serve you in the manner that we know George Boland would have, had he had his health.

PRESIDENT MAUPIN: I should like to say to you on this occasion that under the rules of our Association, upon a vacancy occurring in the office of President-Elect it becomes the duty and the obligation of the Executive Council to appoint a President-Elect of the Association. That has been done by your Executive Council, after the most unusual and extremely misfortunate developments concerning George, and with Russ taking over on this occasion, the unanimous decision of the Executive Council for the appointment, and he has now been appointed to take office by virtue of the resignation having been accepted—Mr. Charles F. Adams of Aurora, Nebraska. “Chick”, are you and Mrs. Adams here?

“Chick” and Russ will attempt to take over as of the time that I finally relinquish the gavel as of four-thirty or five o’clock tomorrow night, and I am sure with that working team you are going to have officers for the new year of this Association who will carry on the work and activities of this Association as it has been carried on in the past.

Now at this time it is my pleasure to present to you one of my old-time friends, a distinguished member of our Bar now serving in the capacity of Senior Judge of the Circuit Court of Appeals of the Eighth Circuit, Judge Harvey M. Johnsen.

Harvey, as you all know, and upon this occasion I take it that I am permitted to use the name Harvey rather than Judge, was the first President of our integrated Bar. He was appointed to the Supreme Court of Nebraska while he was serving as President of this Association and he withheld accepting or at least qualifying for the bench until he completed his presidency. Somebody out here says I am wrong. Was it the Supreme Court or the Circuit Court?

As has been my experience down through the years, and probably for the first time, I get an affirmation from Mr. Justice Johnsen; he says yes it was the Supreme Court. It is one of the few times it has happened to me.

Harvey, in the days that he was a practitioner, was known as the lawyer's lawyer. As a member of the federal judiciary I state that he probably has achieved that status in judicial circles where it may well be said of him that he has become and now is a "judge's judge."

So it is with a great deal of personal pride and pleasure that I present to you Judge Harvey M. Johnsen for further discussion.

JUDGE HARVEY M. JOHNSEN: President Maupin, Mr. Justice Clark, and I shall shortcut and I hope you will forgive me, by simply saying Ladies and Gentlemen: your dispensation of flowers is even more attractive than Senator Everett Dirksen's mellifluous stroll through his marigold gardens on TV.

It is my privilege to present the speaker of the evening, and I am going to be brief because I was at a dinner in Washington one time, Mr. Justice Clark, when you were the principal speaker and we got around to you at eleven o'clock. This was not a lawyers' dinner; it was a judges' dinner. So you can draw your own conclusions.

It is of course an easy task to make a presentation of a speaker of such distinction and accomplishment as Mr. Justice Clark. Rather, the difficulty in such a situation is how to muzzle the introducer, lest he become so fulsome with statistics and rhetoric that the speaker himself is caused to squirm and the audience to mutter, "Dry up, Buster! We came to hear the speaker, not you."

I have observed that any one who presents a Texan always engages in the initial courtesy of telling his audience that fact. This, however, inevitably brings out the chronic ailment which every man seems to have when he stands on his feet before an audience of being reminded of a story or two. Of course the stories about Texas, the great State of Texas, are legion. I'll take the privilege and shortcut on the rest of them by telling you my favorite one.

It has always been that of the father who was giving his youthful son some final advice as the latter was about to venture out into the world. "Son", said the father, "one of the finest qualities a person can have is to always be considerate about the feelings and the sensitivities of others. For instance, whenever you meet a man, never ask him where he's from. If he's from Texas, he'll tell you; if he isn't don't embarrass him."

Mr. Justice Clark is indeed a Texan in the finest sense and the most rugged signification of that term. He was born and raised in Dallas, educated in the schools of that city, and went for his higher learning to the University of Texas from which he received both his academic and his legal degree.

His attachment to the law was not fortuitous. His father and his brother were practicing attorneys in Dallas before him. Indeed, so much was the legal spirit a part of him that he was not satisfied to marry any Texas beauty except the charming daughter of a Justice of the Texas Supreme Court, and the blood stream of the law has further flowed in the family veins since his son, Ramsey Clark as you know, is now the present Attorney General of the United States.

The thing that stands out with respect to Justice Clark, and these are things we don't always evaluate, is the background of experience he had when he went on the Supreme Court. This had been most fulsome—private practice, public service, he had gone through the Department of Justice, had gone up through the positions of Assistant Attorney General in charge of Antitrusts, Assistant Attorney General in charge of the Criminal Division, and finally the Attorney General.

The thing that stands out in connection with this is the civic interest which he always had. I won't be able to go through all of the things that he did, but one or two of the notable things was while he was Attorney General he was responsible for the creation of the Attorney General's Committee on Juvenile Delinquency. He organized the National Conference on Citizenship, and there are numerous others which I shan't undertake to go into.

He was appointed Justice of the Supreme Court in 1949. His activities since that time, something that is not ordinary on the part of a Judge and even less on the part of a Justice of the Supreme Court, have been widespread and outstanding. He has been President of the Institute of Judicial Administration; he has been Chairman of the Section of Judicial Administration of the ABA; Chairman of the Joint Committee for the Effective Administration of Justice; Chairman of the Board of Directors of the National College of State Trial Judges. He was our Circuit Justice of the Eighth Circuit for a number of years after he went on the court. We lost him to the Seventh Circuit, which has been most happy and which I know feels has sustained a great loss in his retirement from the Supreme Court.

Of course we would expect a man of this stature, experience, and capacity has received numerous honors. He has. He has about

twenty Doctor of Laws degrees from various schools, universities, and law schools.

I think perhaps one of the things that he would most treasure is that he was the recipient of the American Bar Association's Gold Medal Award for conspicuous service in the cause of American jurisprudence. A Judge's standing, as well as a lawyer's, the thing he appreciates most is the recognition so far as his own profession is concerned because they know how to evaluate him far better than the man on the outside.

He received the first American Judicature Society award for distinguished service, and many others.

I think perhaps the greatest tribute that has come to him, and I am sure one that he feels the deepest in his heart, was the great regret that the American Bar, and I say this not in organized terms but the legal profession felt generally, when he retired from the Supreme Court. There was a feeling of having him on the court that helped to strike a balance, and this in my analysis has always been because of his recognition of realities, the striking of a common sense level with respect to the things that he was dealing with.

One of the things that impressed me most when he first went on the Supreme Court, I was in his apartment one evening for dinner with one of our mutual friends, Judge Bill Mathes, who is now dead but who was a fellow Texan who was an outstanding district Judge on the United States District Court of California. We entered his apartment, and this was just shortly after he was on the Supreme Court, and one of the first things that struck my eye was that lying on the table, open where he had been reading it during his evening preoccupation, was a copy of "The Federalist", going back to observing and getting yourself into the foundations that existed when we started. This doesn't mean that he doesn't believe in change, because the Constitution, of course, the same as any institution in democracy must be a *live* one, but it is something worthwhile to know that he was concerned in reviewing in a different way than he had in law school, because it came to have more meaning, and refreshing his recollection and going back and absorbing his attention in those things.

I would say that he knows more judges, more lawyers than any other judge or member of the United States Supreme Court. I think the greatest tribute that can be paid to him, not only the regret which the Bar felt, and this was general, but that most all those that he comes in contact with simply call him "Tom Clark".

It is my pleasure to present Mr. Justice Clark.

...The audience arose and applauded...

ADDRESS

Justice Tom C. Clark

Mr. Johnsen, Mr. Maupin, Mr. President, Mr. Boland, Mr. Chief Justice, and my Brother Judges of the Federal and State Courts, you Beautiful Ladies at the Head Table, and you Beautiful Ladies not at the Head Table, and my Fellow Lawyers: Well, I am overcome, Judge, with that introduction. You gave it just as I wrote it except you did leave out about my grandchildren. Mr. Maupin, I have six and one-half. I am hoping this half develops into a boy, because I have now five granddaughters and one grandson. Usually when the speaker introduces me and he leaves out that paragraph, I make a federal offense of it. But I'm not going to do it tonight because I remember my dear father and mother, and if they had been here tonight and heard it, my father would have chuckled, knowing there was no truth in it, but my mother would have loved it, and what's more, she would have believed every word of it.

Judge Johnsen has been my good friend for many years. I go way back with him, even before I became a Circuit Justice back in 1949. Tonight I wanted to deal with some of these Nebraskans whom I met 'way back. This being your Centennial year, I thought it might give me an opportunity to sort of reminisce.

My wife tells the story of the little girl in the University who was a very charming young lady. They lived at a boarding house right across from my fraternity house. They used to come home every night and tell what had happened. One girl would tell about this boy kissing her, and another one would tell about something else, and when they got around to her she said, "Well, I can't tell anything. I never have reminisced.

Well, I want to reminisce with you tonight. I had a very fine speech that was prepared by a Harvard boy, by a law clerk, but I was reading it on the way out here and I couldn't pronounce some of the words. The next time I'll have to take one from Creighton or maybe from Lincoln.

In any event, Mr. President, I'll leave the speech with you. If you want to have some good bedtime reading and you are quite ready to go to sleep, I recommend it.

My first offense in Nebraska was 'way back, well, almost thirty years ago when I met Judge Van Pelt. He was then representing the Deshler Broom Factory. I don't know whether they are still in business or not. In fact, I hadn't heard anything more about it until this afternoon when I went over to the University and I found Judge Van Pelt and we reminisced about it.

I remember the case involved the Wage-Hour Law, which had just come in. It came in, I believe, in November, 1938. This case developed over a 25-cent an hour wage that was required by this law, and the question was whether or not this company had been paying it. They worked on a piece basis, how many brooms you turned out, and as a consequence it was pretty difficult to determine. Back there then, Judge, the interstate commerce was not so developed—I am speaking now legally—as it is today, and we had to trace these particular brooms that these particular parties that we felt were not getting the 25 cents, into interstate commerce.

Judge Van Pelt was very kind and obliging. I told him rather than embarrassing the owners and disturbing their daytime operation, we would come in at night. So I took a couple of youngsters that had just been out of school—Thurmond Arnold used to hire them at eighteen and paid them the same amount of money and turned them over to the older lawyers to take out with him.

So we went down every night and we would take these order numbers on which these people were paid and trace them back through that whole production line in order to determine what people worked on that particular order and whether or not the order went into interstate commerce.

Well, it was very painstaking and frustrating, but you know if you work on a lawsuit long enough it sort of blossoms. It taught me a lesson back there with Wage and Hour when I was a special attorney in the Department of Justice at \$5,000 a year. Wage and Hour back then were tough cases because you had to prove that the stuff moved in interstate commerce. There wasn't any question of affecting interstate commerce. Sometimes it was difficult to get the facts. But all of a sudden we commenced to develop a line that just developed all of these shipments into interstate commerce and we had our case made.

That was my first time in Nebraska and I found since that time that all of the lawyers are like Judge Van Pelt. They are smart, they are devoted to their client, and when they find out the client is wrong, usually they fold up when it comes to a criminal prosecution. I think in that instance we dropped the prosecution and took a consent decree of some other kind that prevented any further violations.

I know about one hundred years ago when Nebraska was first founded, they wouldn't have had a Wage-Hour law, I don't believe. They would not have had a court of the type that we were in at that time. They would not have had a lawyer who was a member

of a Bar of the type that Judge Van Pelt was back in 1938. Quite a difference occurred during those years.

We used to talk sometimes when he would come down to the broom factory and sort of watch us work. He and I would talk—we were the supervisors, see, sort of foremen. He would tell me about Creighton and about the Lincoln Law School, about when they got started, about the time when Nebraska first came into the Union and the great lawyers of Nebraska back there then who usually were licensed by the Judge. As I understand it, he would just go down and the Judge would make him a lawyer, after having a drink or two.

And then along came the law schools and you would have a degree from the law school which would entitle you to practice, which was the vogue in Texas when I became a lawyer in 1922.

Then later on came the Bar examination that you require now. So things are quite different when it comes to licensing lawyers than they were back there one hundred years ago or, for that matter, when this Association had its first meeting back around 1900. I understand you had one meeting, sort of a rump meeting in 1899. That is the year I was born, so we'll say you came from 1899 because that was a great year! A great year! The vintage was good.

After that I had the pleasure of coming to Nebraska to celebrate the birthday of Roscoe Pound, and it was held in Lincoln, I believe in 1945 or 1946. I made a talk. Well, it was supposed to be aimed at Dean Pound, but he was a better talker than I was and he really made a great speech for us—without a note, too, by the way.

I shall never forget that that evening we were up in my room and we were talking about various situations and the fact that the war was just over, the country was going to have to get back into gear without a war, which would be quite a hard thing to do. After each war, Dean Pound told me, you always had problems, usually in the juvenile area, because during a war both women and men worked to develop the war machine, most of the men being away, and the women pitched in and kept the home fires burning—down at the factory sometimes—and as a consequence you had juvenile problems.

That brought about two things that the Department of Justice began during my administration as Attorney General, and one of them was the commission that Judge Johnsen mentioned on Juvenile Opportunity, I called it, and the other was the Freedom Train.

That night I told Dean Pound about one time they brought the Liberty Bell through Dallas, Texas, my home town, when I was

quite a small kid, and they had it on a flat car, all protected from getting any greater cracks in it. I thought it was wonderful that I could go up and just touch it.

Down there that night when I was talking to Dean Pound I said, "What do you think about us getting a car and we would put the Liberty Bell on it, along with maybe the original of the Constitution and the Declaration of Independence and the Bill of Rights, and take it around the country. He thought it was great and he coined the phrase "Freedom Car."

When I took it up with the War Department and with other agencies in the government and with private industry which, incidentally, was the providing force behind the Freedom Train, they decided that instead of having a car we should have a whole train that would carry these documents—not the Liberty Bell because those who were in charge of the Liberty Bell said that the crack was getting worse sitting there in Philadelphia and if they carried it around the country they were afraid it would break in two.

But the great Freedom Train sprang right from that meeting in Lincoln, Nebraska, on Dean Pound's birthday back in 1945 or '46. I think it was '46.

I shall always remember those things. In comparing the times of that era with those of today, legally, there are many differences. You take in the law schools alone, your law schools I am sure are somewhat like the law schools over the country, some better, some worse. I know when I was on the Court I had two law clerks. I now have one as a retired Justice. I used to take one of my law clerks, for eighteen years, from the smaller law schools, the ones that had maybe one hundred to two hundred to three hundred students, because I thought that rather than taking both of them from the prestige schools, I might give the smaller law schools an opportunity to say, "We have a clerk on the Supreme Court." It was a very good tonic for them.

I found, incidentally, that the young men I obtained from the smaller schools did as good if not a better job in some instances than did the ones from the brand name schools, the prestige ones. Indeed, I had one that came from a night school—a *night* school—who was one of the best clerks I ever had. Today he has a job paying him \$50,000 a year. He hasn't been out of being my clerk more than ten years. He became an expert in patent litigation. It just goes to show you that these small law schools are still the backbone of our legal profession. Don't fool yourself on that!

I think there is one thing that they have somewhat neglected and I am glad to see your Bar supporting tonight. Back when

Nebraska became a state there were great advocates, I am sure, just as there were in Texas when Texas came in a few years before. Every lawyer was an advocate back then, and he practiced every kind of law. He was what we call today a "general practitioner". He just "generaled" around on everything. It didn't matter what it was. If they had anything from a keg of nails to a keg of whisky and needed a lawyer, he would represent them.

I never will forget old Colonel Crawford back when I was a kid. He lived right across the street. He looked just like this Old Charter ad that you see nowadays. He used to take criminal cases, civil cases, anything, anywhere, any court, any time night or day. Well, nowadays you don't have those.

I was happy to see your Bar tonight give to these young men these trophies for their advocacy, and I hope that *they*, in keeping with the language that was on those trophies which I read before they came up, will continue their work in advocacy.

I want to say, too, that I was proud to read in your report of committees that Mr. Maupin sent me that you had recommended to your Supreme Court that they implement your recent statute which authorized the use of senior law students, under supervision, to appear in courts as counsel for indigent defendants. I think that is a very forward step and one that will be the difference in the advance of advocacy. The trial lawyer, or advocate, is decreasing like the Indians, and if we don't watch out we won't have any, and before long we are going to have administrative agencies handling all the work instead of courts. I am through with my service on the Supreme Court. I am going to still sit in the Courts of Appeal if I get any invitations, and I may sit in a trial court or two on the federal side, of course. It wouldn't bother me in the least insofar as my financial situation is concerned if you had administrative agencies, but I am opposed to them! I think that we should maintain our courts. Every person is entitled to a trial in court, and, if you don't mind, with a jury if he wants a jury.

Another thing that has been going on that I think is very helpful in this regard, and it has been backed by the law schools and by your law school, is this program of "Defenders" for defendants throughout the country. Take, for example, in my Circuit in Chicago the live law schools have gone together there and formed a little educational corporation in which the dean of each law school selects a certain number of senior and graduate law students that he brings together in this Defender Association, and every morning—*every* morning—in Bill Campbell's Court, Judge Campbell's Court, the Federal Court there, and across the street in Judge

Boyle's Court in the State Court, these boys stand there and see these defendants pled in arraignment and in other preliminary hearings, and from then on those boys, of course under the tutelage of licensed lawyers who represent by appointment indigent defendants, continue to be in that case.

I was out there one day handing out some diplomas or certificates to these boys that we gave them that they might hang on the wall and point to it in a few years when they get out in the practice, like I used to do when I got my certificate from the Supreme Court back in 1927. I put it right by the door, just as the client came in. He would see "Supreme Court, United States," there and invariably he would ask me something about it. Well, it didn't hurt the fees any.

Anyway, I was handing out these diplomas and this young man had told me earlier that he would not be able to come that night because he had a jury out. He was a kid in school and I said, "What do you mean?"

He said, "I am on your Defender program and I've been trying a case down there with Ray." Ray was the lawyer, our Director. He said, "The jury is out."

I watched him and he would go out every half hour and telephone, I suppose. He was still there at the end of the banquet. He got his diploma. I found out that Abe Meredith was trying the case, so the next day Abe called me up. I had talked with him that night about this young man and he said he had done a good job. Abe called up and said, "Well, that boy won his case a little while ago."

He came up to see me. I had a very swanky office then in the Federal Building as a Circuit Justice. I was head on the totem pole. He came in and his eyes were all starry. I'll wager that that boy will be a trial lawyer. He has got to go back in the courtroom because he really got an experience there that he will always remember. He said that he had won the case. Of course he didn't win the case; Ray Berg won the case, but let him think he won it! He is going to develop, I think, into a great advocate.

There are other things that are happening nowadays that didn't happen one hundred years ago nor when your Bar began its existence sixty-eight years ago, and that is a college for Judges. Yes, a college for Judges. Judges back to school! I never dreamed of such a thing in my life. If I had ever told a Judge in Dallas, Texas, that he ought to go to school, I might as well have closed up my office—just closed it up. Of course I didn't do that. But about four or five years ago, Judge Johnsen mentioned it, we started out

on this Committee for Effective Justice and we went around having seminars in various states. So these Judges would come up to me, State Judges with general jurisdiction, like these fine Judges who are here tonight, and they would say, "You know, this two and one-half days is pretty good, but it would be a whole lot better if we could go to school maybe two or three weeks longer." I commenced getting letters from them—"Why don't you start an Institute?" some of them said, but most of them said, "We ought to have a school." They didn't even call it a college. So we started a College for Trial Judges out at Boulder, Colorado. We started with about ninety Judges, and I am happy to tell you that this past summer we had 307 Judges enrolled in the school at Reno, Nevada. We have one of our sections there because they gave us a grant, the Fleischmann people, and they tied it—you know these tying clauses—well, they tied it to Reno. The other section, however, we had at the University of Pennsylvania. Next year we are going to have it at North Carolina and the next year at Harvard. At the next meeting of our Board we'll pick another school after Harvard. We will go right down the East Coast and through the Midwest, going to law schools to have this College in the eastern sections.

We hope to be able to take all the Judges who are just coming on the bench. I get letters every day from Judges who say, "I was appointed yesterday" or "I was elected last month. I hear you've got a college somewhere." Well, of course I don't have a college at all. I don't have a thing in the world to do with it. I just loan my "handle" to it. I send them over to the dean. They want to come. It is a great thing—a great thing! I wish you would talk to some of them that came from Nebraska. They'll tell you.

That is something you never dreamed of back there. And where did it come from? It came from the Bar, from the organized Bar. That is where it came from. It is a great work that they did.

I have a final little comparison I want to make. You may not like it. I may step on some toes. If you don't like it, just forget it, just forget I had anything to do with it.

It is sort of like the joke that Bob Hope—I hope you will pardon me, Judge, if I tell this one; you said a moment ago that the fellow always says "That reminds me of a joke."

One time I was going over to New York and my secretary ticketed me from Friendship Airport, which is Baltimore. I could almost have driven up to New York by the time I got to Baltimore with all that traffic.

I got out and went into the terminal and just as I came in I met a friend of mine and he said, "I just came from Dallas on the

plane and Bob Hope is on there. He and I had been down to SMU. He gave them a little donation." I found out later from Bob it was \$500,000. "He told me to tell you that he was saving a seat for you."

So I went on the plane and Bob was sitting on the front seat and he had this seat saved for me. I said, "What are you going to do in New York?"

He said, "Oh, I'm not going to New York."

I said, "Well, this plane goes to New York."

He said, "I'm going to Philadelphia."

I said, "Well, you're on the wrong plane."

He said, "No, I'm on the right plane." Well, it stopped at Philadelphia and he got off.

On the way up there, though, he told me several stories. I can tell you just one of them in view of this mixed audience.

This is about Sister Agatha. Sister Agatha, according to Bob, was a very devout nun. She had devoted her life to the Lord and she died and she found herself in hell, and she was very much disappointed. She picked up the phone and she called St. Peter and she said, "Hello, St. Peter, this is Sister Agatha." She said, "I am down in hell."

St. Peter said, "Yes, Sister, I know." He said, "We are crowded up here. It broke my heart to have to let you go there but you are going to have to be patient. You call me, or I'll call you in a few days."

Well, he didn't call so she called him again. She said, "St. Peter, this is Sister Agatha. You remember me?"

He said, "Oh yes, yes. You are down in hell." He said, "I'm going to send my chariot down there for you in a few days."

She said, "Well, I sure hope you'll hurry." She said, "You know, they've got me smoking and drinking down here."

Well, she waited a few days longer and she didn't hear anything so she called up the third time. She said, "Hello! Pete? This is Ag. Just forget about the whole thing!"

So just forget about the whole thing if I make a mistake.

President Maupin asked me to come about six months ago before I had my unfortunate bout with hepatitis out at Bangkok. Incidentally, this is the first appearance with lawyers that I have been able to attend since that time but, well, I love the law and

the lawyers make the law so I love the lawyers, and I missed it. I missed not being with you so I am very happy, Mr. Maupin, that you asked me here tonight and gave me an opportunity once again to renew old acquaintances and meet again with the law that I love and the lawyers that I love with the law.

When I was asked to serve as Chairman of this Committee that has a very long, long handle—I am not sure I am going to get it right but it runs something like this—a Special Committee for the Evaluation of Disciplinary Enforcement, which has to do with grievance committees and disciplinary matters, which I am sure that the lawyers of Nebraska know all about because you have one of the most enlightened systems in the country, I told Orison that I would be glad to serve in any capacity that he thought I might be of help.

We started out and when I got the hepatitis some three months ago I wasn't able to do anything about it and haven't been able to do anything about it until tonight, so I thought I might just use this occasion as a springboard to tell you what we have been doing, which will take me just a few moments.

We started out and of course we had no information as to the various states. There was no information concerning the disciplinary procedures of the various states. We found out there was a hodgepodge. Some, like my state, require a jury trial and a court, just like any proceeding. Some, like your state, have an investigation through appointed committees by the Supreme Court, discipline committees with appeal boards and a final action by the Supreme Court. Others don't have much procedure at all. As a consequence, it is difficult to say just what the situation is.

So we decided we would have a liaison officer with every Bar Association that has a delegate to the House of Delegates of the American Bar. We now have those appointed. Earl Morris has just appointed them in the last few days. We have acceptances on practically all of them. We hope through that to be able to determine just what the procedures are.

Then we have been checking up on some of the problems. We found that the most recurring problem in the eighteen states that have had Bar Counsel, they call them, and they really handle disciplinary matters practically altogether, the predominate and recurring problem is financial; that is, defalcation, where a lawyer may collect some money and not turn it over.

One of them was a most unusual situation involving \$35,000—this is an example, however it is a true one—against a railroad. It

was collected but the lawyer told the client that the railroad was a little bit behind in its bills and that they had decided they couldn't pay any judgments or any matters of this kind until their stock was at 20.

This party believed the lawyer, which is fantastic. The stock then was at about 2 or 3. It finally got up around 10 or 15 and he went to see the lawyer. He said, "Oh, that is great! We won't have to wait much longer."

So one day the client had sense enough to go in and ask a broker, and the broker said, "Why, that is ridiculous! This company is in good financial shape, and you should have your money."

He went to see the lawyer and he had moved to another state. And do you know, he is still practicing in that other state! We checked up and he is still practicing in the other state.

Another lawyer got tight one night and killed his wife. He received a ten-year manslaughter sentence. This doesn't have anything to do with defalcation but he was disbarred in his state where he lived. He has practiced in three states since that time, three different states, although the disbarment in the original state still stands.

There is no correlation between the various fifty states or, for that matter, any of the states with reference to disbarment proceedings.

Just recently, in the last few weeks, I have been reading the papers in Washington. I don't have much to do, since the doctors say I have to go to bed every afternoon for three hours, but read papers. I notice that a lawyer there near the Washington area had gotten up some scheme on mortgages where instead of taking the money and applying it on the mortgages he was applying it in his pocket. He got his money mixed up, hoping that maybe lightning would strike and he would be able to make it good on some other case, I suppose.

The astounding thing about it is that these boys tell me that the average years of practice of the usual defalcation is fifteen years. I would never have thought that. I would have thought it would have been some fellow who was way down in his grades and just going out and happened to get a P.I. case or something of that type. But it seems to be, not the younger lawyers, but the ones from twelve to fifteen years in the practice, which is amazing.

Those are the things we are looking into, trying to find out the facts about it. We don't have the facts. We have a smattering of information that seems to be accurate. But it does point up some-

thing that needs attention, a foul situation, you might say. If it is permitted to continue, with the increasing number of lawyers throughout the country, 70,000 boys in the law schools of the United States today, naturally there is going to be more of this type. If one sees another lawyer getting by with it, he is liable to be a little influenced by it himself.

So I think it is a very important assignment that Orison Marden has given me. I have a very fine committee. They reside all the way from Boston to San Francisco, Florida and the Midwest as well. We intend to do something about it. We need the help of the lawyers. The *honest* lawyers generally haven't taken too much interest in trying to help in weeding out these that might be dishonest. I am not looking at any particular one of you when I say this, but most of the honest lawyers think, "Well, it is just custom."

Just think! Shakespeare said, "Let's kill all the lawyers." Ben Franklin said, "Behold an honest man, a lawyer!" or something like that.

Then they tell me that Godfrey said that he used to stay at the Kenilworth when he went to Florida. He owned a piece of it. But he said now he couldn't stay there; it was too high. His *lawyer* owned it. And then he added a telling sentence. He said, "The lawyer always gets everything."

Now of course I am sure Arthur was just joking, as he usually is, but those are things that we have to cope with.

The polls are the same way. The poll in Missouri, here next door to you, the poll of the Bar of the City of New York with reference to personal injury litigation are signs in the wind, things that we must do. I want to help on this. Our committee wants to help on it, and I want you to help. I want you to help *me* so that I might help *you*.

It has been great, Mr. Maupin and Mr. President, to be here tonight to meet with the members of this great Bar in their sixty-eighth annual meeting, to greet their beautiful wives who are pretty enough to be Texans, and to talk over old times.

Though I am off the Court, I still have an office in the court building. I hope that when you come there you will, as you have in the past, come by to see "Old Tom." He is getting old—sixty-eight last week—but he is still young in heart and he still loves the lawyers. God bless you!

...The audience arose and applauded...

PRESIDENT MAUPIN: Mr. Justice Clark, I am sure that I voice the sentiment of all those who have heard you and are within the range of my voice tonight that we have been delighted to be here to have the opportunity to hear you and to have you as our guest. You have brought us a wonderful message. We hope the occasion may arise in the next ten or twenty years when you will be back for another speech.

PRESIDENT MAUPIN: Just before closing, I gain exercise a personal prerogative by introducing to you a lady who has been associated with the profession of law and felt the imprint of the profession as such for her every living moment.

Her father was a distinguished German lawyer, a personal friend and political supporter of Dr. Brüning, the Reichschancellor of the Weimar German Republic. Her only brother and son of her father graduated from a German Law School after the end of World War II. Her son, and my stepson, is a graduate of the University of Michigan Law School and is presently about to obtain his doctorate degree in law at the University of Heidelberg, Germany, on a scholarship that was conferred upon him by the Fulbright Scholarship Committee.

She finds herself tonight still married or still tied up with a lawyer—my wife—Ruth Maupin.

That, ladies and gentlemen, concludes this evening's program. We are delighted that you are all here. Ruthie and I would like to take this occasion to thank each of you who have been so kind and so courteous to the two of us during the time it has been our privilege to serve you in the position that I have served during the past year. So in her native tongue, and mine, we say "Auf Wiedersehen" and goodnight!

...The annual dinner meeting adjourned at nine forty-five o'clock...

TORTS SEMINAR
FRIDAY MORNING SESSION

October 20, 1967

The second session of the Torts Seminar was called to order at nine-thirty o'clock by Co-Chairman M. J. Bruckner.

CHAIRMAN BRUCKNER: Gentlemen, we'll start, despite the fact that most of the lawyers seem to be sacked out somewhere.

At this time I would like to turn the program over to "Biff" Morrison who will introduce the first two speakers this morning.

CO-CHAIRMAN FRANK B. MORRISON: You will notice in your program that this section of the seminar is devoted to a discussion of five outstanding cases that have been tried involving unique points of law during the last year.

The first one listed on the program is the case of *Schneider v. Chrysler Corporation* that John Miller and I tried in Omaha, but unfortunately it is still on appeal and has been for about a year. John felt that in light of that he shouldn't discuss the case.

So we were going to go on to the second case. This is your case, isn't it, Jim? The second case listed is also a case that is still on appeal. We thought it would be disposed of by now by the Eighth Circuit Court of Appeals, but application has been made for writ of certiorari in the United States Supreme Court, so Jim Knapp feels that probably we should not discuss that case either.

Fortunately, Jim has authored so many great results that he can dip into his repertoire and come up with a substitute. The substitute is a case that I had something to do with several years ago. I think the case involves some interesting questions, something that will enable Jim to make an effective and interesting presentation, even though it is not this \$200,000 result but just a \$50,000 result.

Jim Knapp is one of the real fine trial lawyers in the state, as I am sure you are all aware. He also, as with the speakers yesterday, is equally effective as a defense lawyer and as a plaintiff's lawyer. I think you will find him to be most entertaining.

REMARKS

James M. Knapp

Harrison v. Carven, the case I want to discuss briefly with you this morning, was a wrongful death, or as we are now calling them since Mr. Lambert spoke yesterday, a "survival" action.

It was affirmed by the Eighth Circuit in the latter part of 1966. Jim Lane and I represented the plaintiff and, parenthetically I would like to add, the cardinal principle of tort practice, I have discovered, is that an association with Jim Lane or "Rocky" Miller is particularly conducive to successful trials.

At any rate, certainly neither the size of the verdict nor the law pronounced by the Eighth Circuit in its decision in the *Harrison v. Carven* case represented milestone's in Nebraska's tort law. The verdict, although in excess of \$50,000, has certainly been exceeded any number of times in wrongful death cases. The decision of the Circuit Court, although an able interpretation of the application of Nebraska's Guest Statute, didn't carve out any new paths of jurisprudence.

However, behind that verdict, and unmentioned in the Circuit Court's report was, I believe, a unique example of the imagination and the skill that a good trial lawyer demonstrates when faced with an unexpected and certainly an unwanted situation. Believe me, the skill and the imagination I refer to in this matter were demonstrated by my co-counsel, Jim Lane. I stood by wringing my hands during most of the situation.

At the inception of this particular case the facts are relatively simple. The decedent, a young married father of three boys, was killed in a car—parked truck accident. Although the liability was very ably and competently contested, the factual situation of both liability and damages seemed to us to be strong.

After the death of her husband the widow, the mother of the three children, moved to Missouri. Consequently the case was filed in Federal District Court and began to wend its way toward trial. Periodic checks with this widow, the mother who moved to Missouri, over the next two years while the case was getting to trial were made by us with no particular change in the situation.

Thus it was with some degree of surprise that we found when we arrived at North Platte for trial of the case that instead of representing a young, slim widow, we were representing a very, very pregnant bride. Well, the effect of the court's agreement with our plea, that the remarriage should not be considered by the jury was, believe me, somewhat diluted by her physical condition.

Despite this change in circumstances, the original trial plan was followed with one major exception. The client, although no longer a "game" nor "little" widow, was still "game." She sat up with us for two nights, with the financial records of the decedent, before she went on the stand. By that time a very accurate, a very

truthful resumé of the actual contributions of the dead father to each of his three minor sons had been completed. We were able to prove by the widow, who testified strongly to this fact, the amount of money the father had contributed to each of his sons in food, shelter, clothing, medical expenses, and so forth at the trial, and as a matter of fact the verdict totaled almost exactly the widow's testimony with reference to those contributions.

The courage and the competence that Jim Lane demonstrated in this case by virtually concentrating all of the evidence on damages to the three boys and almost abandoning the claim of the remarried bride, typifies to me the skill and the imagination that you can run into out in the Platte Valley today.

That is about all I have on this case. My point is to get your program caught up and to save your time.

CHAIRMAN MORRISON: Our next speaker is a personal friend of mine. He has come a long way to be on this program. John Shamberg is from Kansas City, Kansas, and is recognized throughout the Midwest as one of the finest plaintiff lawyers in the State of Kansas.

John is very active in the American Trial Lawyer's Association and has been for years. He started serving on the Board of Governors of the American Trial Lawyers Association.

He not only is effective on his feet but he is a scholar and has been trained as a law clerk for the Tenth Circuit Court of Appeals where he served Walter Huxman.

He is a member of the Board of Trustees of the Kansas Bar Foundation, and he is a senior partner in the Kansas City law firm of Schnider, Shamberg & May. I think you will find the case he is going to discuss is one that is extremely interesting.

UNSAFE DESIGN OF ROTARY POWER MOWERS

John E. Shamberg

This is sort of a return home. I was born in that great mid-western metropolis of Fremont, Nebraska. Anybody here from Fremont? I left there at a fairly early age but I got some of my pre-law training there. I am an alumnus of Miss Donahue's kindergarten class of Hawthorne School. I was hoping we might have a reunion with some of the other alumni who were here but I don't see anybody around.

It is good to be here in Nebraska again. I always find a warmth and a congeniality that I don't find equalled anywhere else. It is a wonderful feeling.

I did something which I hesitate to do, and that is to have a paper prepared of the discussion of this case that I was asked to talk about, simply because time did not allow me to discuss in detail in depth the legal principles and to cite the myriad cases on one aspect of the value of this case. But I thought some of you might be able to benefit from it. That is the reason this paper was prepared for your use, as you see fit to use it.

The case of *Swearngen v. Sears Roebuck & Company* was decided on March 31, 1967, by the United States Court of Appeals for the Tenth Circuit.

It is indeed a significant and an important case. Aside from the fact that reliable statistics indicate that there are approximately 100,000 accidents, mishaps, from the use of the everyday garden variety power lawnmower in domestic use, which this case deals with, the case is important to us as lawyers because of the rather broad principles that it enunciates with respect to the responsibility of the manufacturer of power equipment, which I think these principles might be of value to you in any number of cases, and also very importantly, at least as I see it, the case approves certain techniques which are available to the average injured person with limited means and resources, for proving negligent design in this rather sophisticated area where the plaintiff must come to battle with and combat the sophisticated, seasoned experts of industry. In this regard the case, I believe, is very significant.

A statement of the facts is probably in order to give us a backdrop against which to discuss these principles so that we might have an illustration of how they might be used.

On a very pleasant summer day Officer Robert Swearngen, a police officer in one of the upper middle-class suburban areas of the Kansas City area was cruising along the street in the City of Mission Hills, Kansas, past the home of Garry Whittaker. Although this has nothing to do with the case, Garry Whittaker happens to be the son of the former Justice of the United States Supreme Court, Justice Whittaker—just a little sidelight. Mr. Whittaker's houseboy was mowing the lawn with a Sears Roebuck powered lawnmower, and as he was going along parallel to the sidewalk, moving in the same direction as the officer was driving in his car, a projectile was hurled from the machine; a foreign object, a stick about four or five inches long shot out into the street, struck Officer Swearngen in the eye, and blinded him.

A settlement was made with the property owner for the negligent use of this dangerous piece of equipment, and then the suit

was filed against Sears, Roebuck & Company on the theory that they had unnecessarily carelessly designed this power mower.

The power mower, very briefly, was the usual hand operated type with a 20-inch blade located on a horizontal plane and on one side, as you perhaps are all familiar with, it had a discharge chute through which grass was thrown. You could, of course, adjust the catch on it, but it didn't happen to have one this day. Through this chute this stick was picked up and hurled out into the street, a distance of about twenty-six feet, and put out the man's eye.

As I said, the case was tried on the theory of negligent design. We chose that purposely because of the pitfalls of implied warranty. At that time we had recently adopted, or perhaps it was before we had adopted, the Uniform Commercial Code which, of course, limits the area of responsibility of the negligent manufacturer to users or perhaps those who are more intimately related to the owner-user than would be Officer Swearngin, who is in the category of a bystander.

Of course that is one of the important features of this case, because it establishes that one who is guilty of negligent design is negligent to a bystander if the test of reasonable foreseeability is met. That was the theory on which the case was presented.

The issues were, of course, was the instrument inherently dangerous? Was the manufacturer negligent in designing this inherently dangerous machine? Could it reasonably foresee the harm that might occur as the proximate result of this negligence?

The important feature of the case was the method of proving negligent design. This was accomplished by the use of an expert who happened to be a graduate engineer who specialized in design and consulting work. He had a very illustrious background, having helped design craft for the military services of McDonald Aircraft. He had designed and built rotor moving parts and was well qualified in the area of dynamics and centrifugal forces.

The method by which he was brought into the case was first to establish his qualifications. In studying this case I might point out this is the area where I think this case has widespread use to any of you who might be involved in a case of this nature on either side of the picture.

Having established his qualifications as an experienced well-educated expert, he then employed several approaches to the problem establishing negligent design. Those were as follows: First he showed that the machine was inherently dangerous. Then he showed how the machine *could* have been designed so that it would

not have been so dangerous. Then he employed certain standards in the industry, which in this case were the American Standards Association safety specifications for power lawnmowers. Some of you are undoubtedly familiar with this body for consensus of opinion in the industry, but it is made up of a composite amassing of information from the engineering profession, from industry, from all segments of the American economy that deals with the production of consumer goods, and it is for the purpose of designing standardized products that have in mind and concern themselves with safety, comfort, and convenience in the manufacture of these products.

By the use of these standards it was shown in this particular case that in three respects the minimal requirements for safety design of an ordinary household power mower were not met.

The first was in making the discharge chute too large. Without getting into the more complicated feature of this presentation, not only was the square inch area of the discharge chute too large so as to naturally create a larger spray area, but the vertical angle of the discharge chute was considered too great so that the trajectory was too great and increased the distance that foreign objects, such as a stick, could be thrown. And, thirdly, the blade was not recessed or set back far enough from the discharge chute opening.

Now, as I pointed out, these were minimal design requirements.

In addition to that the expert pointed out that there were other ways in which this machine could have been safer. The most obvious one was to put a barrier or bars across the discharge chute. By taking a simple piece of five-eighths inch bar and covering it with ordinary garden hose, he installed three bars across the discharge chute opening. He then tested the machine, and the machine worked just as effectively as it had before, and it prevented foreign objects, sticks and rocks and such things, from flying out of the machine and causing harm.

Interestingly enough, it developed that he had tested the machine cutting grass up to two feet in height, he cut wet grass ten to twelve inches in height and the machine was as effective as before. Further tests found that in mass production this adaptation or modification could have been carried out for about fifty cents a machine.

One of the judges on the Court of Appeals when this information was brought out spoke up and said, "I think the expert has something there he ought to invent and copyright because it certainly is an ingenious idea."

There were other areas in which this machine could have been perfected, such as a retractable blade, one which rose on hitting objects on the ground, and a recessed housing which goes over the motor which is on top above the blade with a resilient lining that would catch foreign objects as they whirled around so they couldn't drop down.

Now as far as the dangerous features of this machine were concerned, it was established and was not disputed that this machine developed speeds up to 3900 rpms per minute, which would permit, with the addition of centrifugal force to throw this thing, in the estimate of the expert, from the machine at 241 miles an hour, so that the twenty-six feet that were traversed by the stick in going from the machine to Officer Swearngin's eye was covered in about one-tenth of a second, the speed of a bullet, you might say, so that there was no doubt that you were dealing here with an inherently dangerous piece of machinery.

One of the important features, as I indicated, was the use of the standards. A minute might be spent on how they are employed, because many of us don't have occasion every day to do that.

Standards may be introduced in two ways and used in two ways: First, they may be used to support the expert's opinion independently arrived at, having been first duly identified and established as authentic; secondly, they may be used per se or by themselves as substantive proof for proper conduct. The latter use is more limited and is not used as widely as is the first.

The method of employing the standards—and there are standards in practically every aspect of American industry; the ASA is only one group of publications—is for the expert, having first qualified himself, to then identify the standards, indicate that they are accepted in the industry, indicate that they are a consensus of the industry, and he may then allude to these standards to substantiate his opinion as to either the defect or the omission in design or it might be used by the defendant on the other side in establishing that the conduct employed by their client, if the industry which is being sued, was exercised in a careful manner that they did meet the standards in the industry by complying with requirements of the standards.

The other method of using the standards is by introducing them, and in some states, such as our own, where we have a learned treatise exception to the hearsay rule, having been first identified by the trial judge as being a learned treatise in whatever area they purport to be, they may be admitted per se as substantive proof of what the norm of proper conduct is, or if the expert identifies

them as such they may be so used, but as I say that is a more limited use and I don't know whether that use is permissible in Nebraska or not. I do know that the State of Alabama, without the benefit of the hearsay exception statute on learned treatises, has seen fit to permit the use of learned treatises as some substantive evidence of proper conduct or the norm of conduct that should be employed in the related field.

I have set out in this paper, for whatever benefit it might be to you, a number of standards and codes that are used throughout the country in various types of industries. If you haven't looked at them you will find them in this paper. I am not going to cite any cases, but just to give you an idea, you have codes concerning standards relating to the carrying of loose equipment in vehicles; safety code accepted as the standard of construction on upkeep of power lines; standard on construction of high voltage lines—these are cases in different jurisdictions that I am not mentioning—Standard Automobile Engineers Handbook regarding design of ballbearing stud in steering mechanism; manual describing labels promulgated by the Labeling Committee of the Manufacturing Chemists Association; a National Building Code regarding hand rails on steps; standards of National Fire Protection Organization and the New York Fire Department concerning labeling; codes of the Association of American Railroads customarily followed by railroads have been ruled admissible in evidence on the issue of negligence in numerous cases, including the systems of signals appropriately or properly installed; rule concerning a running switch; loading cars; proper construction of cars; and many others.

There is hardly any aspect of American industry where you cannot find some standard, some document which represents a consensus which will assist either in establishing that the norm that industry suggests should be used has been deviated from or, conversely, that it has in fact been complied with.

I suggest that in a case involving negligent design, such as that which we had in the *Swearngin Case* requires, in order to establish a plaintiff's case, that you have a qualified expert who is competent to testify in the area where you are attempting to prove this negligent design. Certainly, if there are standards or codes applicable to that design or manufacturing process, they should be employed in connection with the expert's testimony to establish deviation from or compliance with that norm.

Swearngin was important in another aspect. It is not a very long opinion. I understand my good friend, Frank, has already used it. But it is important because it has held without any difficulty

that where a retailer, such as Sears, Roebuck & Company, who was not the manufacturer of the power mower—it was manufactured by a totally separate corporate organization—but where the retailer represents this product as its own, and it was in fact put out under its own label and the instruction manual bore its name, in other words, where it puts the product out as its own, the courts will, in determining responsibility for any negligent conduct, disregard the separate identity of the corporation and, as the Court said, “pierce the corporate veil” to look to the retailer who has, in fact, put this product on the market to answer for its omission or its negligent conduct.

I have cited some other cases in my paper dealing generally with the subject of the responsibility of the lawnmower operator to bystanders, which is a subject of some interest because of the tremendous number of these cases that arise, and they may be of some help to you.

I have abbreviated these remarks to stay within the program. I hope this will give you some suggestions on how to employ the expert in a negligent-design-of-equipment case, and how to use the codes of standards in the applicable industry in connection with that expert's testimony.

CHAIRMAN BRUCKNER: It is with a great deal of pleasure that I present to you Martin Cannon.

DEAF MUTE WITH PARALYZED HANDS

Martin A. Cannon, Jr.

I am very flattered to be invited to address this group, and I'm particularly flattered by the source of the invitation, the Nebraska Association of Trial Attorneys. I just got their roster the other day and when I went through it it made my humility increase, if anything. The names that are listed there, Omaha particularly, are able, bright stars in the field of courtroom forensics and it is pretty impressive. Some of the names still linger—Margaret Lawse, Ted McWhorter, Walter Wellman, Jr., Warren Schrempp. I'm impressed!

The case that I have been asked to discuss is one that naturally I take a certain amount of pleasure in talking about, mainly because it gives you young fellows something to shoot at.

I must say that it is kind of interesting to me because it started out like such a bum case, a tough looking case, but a case that just kind of caught you by the heart and made you want to do something about it.

Just imagine getting hold of a case like this many months after the injuring event had taken place, and hearing by hearsay from other people than the injured party a sort of rough idea of what happened, and a frantic little deaf wife and a couple of little kids coming in and saying, "Isn't there something we can do?"

The story is that the fellow had a piece of tin in his hand and he stuck it against a power line. The injuries, of course, were grave. Actually they are so grave that if you can back off from them a little bit they are downright funny. It is just so awful that it is funny. Of all people to get a terrible injury to his hands, a man who was already blessed with about all the misfortune that a human being ought to have to bear. After the original shock wears off and you realize what an inevitable tragedy it is, you can laugh that life would hold such a circumstance.

John Delehant's son came home, and about that time apparently it was stylish for the young kids to think up different definitions for a real bad fellow, and the way they talked about it was that he was a "real rat fink." When he heard about this case going on John told me that his son had come home with the definition of a real rat fink. It was a fellow that rapes a deaf mute and then breaks her fingers so she can't tell. That's a sick joke. And so was Garrett Nelson's injury a sick joke.

When we got into that case, I just want to tell you a little bit about how the discouragement gradually faded away. To start with, we began with the case a month or so after it had occurred. We thought about it a while and figured there was not much to do. There is no question the man has got a permanent disability as far as his compensation insurance is concerned. He doesn't even need a lawyer like me to get *that*.

So I thought I would go out and look at the wire. By the time we got out to look at the wire, there was a brand new pole.

I suppose I ought to start out by telling you what happened. Garrett Nelson was working for a sign company, and it was his job to put a new molding on a sign out on Dodge Street. By coincidence it is the sign that is alongside the road that goes into the warehouse where Sears stores all those lovely power mowers, out just south of Dodge, west of 72nd Street. He was up on the sign and somebody handed him up a piece of moulding. It was just a piece of tin that had been stamped so that it looks like a picture frame and it goes around store signs. It is still there if you want to look at it.

As he was lifting it up to emplace it on the top of the sign somehow it was energized by the power from an overhead line

and the power went in through his hands and out through his fanny, and it just blew the nerves right out of his wrists. He lost the radial and ulnar nerves in each hand. The result of that kind of nerve loss is the complete shriveling up of all of what they call the interosseous muscles of the hand so that he became unable to do anything with his hands except that (demonstrating). He had lost the ability to oppose his fingers, to wiggle his fingers, and this is a very important thing for a deaf mute. At the time I really didn't know anything about deaf talk. They go like that, and like that, and that means a baby, and they have other signs. Later on I found out that the deaf language is not only very complete, it is just about as rapid as a human being's ordinary speech. I will tell you about that in a little while.

At any rate, we went out and looked at the power line, and they had moved it up the pole a way. There was a cross bar about four feet down and they had raised it up and put it in again. We got hold of some mathematicians and we got hold of a boom truck and we went up on the boom with a photographer to take pictures of where the cross bar used to be and dope out the amount of sag that could have been in the wire to try somehow, somehow to establish what our people thought was the fact, which was that the wire was illegally low. But of course it was quite legally high by the time the power company had looked the scene over.

This was really a very difficult job. It involved the computation of algebraic curves of some erudition and also reconstruction and proof of how much distance there was between where this wire is now and where it used to be. As a matter of fact, if you do drive by there you will find how we did that. We nailed a yardstick to the side of the pole and then took pictures of the pole with the yardstick as the built-in scale so we could study the picture and determine distances. If you are sharp-eyed as you drive by there, I think nobody has gone up and taken that yardstick down yet. It's still up on the pole.

The interesting thing about that was that I was up in that boom and we would be about like that distance from this big piece of steel wire that was going hum-m-m-m-m and being in this steel truck taking pictures two and one-half feet from that wire.

Later on in the course of the trial one of the witnesses for the power company was on the stand, in answer to our claim that the electricity had arced across the air to cause this energizing of the framework that the man held, and I said to him in court, "Well, you say that a spark will not jump only about a quarter of an inch. Do you ever stand near those wires when you are grounded?"

He said, "No, I wouldn't stand near to them."

I said, "Suppose there was an 8,000-volt line and you were going to come near to it, how near would you get before you would start feeling that your life was in danger?"

He said, "I wouldn't come within six feet of it!"

I asked for a recess.

After we found out that, we saw a glimmer of hope that somehow we might be able to establish that the wire was a little too low, and so we filed the lawsuit. We took the power company's deposition, somebody over there that had gone out and investigated. I asked him, "Did you fellows do any measuring out there when you went out right after this accident?"

"Yes" he said they had.

The wire had not broken. When they went out there it was still there. "Did you take any pictures?"

"Yes, we took pictures and our men made the measurements."

The minimum height that this wire had to be above the top of the sign was eight feet. With my heart in my mouth I said, "How high was the wire above the sign?"

The fellow said, "5'6".

So we sent our algebraic mathematicians home and all of our curve notes and the yardsticks were promptly forgotten, and it became an established fact that this uninsulated wire was hanging just about five and one-half feet above the sign.

But we still had a lot of problems, because of the fact that wherever the line was, you had to face the fact that it was the man himself who had this piece of tin in his hands. But on reflection it occurred to us, and the argument was well made to the jury, that when you are looking up at the sky, that a little wire that is about as big as three matchsticks twisted together, you have no basis for telling how far away it is. It is like a line on the sky. There is no third dimension to it, and so it is really not such a reprehensible thing for a fellow not to notice how far away it is.

But in addition to that it became apparent that the position that Mr. Nelson was able to place where he was holding this piece of tin wouldn't put it in contact with this wire. The power company scoffed at that because they had the proof, they had a witness who not only was there at the scene but had seen the piece of tin after it had fallen to the ground and could see the big black marks

on it just five and one-half feet from one end. The black marks, as it turned out, we made out of Garrett Nelson's flesh; that was where he was holding that piece of tin, not where it had hit the wire. And that impressed the jury quite a bit. That kind of improved the case as it went along.

While we were trying it, the power company had a man on the stand who was the General Manager who wanted to testify that we had had terrible snowy weather just before this event, which was the reason why the power company, even though they had two weeks' notice, it turned out, of the fact that this wire was too low to explain why they hadn't got out there to raise it, even though they had two weeks' notice of the fact that they were going to be working on this sign, it was still "terrible snowy weather."

Bob Fraser, God bless him, asked this fellow, "Well, now, Mr. General Manager of the company, do you have some way that you can specifically recall that we had a very severe snowfall at that time?"

He said, "Yes, I do."

He said, "Tell us about that."

I started to object but I thought, "Oh well, let's see what he says."

He said, "I remember because I was in the office during that snowfall. I looked out the window and, my Lord, there was eight inches of snow on the ground. I rushed to the phone and I called my wife and told her, 'Pack a bag, because we're going to Florida right now, today.'"

Well, you might guess that in the course of the final argument it was suggested to the jury that Garrett Nelson ought to be allowed to spend his winters in Florida.

Then another thing I think was interesting the way the facts developed, and I must say that this was a very interesting case to try, not mainly but certainly not unimportantly because it just kept getting better and better and better, but in the course of it we were always dealing with the fact that this was an 8,000-volt line and the clearances that are required between a line and—quit smirking, Tierney; just because you are settling it for less than the verdict doesn't mean it isn't a good verdict—but that 8,000-volt line is *not* an 8,000-volt, and this came out in the course of the trial; an 8,000-volt line is actually an 11,600-volt line. Now I could tell you why. I wouldn't understand it, but you might. It would take too long.

In addition to that, and this is where my comment in my letter comes in, in order to determine an 11,000-volt line as to just how much juice there is in it, you multiply 11,000 by the square root of 2. Well, that is something they throw out like obviously the square root of 2 is a very small sum. We called a few expert friends in and did a lot of research and finally found out that the square root of 2 is 1.4, and in an 8,000-volt line there is 17,000 volts of juice in it lots of times. So the possibilities of arcing from such a line to a nearby grounded conductor are very great.

Those are the things that gradually developed in that case and brought about a situation where we were able to prove, I don't think just *prima facie* but with absolute certainty that, first of all, the line was quite low, that secondly the power company had had knowledge of its low position for many weeks prior to the accident, and thirdly that they had actually come out and done some work to restore the correct position to some much lower voltage lines that were on the same pole but left the high lines low, and fourthly, that Mr. Nelson, who was working on the sign, never touched the line with his piece of tin at all but had it clear the piece of tin a substantial distance, and suffered his injury because the electricity arced through the air and injured him. The details of how these things became inescapable would be much too detailed to bother you with.

The argument of that case was a real, well, I would say pleasure even though it required the contemplation of a pretty serious tragedy. Here in Nelson you see a deaf mute, but he was also a very, very able man. He was not skilled to any great extent from the employment standpoint, but he was a good basketball player. He was built like Charles Atlas, a muscular, beautiful young man. His wife, incidentally, his brother, his wife's sister, everybody in the gang was deaf, but his children are not.

I made a few points, as I recall, at the very beginning of the argument. It just happened that when we started trying the case his wife had their two little tow-headed two year olds with her in the back of the room. I said to the jury, "Ladies and gentlemen, my client is a deaf mute. As you may have observed, his children are anything but mute." They were at the back jumping and laughing, and the jury kind of laughed at that.

Still, the net effect was that this was a terrible thing, to have such a fine, healthy young man hurt in this fashion. His hands were useful only for very gross moves. After quite a bit of surgery had been done he was given the ability to oppose one thumb and one index finger, but not the others. So it isn't quite true that he had

paralyzed hands, but he had an extremely limited use of his hands. He could do this with them (demonstrating) and he could oppose the thumb, and therefore in a very slow and halting manner he could communicate, and that is what he did.

You might be interested to know that the interpreter, and I got really a wonderful fellow to interpret, from the Nebraska School for the Deaf. Among other things, he is able to stand behind the preacher at a church service with his hands going and translate into the language of the deaf word for word and syllable for syllable everything that the parson was saying in just a matter of a split second behind him in time. The way they do it, on words that are not ordinary, is by simply making in rapid succession one sign after another for every letter in the word. The result to the trained observer is to see the whole word, just like you see a whole word when you look at the printed page.

So our interpretation problem as far as getting across the questions to the witness was no problem at all. The answers were necessarily slow and monosyllabic wherever possible, but the message came through very clear and strong, and the jury loved it, as you might know.

Those are the technical aspects of the case.

I do remember one thing that gave me kind of a thrill. I knew something good was happening during the course of the closing argument. We spent quite a bit of time discussing with the jury the special damages, the actual expenses that this man was going to incur throughout the rest of his life and already as a result of his injury. When I got to that certain point, there was a preacher on the jury who sat up in that corner right there and when I got through with the special damages I said, "That is what he is going to lose," and I just kind of drilled the preacher, looked at him and said, "But somebody a lot smarter than I once said that man does not live by bread alone," and that guy's eyes just snapped!

The case had gone in the course of a year or two from one of those hopeless tragedies that there was nothing to do about to a clear case with the odor of great success about it. And that was the way it was when we walked out of the courtroom.

Now just for your general information, if you haven't had cases involving electric shock, there are many cases involving contact with power lines that have been filed and it is amazing how many of them have been lost. It is an awful hard job because so often the basis of the plaintiff's claim is a low wire. If you get into a case involving a low wire you'll find it quick by looking up the

Annotations in A.L.R., but just to give you a preview of it, it seems that out in the country every time a low wire is strung, it is strung right over where a fellow wants to dig a well. They go out and they drill a well. They want to know how deep it is. They take a pipe out and they stand there and pull that pipe out and of course they hit the danged power wire and burn their feet off. It turns out that the power wire is supposed to be 20 feet high and it is only 17 feet high. But it also invariably turns out that this pipe was 32 feet long. It could have been ten feet higher than it was supposed to be and they still would have gotten it. Consequently, on the basis of the want of proximate causation, the maintainer of the power line has escaped liability repeatedly.

In the Nelson Case it was very interesting that it could be established that the power lines were supposed to be at least eight feet above the sign. The man was sitting on the sign. He was lifting up a 16-foot long piece of metal, and he was trying to reach the point in the middle where it would balance so he could turn it over and lay it side-wise. It was just a wonderful thing that the 8-foot law and that 16-foot piece of metal got into the same case because obviously if he had had the proper clearance in his case he would have been clear of the line and he would have been safe.

But this is a hurdle that you want to study pretty hard when you get into the preparation of a case of this kind for trial.

The only other thing that I would comment on in this case is something that I think we all ought to be concerned about. This was a big verdict, but it could by no means be said to be an excessive verdict. This man couldn't work. He couldn't even button his fly. He couldn't do anything for himself. I remember when I was trying to think of ways to explain that to the jury I wanted to say, "My Lord, folks, he can't even set an alarm clock," and then it occurred to me that he couldn't hear it either. And then there is the same thing, "Just think of the trouble he would have dialing the telephone," but I took that out because he couldn't talk on the telephone. But there are a tremendous number of things he can't do. He can't cut his own steak. He can't turn a key in the lock. There are a number of things that render his life a real tough thing. So the amount of the damages was not excessive, I don't think, by any fair judgment of it.

But you've got to run scared on these things! I would like to discuss for a minute the idea of having to run scared. I think we all ought to do what we can to bring some kind of an end to it. When I was discussing some disposition of this case I didn't want to take a blasted dime off that verdict because I thought it was

solid gold. But I represented a guy that needed some money and he didn't have a real basis for gambling with that kind of coin, and the other guy did. It didn't mean anything to them. So the only safe way that it can ever turn out that a big verdict that is reasonable and properly entered can be kept from being whittled away by just the economic tyranny of the insurance companies is if we've got a situation where we *know* that in the processes of appeal the size of the verdict alone need not concern us.

The scuttlebutt is, as I am sure you all know, that it does need to concern us that big verdicts are examined with a very critical eye in our Supreme Court. I don't know that that is true. I know that our Supreme Court has very seldom reversed a case on the grounds of excessive verdict. But certainly it seems to me it should be our object to develop a situation where when a big verdict is entered and has good sound reason for its amount and for its entry in the first place, that we shouldn't have to fear its size per se. Maybe we do it unnecessarily. If we do, then I guess maybe we are just chicken. But if there is any merit to what everybody says, that a big verdict is shaky per se in the State of Nebraska, I hope that our Court will some one of these days real soon stand up and say very clearly that this "ain't" the case.

You talk about this verdict as a big one, and the settlement was a big one too. I settled it for \$300,000. Everybody said, "Gee, you got \$300,000! And every time I say, "Like hell I did; I kicked \$300,000 away," which of course I did. To get the \$300,000, I gave the \$300,000. I felt I had to do that. I felt that I couldn't gamble for this fellow. I could gamble for myself with a nice verdict; not that I was shaky. I would live without it, but Garrett Nelson wouldn't. The insurance company could live *with* it, but Garret Nelson couldn't live *without* it. So the position is bad, and what it means, it seems to me, is the certain knowledge on the part of counsel and all the parties that when a verdict is entered it is going to stand up, even if it is big, with the same degree of certainty as if it were small, as long as the legal basis behind it is sound. If that is true and everybody believes it in the federal court, I hope we can come to believe it in the state court.

CO-CHAIRMAN MORRISON: Warren Schrempp's reputation as a trial lawyer is well known to all of you, but perhaps you are not familiar with his vital statistics. Warren was a graduate of Creighton University School of Law in 1943. He was an Assistant United States District Attorney from 1945 to 1948, and currently is the senior partner in the Omaha firm of Schrempp, Rosenthal, McLane & Bruckner.

He is a member of Alpha Sigma Nu, which is the Jesuit National Honor Society. He served as President of NATA in 1962 and is currently serving a two-year term on the Board of Governors of the American Trial Lawyers Association.

Warren is here today to talk to you about the case of *Arrick v. Warren Douglas Chemical Company*, in which he obtained a \$35,000 verdict for an eight-year old girl who was killed.

DEATH OF A CHILD

Warren C. Schrempp

This particular case that Jim mentioned, *Arrick v. Warren Douglas Chemical Company*, and as a matter of fact the field of child death cases, wrongful death cases, makes me think that our firm probably should be known as Zenith & Nadir, Attorneys-at-Law, because we have had the tops and we've had the bottoms. I am not so sure about the tops but I am definitely sure about the bottoms.

I think those of you who have kept in touch with the appellate reports of the United States Court of Appeals, as well as the Defense Institute Journals, will know that I solved the question that has been bothering lawyers for many years, and that is the question of *how* can you possibly lose and get a defendant's verdict in an admitted liability death case. I did it!

From the plaintiff's standpoint I did it in a case out in North Platte, which most of you have read about in Federal Court. I had the able assistance from the defense side of the table in accomplishing this remarkable feat, of Jim Lane and "Rocky" Miller, but with our combined talents we managed to bring a verdict in, a defendant's verdict in an admitted liability death case of a two-year old child. I had the bad judgment to then take the appeal to the United States Court of Appeals and thereby make a monument to my ineptitude in this particular field.

So I am sure it came as a great surprise to most of you when you saw my name listed on the program after the title "Death of a Child." However, fairly recently in a case that follows my name, *Arrick v. Warren Douglas Chemical Company*, I did have the good fortune to try the case of an eight-year old child—admitted liability again. If you think that didn't mean a black cat to me! I am back in trying an admitted liability death case for a minor child.

With great temerity I approached the case and did manage to achieve a verdict of \$35,000. This verdict has been settled at a fair figure below that amount. It was not settled because of the

economic tyranny of anybody. It was settled because the defense counsel and I finally came to an agreement at a lesser amount and we do think it was a fair settlement. The verdict itself was a fair verdict and the settlement was fair.

I might say—and I am gilding the lily, after hearing Tom Lambert's address to you yesterday—I might say that as you well know from the standpoint of the plaintiff in child death cases there are some terrible things that you have to overcome. Tom Lambert mentioned that the death of a minor child is the toughest of all death cases, and it is for a very good reason, or reasons. I will mention these briefly in passing.

No. 1, in the usual child death case, it is the child out in the street who gets hit by the car. Try as you will, it is an extremely difficult job to ever take the jury out of the driver's seat of the automobile because they have had instances where this thing has almost happened to them.

No. 2, you have to overcome the feeling of the jury, why is it that these parents who perhaps were not watching the child or the child wouldn't be running out in the street, or why should any parents be allowed to profit by the death of the child? This is something that has to be overcome.

No. 3, you have to overcome a situation, particularly as the situation existed in the case that I am about to make a few remarks about, you have to overcome the presumption that the jury will say, "Well, this is a large family." There were ten children in the Arrick family in this particular case. This is a large family.

No. 4, you have to overcome the able defense argument that a child is a liability financially rather than an asset.

These are the problems that beset you. The only technique or modus operandi that we used in the Arrick case that I had not used before was placing an expert witness on the stand.

The particular situation in the Arrick case was that there were ten children in the family, and the eight-year old girl was the oldest girl in the family—not the oldest but the oldest girl.

Francis McLane tried the case with me and we were discussing the particular facet of "How does the jury understand the value of the services of an eight-year old girl?" There were probably bachelors on the jury. There were people without children on the jury. Despite the fact that in the *Jillbers v. Buffalo County* our high court said, in effect, that as far as proof of damages, undoubtedly on the jury there were parents of children who were well

acquainted with the value of the services of children, despite that we did feel that it was a proper field, so that some of the jurors who are not so familiar with the services of children could be informed as to what importance in the family circle the oldest girl plays.

To that end, Mr. McLane said, "I know Mary Manelli, and she has a family almost exactly the same, that many children, and they are all grown up now, and the second oldest child was a girl." So we called Mary Manelli. We did not feel that it invaded the province of the jury in this respect. We called Mary Manelli who established in her testimony the value of the services, the various things that were performed by the oldest daughter of the family. She could tell not only at the age of eight but she could tell how the second oldest girl took care of different things in connection with the family all the way up to the time she was twenty-one.

Now in the few minutes that I have remaining, these various facets: First, a large family; there are other children left.

Secondly, that a child is a liability financially instead of an asset.

Thirdly, What is the value of the services I should try to cover in an argument?

You know, there are always three arguments—you have heard this many times before—there is the argument you think you are going to make; there is the argument that you make; and then there's the argument that you dream that you should have made. Well, in this particular case, because frankly this is about the first time in these child death cases that I have ever managed to get fairly decent verdict, we did have Glen Woodbury type up the argument, which was very short, and there are only a couple of excerpts that I want to read, and I will close with that, because these excerpts I think do point out the possible ways, suggestions at least, for handling these three facets that are so dangerous and deadly when you are trying, from the plaintiff's standpoint, a child death case.

I said to the jury, and I am reading from the exact transcript of the argument rather than the one I made up afterward: "I might say this, that on an issue that has been made, and I am not objecting to counsel for the chemical company making it, the fact there were *other* children, that there are other minor children, the first thing I would like to say about this is you might share with me or maybe you might not share with me this idea, but with my children and I think all of your children, there are no two alike. They are each different. If counsel argues in connection with the

fact that there are *other* children, argues that situation, I think it would be much like the situation where a man has, let's say, several horses. Let's bring it right back home. Let's say he has several horses, and one of them is a horse by the name of Kauai King. For some reason or other *that* horse is killed. Let's say that a railroad was shipping the horse, or something like that.

I believe Kauai King was incorporated for around \$250,000. If Mr. Ford brought an action to recover the value of that horse from the railroad that had caused his death, and we are talking about a *horse*, not a human being, and he proved that amount as being the value of that horse, there shouldn't be a cent discounted from that and there wouldn't be a cent discounted from that, it would be no answer for the railroad to say, "Oh, Mr. Ford, but you have *other* horses!"

So if this argument is presented, or if that thought has passed through your mind, I wish you would remember that little example, because the mere fact that there are other children makes no difference in your computation of damages in this case.

"What is the value of a child? The Judge will tell you that the value of the services of a child is a matter peculiarly within the knowledge of you jurors, because most of you have had children, have children, or if not you are closely acquainted with children. You know what children are worth, but you can't just say, like so many parents would say or like I would say, "I wouldn't take a million dollars for any one of my kids." But that isn't the rule of the court.

"I think counsel for the defense may want to talk to you and he has a right to talk to you about what this child did at the age of eight. His Honor, Judge Hamilton, will tell you that your consideration is not limited to just that age, the age of eight. Consider what the child would have done in the future, because at eight she was just coming into the threshold of her usefulness to her parents. Do you want to confine it to that age or what she has done?

"We have introduced evidence of what some other children have done when they are sixteen and eighteen and over and beyond that. Judge Hamilton will tell you, I am sure, that you are not even limited to the age of twenty-one because, and I won't say a poor man's family but a man of moderate means, such as the people in this case, his family is his estate. It is his heritage.

"It has been said that children provide in the later years of life assurance and *insurance*, because the law of life is then to support their parents. I know that *you* know from the description of

this little girl that we were able to get that she would have been exactly that kind of a person. This was something that the parents could rely upon. Think of the years between eight, she has already shown signs of what she would have been, but think of the years between eight and eighteen if she didn't marry. After that, the Judge will tell you, you have a right to consider *that*.

"You have a baby sitter, you have a nurse when she gets a little older and takes care of her younger sisters and brothers, you have a dishwasher, you have a teacher who helps the children with their lessons because she is the oldest girl in the family, and particularly the oldest girl in the family, you have a consoler to take care of the little children, you have a housekeeper. If you took just the standard going rate of wages for a housekeeper, a teacher, a dishwasher, and add those all together for a day or a year or for the lifetime of the eldest daughter of a family, you would find that the total would come to a terrifically large amount.

"And you might, ladies and gentlemen, if you wish, do that when you get back to your jury room. How much would it cost to go out and hire these services to be done? I am not speaking in terms of sentimentality. These pictures and the old report cards are the only sentimentality mementos. But I am not speaking about sentimentality."

I closed in the rebuttal argument by saying, "The defense counsel did a magnificent job of computing the cost in argument"—final argument ordinarily is not as important as we lawyers think it is. It doesn't have the effect on the jury that we really think it does. When we were in law school we always think, "Well, some day I'll get up and speak to that jury with the 'tongue of men and of angels'." But that jury has their mind made up pretty much before the argument. However, in the final argument in a death case I think it is important. I closed by saying, "In response to the very able argument of counsel for the Warren Chemical Company I think, ladies and gentlemen, in this particular case, or in any case, a child is *not* a liability, as the Warren Chemical Company would have you believe. A child is an *asset*. A child is an asset every day and every year that goes by. *That* child was an asset that these people were entitled to keep, under the law, for always until they died or until the child died a natural death.

"I think, ladies and gentlemen, that if the Warren Chemical Company in its case feels that the loss of a child is worth *nothing*, that idea should be changed in their minds in this courtroom—by this jury—on this day."

CO-CHAIRMAN MORRISON: It's getting late and we would like to get started if we could. We are running about thirty minutes behind so will you please take your chairs.

This next section of the program is devoted to a discussion of techniques employed in the handling of medical malpractice cases. We have with us as participants in this part of the seminar two of the nation's leading trial advocates, one being a defense lawyer and one being a plaintiff's lawyer.

The first person who is going to speak to you will be Orville Richardson from the firm of Hullverson, Richardson & Hullverson in St. Louis, Missouri.

Orville Richardson, as many of you know, is one of the outstanding plaintiff's lawyers in the United States. He at the present time is the First Vice-President of the American Trial Lawyers Association. He has had a very distinguished career in the past. He has been President of the Missouri Bar Association, a past President of the Missouri Trial Lawyers Association, and on and on it goes. I could stand here for an hour and talk about his qualifications but I think you are not interested in that as much as you are in finding out what Orville Richardson has to say about how a medical malpractice case should be handled from the plaintiff's side. So without going on any further I'll introduce to you at this time Mr. Orville Richardson of St. Louis, Missouri.

TECHNIQUES IN HANDLING A MEDICAL MALPRACTICE CASE FOR THE PLAINTIFF

Orville Richardson

We are running late so I am going to skip all the jokes and merely say this to you, that Frank did not give my leading qualification, and that is I have never lost a malpractice case—in fact, I have never tried one to completion. On the other hand, I think I have had the largest volume of malpractice claims of any lawyer in St. Louis. What does this mean? This means either selection or settlement. That is what it means.

Now that I've made my speech, I really should turn the program over, but we've got plenty of time now so I will make a few remarks in general to you.

Incidentally, now that you know I handle a large number of malpractice cases, I'll use this word openly. Formerly we had no seminars on malpractice. It is only in recent years that Bar Associations have *dared* to come out and talk about professional liability

and professional responsibility. Then, more recently, we have come to realize that what we are talking about and what we should talk about is not malpractice at all but its more general terms of professional *responsibility*. When we speak of that, of course, we speak of the liability and the responsibility of *all* professionals, even you and I.

Well, lest you should believe that because of my wide experience in this particular field that I should be able to refer you to a St. Louis expert who will come to Omaha and testify that what your doctors have done up here is wrong, don't call me—I'll call you. O.K.?

Agin, I think it is more important that I give you the few brief things that I have to say, and whether they are important or not is a matter of value judgment that I shall leave you, but let me speak to you about the important things first and then, if I have time, we'll go back and fill in a few details.

These are the important things that I wanted to say: In order to handle one of these problems or cases I think that you should start off with having some knowledge of why it is that people have these claims against doctors, lawyers, architects, engineers, and others who call themselves professionals. And, incidentally, the field of professional liability, or those who call themselves professionals, is extending all the time. The accountants, the CPAs, the people who sell estate insurance and estate plans call themselves professionals. Some of them call themselves lawyers. Some of them *are* lawyers. I see you seem to have the same problems up here in Nebraska that we have in Missouri and other places.

But let's go back. Understanding why it is that people have these complaints, why are they dissatisfied, understanding the client to begin with and, let me say, why is it that people do come to us and have these claims against doctors? Well, we could list a number of reasons.

I think we must start off with perhaps the principal reason, and that is a *bad* result has been obtained. The law is concerned with realizing the reasonable expectations of people in society, and one of the reasonable expectations of a sick person who goes to a doctor who holds himself out as a professional person and able, and who often makes promises which are far too fantastic concerning cures, the reasonable expectation of this person is that he gets some relief from his problems, and that he doesn't expect to be made *worse*.

So we can start off by judging the case in terms of why the person has come to you by determining whether or not the doctor

has at least left the patient no worse off than he was to begin with. Has he harmed him in any way? If he has harmed him in any way, then we think in terms of the general law of whether there has been a foreseeable reasonable risk which the doctor has failed to avoid.

Another reason that people come to us, and, incidentally remember what I said to begin with, we speak and talk and think nowadays in terms of the liability of *all* professionals and of all doctors, and in any study of the malpractice or professional liability claims against doctors we all gain a lesson because we are just as responsible, and perhaps more so in many situations, than the doctor is. So think in your own practice about the bad results that we accomplish and whether or not we have actually harmed people rather than helped them.

Another problem is one of public relations, and again you will see the application of that to the legal profession. One of the things that we are gravely concerned about nowadays in all Bar Association activities is our relationship with the public, or perhaps better still the public's relationship with *us*.

The doctor often brings upon himself many of these things by bad bill collecting activities or by his neglect of the patient, his impersonalization, his being in a hurry, even as you and I, not being able to sit down and talk to the patient and explain the problems they have initially and what they are going to do and why it is that they fail.

Then the third thing, and this accounts for, I would say, roughly, although I have not made any examination of it, about fifty per cent of all these claims, is a criticism by other doctors. The fellow says, "Who in the devil butchered you like this?" See? "Why didn't you come to me to begin with?" This is the way it starts off.

Well, the patient remembers this, you see, and after a bit, well, perhaps he has a legal remedy. He is reading more and more in the newspapers and in the slick magazines and other places that there is a great increase of claims against doctors, so why shouldn't he join the throng and get a little bit of that money from the vast and bottomless insurance pool? So he will come to the lawyer.

One of the first things the lawyer asks is, "Do you have anyone who has told you that this particular doctor has done anything wrong?" Of course the client will tell you, "Why, certainly. I went to So-and-So and he said, 'Why in the devil didn't you come to me to begin with? Who has butchered you like this?'"

Then you go to this doctor and you will be amazed that he just won't recall having said that at all. And he does not want to

get involved in the matter, and had he known that a malpractice situation might result he wouldn't have treated the patient to begin with.

Now, these are not universal truths. No truths any more seem to be universal in a world of relativity. Therefore, I only say to you that these things occasionally occur and account for a vast number of the present claims.

The fourth thing is that we should know that there are new techniques that are developing, new drugs, and through the advances of science the doctor, the ordinary fellow, is overwhelmed by these things. All you have to do is pick up medical journals and look through the advertisements and the claims of the drug houses and the people who make the new machinery for cutting us up and you will see that the doctor is flooded with all types of things. And of course the patient comes to know about some of these things, too—like birth control pills, as an example. I would anticipate, and I think we may well find out—incidentally, I am not Catholic; I am not trying to sell you against these contraceptives and all of these devices—but I am saying to you that we may well come, before too long, to find that there have been changes that have occurred, in these women who take these pills. It may occur. I don't know, but there are some indications of it, and some people are very, very afraid of the things that these pills may be doing to women.

All right, so the new techniques that people are demanding the doctors adopt, the new pills and nostrums and other things that are thrown upon the public, and for which the doctor becomes partly responsible for these claims.

There is the insurance-minded element of the case, and so on.

I have only covered one thing. I am watching my watch, and I want to leave fully half the time to the best and remaining speaker on this program this morning whom you will really wish to hear, so don't be afraid. He will have at least thirty minutes to talk to you.

Let me move right along then, now that you are relaxed and know *that*, to telling you the second thing that I wanted to say, and that is that in the handling of these cases I suppose this is one place where we must really know more about the law and be better prepared than in any other field of negligence trials. We must have a firmer grasp. They are more difficult, to begin with, so we must know the law. This immediately brings you to inquire whether I have any particular books that I would like to recommend. Well, I do have two or three, and that is why I staggered in here with these books under my arm, not to read them to you but merely to call them to your attention.

Let me call your attention to "Death"—incidentally, I get no commission whatsoever from Matthew Bender for the sale of this book, nothing whatsoever, so it is given to you out of the bottom of my heart as a fairly good reliable thing to work from.

Here is Louisell-Williams on "The Trial of Medical Malpractice Cases," and, as all medical and legal books are, you can scarcely carry it. I have staggered up here from St. Louis with it merely to exhibit it here from the platform and urge that if you are seriously interested in one of these cases and must know the law, this is a beginning source.

Another good book is a publication by, of all things, you would never suspect, the American Trial Lawyers Association. This is a volume that is put out by the Lawyers Cooperative Publishing Company. It was published as late as 1966. The law is still fairly fresh. But best of all, it has no pocket part supplements and in a few years you can throw it away. It fits well, you know, up against your wall; it matches pretty well the colors—a thoroughly good book, some references. It is worth looking at.

One of the better publications, of all things, on October 12, 1965, did you know that your own Nebraska Association of Trial Attorneys had a fine panel on professional liability, and this book, with citations to the law and practical suggestions, is one of the very best, believe me. I am an expert, because I am a sucker for books. What is going on in Western California, I am right there! I buy that thing because they are so cheap. If you paid only \$25.00 or \$30.00, nothing sells for ten bucks any more, but for that \$25.00 or \$30.00 you may make \$700,000 in a lawsuit. Who can resist that! So I always buy all the books. I can assure you that although I have a large library on medical malpractice, this is one of the best, believe me! I urge you to get it. It is on all phases of professional responsibility, very, very good, with many citations to the Nebraska law, of which there is extremely small volume—very, very few.

A.L.R. has a number of good notes. I would urge you to look at those. Of course, you and I are just playing around, aren't we? Aren't we? You say, "When is that fellow going to get down to business? When is he going to face up to it and ask the real question? How can I make a case without an expert and where am I going to find one when I have to have an expert. Why doesn't that fellow get down to business?"

Well, I'll get around to it, just playing around, so if you'll wait a moment I'll give you some few tips about that. But this is all introductory, you see, to relax you.

All right, what is the third thing I wanted to say? In malpractice cases above all else you must have a basic medical knowledge, you must know the medical aspects of your case more than in any other case. This consists of three things, basic medical knowledge, most important that which you research yourself in a medical library, that which you research *yourself* in a medical library so as to improve your knowledge—No. 1. No. 2, get all the current materials on the particular problem with which you are dealing so that you will have it to educate the doctor that is going to testify for you, because he hasn't got time to read that stuff. So you read it for him and you prepare. You have gone into it, you've got it all Photostatted or Xeroxed and you walk in with it and say, "I know you have read all of this, Doctor, but I just put it all together and thought you might explain a few things. I can't go over it now. Let me leave a copy *with you*." And he says, "Let me have that!" (Snatching) Well, to you and me this is nothing new. We have all learned that. We know that one of our big problems is educating physicians through medical knowledge. This is a part of the real work of the modern trial lawyer.

O.K., so he must have basic knowledge, he must do his own research, and lastly, he really should have a consultant. Now, this may or may not be a person who is willing to testify, but it would be someone with qualifications who can go over this with you, because as much as you know and as much as you read, it is still indispensable in many cases to have some good doctor who will always tell you, "Well, I will talk to you as long as you don't call me as a witness." Well, you are making *some* progress anyway, you are getting a little way along the line, and so you look for a consultant.

I think the fourth thing that I wanted to say is that it is absolutely necessary that you establish a very good working relationship with your client to begin with. He wants to sue *one* professional man; he may want to sue *you*. Right! Incidentally, I am certain that you know that the statute of limitations against doctors in the State of Nebraska, as it is in Missouri, is two years, but that there is four years to sue you for your malpractice, and one of the best ways that you can make a good case for your client today is to try to settle the matter for too long a time with the insurance company and let the statute of limitations run so that the client will have a wonderful case against you!

If this calls to your mind the necessity of going back to your office, I wonder how many of you can think now of how many cases are in your office upon which you should have filed suit a week ago. You know, while we sit here on Friday, the statutes of limitations are running *out*. I always like to go back and check my files after

one of these meetings, and in doing so I also like to check the coverage in my own malpractice policy.

One of the things I like to ask, I could stop at this point and say this to you. How many of you here have *never* committed an act of professional negligence? Any one of you want to be brave enough to hold up your hand? Moe! Moe has never done that. So we have one. But of course he is from New York and not from the Middle West where things run down the street, Mississippi River, Missouri River, and on some of the things we are not as perfect as they are in the East.

However, let me say this to you: There are, if you don't know it, large numbers of very valid claims for professional lack of responsibility or malpractice against doctors. Don't let anyone tell you there are not. They do a vast amount of good because they do a vast amount of work. The number of people that are injured and sick, and so on, percentagewise I think they, even as you and I, are doing a very fine professional job for society as a whole, but they, as you and I, have done things that are wrong, that are harmful to the client or to the patient, and one of the problems is how to handle them.

I always like to ask that question in a meeting of lawyers: How many of you can say that you have never done anything wrong? Then of course the next question is, how many of you disclose this to your client? How many of you would like to be sued about it? And you would not.

That brings up the next question. One of the main problems in the representation of people in these professional liability cases is in maintaining an honest, an open-minded, a fair attitude toward the insurance company and the doctor involved, who is a human being even though he is a doctor. And you must realize, you must understand his position. I suspect that one of the main reasons that doctors don't like to testify against other doctors is this feeling within themselves of an empathy or a sympathy, but it is reflected back into their own problems, too—how many of them would like to be sued? How many of you would like to be sued under such circumstances?

Let's go a little further. Is an act of professional malpractice one for disciplinary action? It can be. We have manifold duties. If we are negligent, if we fail to use that degree of care and skill which we have or which we should have, is this really something for disciplinary action? Well, maybe the ABA Committee, which is now about the problem of re-evaluating the Code of Ethics, will tell us. I think one of the things they *should* have told us a long time

ago and which they may tell us in this new code, which is very secret, you know, we will hear about it in February at the ABA meeting, but one of the things is, No. 1, and it is related to you and to me and to a doctor, is the duty to be competent, informed, skillful in any undertaking that we follow; and No. 2, if we are not skilled, competent, and careful, there's the duty to refer.

So we then begin to think in a modern world in our profession another problem of the ABA, the problem of specialization and certification, the duty to confine one's intelligence, the ever-increasing problems which require specialization. Specialization here is a fact. What are we going to do about it? What should we do about it? We know we don't want to harm other people by this specialization and certification. What standards should be established?

We have great problems in our profession and there are great problems in the medical profession, and we encounter many of their problems when we intrude into this field of medical malpractice, and I say, again, in all sincerity and honesty, we must have a real good understanding and relationship with these doctors and must understand what their problems may be.

I think we must be prepared for some changing of our own relationships when we enter into one of these medical malpractice cases. Some of them will hate us because we take cases against *them*. They will! And you as a professional man who will take one of these cases, must understand that some of them will hate us because we as a lawyer, holding ourselves out as skilled professional people primarily in the services of the public, *dare* to enter a court of law by the side of one of these people who has been harmed by negligent conduct. This hate may be converted, as far as I am concerned, in cases in which I in all good faith and sincerity believe ought to be followed, converted into a pride for my professional brethren—you who are willing to take the unpopular cases, of which these cases are a part, unpopular cases.

I think you will find that, on the other hand, some doctors will fear us, you see, because you have the courage and the ability to handle them. At least this has been my experience. And there will be a few, perhaps more than you and I understand, a few who will understand what we are trying to do and who will encourage it, men who will know that we are trying to handle the thing as professional people should.

Now I have some notes to tell you about how I handled a particular case, but perhaps I can summarize it and sit down, because I've only got about three minutes left. Let me see if I can cover it real quickly: Relationship with the client to begin with. I like

to take a very substantial fee contract, contingent fee contract, which is another thing that some people in society are talking about. Some defense lawyers—I don't know about the defense lawyers. I am not so certain that they dislike contingent fees, although they say so openly and publicly so that their insurance clients will hear it, which is proper. The company ought to hear a defense lawyer get up and talk about these mean plaintiff's lawyers with their contingent fees and their system of referrals. I think it is entirely proper. But the people who really don't want the contingent fee, of course, are the insurance companies, because then there won't be any lawyers. They can dispose of *us*. And this is the truth. In any case, I don't think the ABA will do anything with contingent fees so as to destroy the economic base of, I would say, about fifty per cent as a whole of the legal profession.

So, a large contingent fee, to begin with. Why large? Well, they are difficult cases. But that is only the surface justification. I like to take the fee because I can adjust the fee and have a satisfied client.

Now, if you think this is immoral, you can complain to somebody about it—and I'll give you some names of people down in Missouri who will be glad to hear from you. Am I right, John? This is a part of the handling of the case. This is a part of the working out of a satisfactory relationship between you and your client, between the client and the law, and the client and the doctor, and this is what we are doing, then, settling in a peaceful way, as Dean Pound told us we should do, with a minimum amount of friction and waste the conflicting problems of society which the law must put in balance and adjust to everyone's satisfaction.

No. 2 in the handling of a case from the viewpoint of the plaintiff is to get a copy of the hospital records before you send out the lien letter. I won't go into any details about that. I think you understand what I am talking about.

Then we will go to No. 3. There is perhaps a little personal call upon the doctor to assure him of the way in which you really want to handle this case. Then follow it up with a letter so that he can take that to his personal attorney, as well as send it in to the insurance company. In this letter I always start out by saying that it is not my desire or intention to prosecute this case or to file suit on it until I am reasonably assured, almost to a reasonable certainty, that I have a case. It is my sincere desire, No. 1, to determine the facts, and I don't have all the facts—and that is true at that stage—I don't have all the facts in almost all cases but I must obtain them. The initial inquiry is one of investigation, and this is why I have

told the client that I have reserved the right any time that I want after proper investigation and after reasonable notice to him to withdraw from the matter. Just because I've got hold of the thing and have got a lot of my time and money invested in it is no reason at all that I shouldn't withdraw if later on it appears that I should.

I told you that *selection* was important. Nine out of ten of these cases ought to be rejected. Nine out of ten of these people who come into my office, I spend a great deal of time with trying to assure them that there is no claim, because I immediately can see why under the laws or the facts that there is no supportable claim. So it is my function, then, to make these people satisfied.

Then I always wind up by a lecture telling them what the statute of limitations is, you know, so I protect myself and my good company which insures me. I also tell them in writing what the statute of limitations is. I beg of them to go to a good lawyer, you know—there are a lot of them—and back it up, see whether or not I am wrong. What we do is an art, we say, not a science. I am only making a judgment of my own. I don't pretend to know everything. I only know most of it. O.K.?

So, rejection, referral, talking to the client, establishing a relationship with the doctor, getting a copy of the hospital record, the letter to the insurance company putting them and the doctor—now, you can't communicate with that doctor except by deposition or this personal interview or the letter. These are the only communications. So this letter you write to the doctor puts you in a good position of exactly what you intend to do, to investigate, to withdraw, not to bring a suit, to give the doctor a chance, and then you also include in the letter something that if by chance he is so unfortunate as to be underinsured that you would be very happy to talk to his own private lawyer about it. That is a reasonable thing to say, isn't it? And I think some of them get the point.

You can say other things in this letter that I won't go into. But when you write it, you must believe it. I don't believe in tricks. Whatever you write, you believe it. If you would like to follow my technique, I think you would find it successful.

Then, full disclosure to the insurance company. These people are smart, these insurance companies. They handle a large volume of these things. They know more than we do, and they will say so, but they do. If there is liability they know it and that defendant knows it. You may not have an expert, but if they have been wrong they will know it. Some time and somewhere along the line, by a lot of artifices and techniques which I could relate to you in more detail, I think you can bring about a fair adjustment.

If you are incompetent, refer it to someone else. Get an out-of-town lawyer. Don't call me; I'll call you. But you can do this, and this is another way of saving yourself some of the problems of bucking heads against the doctor industry or business or profession.

Well, the time is gone. I could tell you about trial. I have tried a few of these—I was kidding you a little bit—depersonalization in the trial so that what you are trying is a professional standard perhaps. The standards now are supposed to be objective and not subjective. That isn't true, because as soon as you introduce an expert opinion into the matter you revert right back to a subjective standard, to wit, the expert's own idea of what is or should be.

We all know about the liberalization of the law that is taking place in Nebraska, and much faster, I would say, than in the State of Missouri. Your great *Space* Case in 1962, setting a new rule with relation to the statute of limitations. You will and must know the *Drozda* case, which will open up a tremendous area of litigation, in my opinion, against hospitals. That is the one in 1966, abandoning as of April 22, 1966, the charitable immunity protection of hospitals in the State of Nebraska. Then your *Smith v. Harris* case in the Eighth Circuit which modifies the locality rule and the school rule perhaps, the school rule particularly.

I was just reading a note last night that osteopaths can testify against doctors, and doctors against osteopaths. They even let Christian Scientists testify at times. So far, magnetic healers and Chinese herb doctors cannot testify. They are not qualified.

O.K. Now you see my time has run out. I have done the worst thing in the world, trespass upon this other gentleman's time, your time, and upon eternity.

There are very few Nebraska cases. The reason is, you either have the very best doctors in the United States in Nebraska and they don't commit malpractice, or you have a legal system or a legal profession, or something or other that is occurring that is preventing the bringing of these cases.

The panel system—you've got a fellow here named Kenneth Cobb and there's Charles Wright and a large number of other people, and I don't know them, who are working on the problem of trying to get a panel system into this state. The medical profession is dragging its feet—or are they? Are they being told something by someone else, such as the insurance companies that they don't want it? Are *they* the real ones who are at fault? Now, I could say a lot of lovely things about insurance companies. I don't want you to get the idea that I am up here beating against them. They're a necessary evil

—I mean, a necessary, fine institution of society. But they may be the ones that are blocking this move that you are trying to make for a panel system in the State of Nebraska.

You ought to at least try it. Suppose it does fail! What is the matter with experiment and progress? You can always go back, if you want to, to the campfires of the last century, as Tom Lambert says. So your panel system is something that you must think about and try. I can assure you, in my opinion, that it is probably a worthwhile thing that you should attempt.

Then of course there are still a lot of us that have got to stand in the trenches and slug away at the rules of law ourselves to accomplish the fine things that have been accomplished, as in your *Space* case on the statute of limitations and on the *Drozda* case and *Smith v. Harris*, and which may or may not be accomplished in a case that I heard about recently in the State of Nebraska.

Thank you for inviting me here. It is always a pleasure. I love to come back to Omaha. I wish I could stay longer. I wish I could listen to this wonderful man, Moe Levine, and my very dear friend, John Shepherd of St. Louis this afternoon. I urge you now to give good attention to my fine friend here who will talk about the defense side. Thank you.

CO-CHAIRMAN MORRISON: Thank you, Orville.

Orville mentioned during his talk that the plaintiff's lawyer ought to ground himself thoroughly in the medical knowledge pertaining to his particular case. I would suggest to you two things: First of all, before you go to the medical library that you serve interrogatories on the defendant and that you ask for the names of the expert witnesses that they are going to call so you can go to the library and read everything *they* have ever written; secondly, that you serve an interrogatory asking the defendant whom he deems to be authoritative in the field and what works he deems to be authoritative in the field so when you go to the medical library you can read everything that the defendant himself deems to be authoritative. Then let me tell you to get there *early*. I just tried a case for two weeks, a medical malpractice case with Joe Cashen, and about three weeks before the trial I went to the medical library to fortify myself, and Joe had sent Bill Riedmann, his associate over there to check out *all* the books so there wouldn't be any books for me. Fortunately, there were two medical libraries. But do get there early.

Our next speaker is Mr. Medical Malpractice Defense in the United States, I think. He is a member of the American College

of Trial Attorneys. He is a member of the International Academy of Trial Lawyers. He is a partner in the firm of Meagher, Geer, Markham & Anderson in Minneapolis.

Yesterday there was some reference from this podium to Bob Mullin being a representative of that great and *bad* insurance trust. That in his case is not an accurate statement, but perhaps I could with some degree of accuracy say that Mr. Markham is at least a representative of the insurance industry. He certainly is not a "captive" of the insurance industry but he is a very able, if not *the* most able medical malpractice defense lawyer in the United States.

TECHNIQUES IN HANDLING A MEDICAL MALPRACTICE CASE FOR THE DEFENDANT

Burr Markham

Members of the Nebraska State Bar, Mr. Richardson, and Guests: It is indeed a pleasure to listen to one such as Mr. Richardson discuss the fundamental questions that confront us all in this particular field.

It has been my pleasure to talk on this subject to a number of symposiums as well as lawyer groups, obviously from the defense viewpoint. However, I might say that I have never heard a more fair analysis of the problem that exists than what Mr. Richardson has informed you.

One comment I wish to make before opening the few remarks that I am going to give to you is this: I have attended many, many medical symposiums and groups of lawyers who are interested in the subject of medical malpractice. I have yet to be asked to speak to a symposium on *legal* malpractice, and I am unaware of the fact that any has ever been held.

Most physicians know too little about law, as most lawyers know too little about medicine. This is due in part to the mutual miscomprehension between the professions. For example, doctors think lawyers pursue justice, while lawyers think doctors pursue patients. What is closer to the truth is that patients pursue doctors and justice pursues lawyers.

My object this morning is to stir the thinking of the Bar so that a more common ground of understanding may exist between the legal and medical professions. "Malpractice" as it is understood by both lawyers and physicians is enlarging the ever-widening breach that exists between our professions. What I have to say to you gentlemen here today in dealing with this subject of "malpractice" as we

use it rather miscellaneously, deals solely with the problems of these suits against members of the medical profession questioning their judgment. "Malpractice" as the term is used and defined in its limited sense really means "bad practice."

I think you will all agree with me that it does not take an expert medical witness to testify that bad practice has occurred when the doctor removes the wrong leg or leaves scissors in the belly or the lawyer permits the statute of limitations to run on his client's valid cause of action. Where the controversy rages is in this limited situation of questioning the judgment of the physician or lawyer.

It is my conclusion after nearly thirty years of observation that our problems are created by the legal profession practicing unlicensed medicine, and the medical profession practicing unlicensed law! If the members of each profession honestly, fairly, and with understanding considered and applied the humble concepts that still govern the responsibility of both professions, our problem would be to a greater extent solved.

The basic legal concept that governs the conduct of both professions in the exercise and application of their judgments is: "A (doctor-lawyer) must possess that degree of skill and learning that is ordinarily possessed by members of his profession and apply that skill and learning in accordance with standards ordinarily applied by similar members of the community wherein he practices."

Generally the arguments have commenced over where the community begins and ends. Example: In Minnesota where I am from it is state-wide as applied to a physician. In Texas, when applied to a lawyer it is county-wide, by a recent decision. I'll concede that most counties in Texas are as large as Minnesota.

Now the application of the foregoing rule in cases of *complaint* over the exercise of *medical or legal judgment* obviously requires that the complainant produce evidence of departure from the foregoing concept. In order to do so he must be qualified as a member of the profession to establish the standard and demonstrate that the standards have been violated.

Here, gentlemen, is where the battle rages and the legal profession literally bay at the door of our Supreme Courts through their associations, periodicals, newspapers, et cetera, in order to open the door to the practice of medicine and law by *lay juries*.

The practice of developing new legal concepts in order to impose liability on the medical profession in part seems to originate in my own state in the case of *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12, decided in 1904.

Our Supreme Court concluded it was for the jury to decide whether the doctor was liable to the patient when he performed a successful operation on an infected ear. Originally he diagnosed the trouble in one ear but in the operating room found it was the other ear. Here the court, in its anxiety to practice medicine, adopted the so-called "assault and battery" theory now sometimes called "informed consent theory."

Most active in this field of developing new legal concepts to impose liability on professional people—this includes both doctors and lawyers, but commonly pointed at the medical profession—is the Supreme Court of California which seems to have taken particular delight in adopting such concepts as

RES IPSA LOQUITUR

(In effect the guarantee under certain circumstances that a good result will be obtained!)

As a member of the legal profession, how would you like to practice law under such guidelines? *All medical procedures have known risks and hazards.*

In every operation that we lawyers perform in a court room, gentlemen, fifty per cent of our clients lose—a mortality of fifty per cent! Such a mortality rate in medicine does not warrant the risk except in cases of extreme emergency.

In the exercise of our medical or legal *judgments*, neither the medical or legal profession should be judged by any other concept than the one I have first referred to, for we may individually disagree on the approach to a medical or legal problem, and with 20-20 hindsight may confuse this *disagreement of judgment* with *bad practice*. In almost every case I try, my hindsight criticizes the judgment I then exercised. If my self-criticism results in my becoming responsible to my client for the outcome, I cannot practice law, nor can the doctor practice medicine, for this compels each of us to become a guarantor to his client or patient.

THE RARITY OF RESULT RULE

This *awful* concept was adopted and then rejected at least in part by the California Supreme Court. The Court was violently criticized by the Stanford Law Review, which may have brought the Court to its senses. This rule in effect provides: If side effects rarely occur from a given medical technique, then a lay jury may infer there was negligence; liability follows result!

Now the terrible thing about such a rule was that the better medicine practiced, the more likelihood liability would occur.

Massachusetts has adopted a rule that permits the use of medical textbooks to establish medical standards, i.e., avoid the necessity for producing medical testimony to establish a *prima facie* case.

Does the author appearing in the trial in print have in mind the problem presented to the defendant physician? I presume a medical text could be obtained on almost any medical subject that would advocate some different technique than the one adopted by the defendant doctor. Moreover, how do you cross-examine a book!

In the matter of exercise of judgment may I point out to you that our judges' opinions and conclusions are *frequently determined erroneous* by the Supreme Court and on occasions even then in 5 to 4 decisions. Therefore, the tenuous circumstances of giving *lay* persons an opportunity to practice medicine or law, if you please, without the benefit of competent expert opinions to support their verdicts is unthinkable, for in fact they are then practicing medicine or law without a license.

When our Supreme Courts yield to pressures to adopt these easy legal concepts on "judgment cases"—I keep repeating "judgment cases"—I am reminded of the story of Justice Pond's invitation to visit the Chinese Supreme Court in session in Peking.

Naturally Justice Pond did not understand Chinese. However, with interest he observed the proceedings. The lawyers vigorously argued their clients' cases and when they had concluded, the associate justices gathered about the chief justice for a few moments and conferred in whispered tones, whereupon they resumed their places, and one of the associate judges began delivering the opinion of the court.

Briefly thereafter the chief justice suddenly and with some violence struck the associate justice over the head with a gavel. This seemed to terminate the proceedings and all judges retired to chambers.

Justice Pond subsequently made his way to the chief justice's chambers and complimented him upon the proceedings. However, said Justice Pond, "I do not understand the part of your procedure where you make the extraordinary use of the gavel."

Replied the chief justice, "Velly solly. Associate justice read decision in case to be argued next week."

In my view, you need not require some fancy legal concept—assault and battery, informed consent, rarity of result, *res ipsa loquitur*, etc.—to establish the doctor is *negligent* when he takes off the wrong leg or leaves ten-inch surgical scissors in the patient's

belly. Nor do you again need such rules when the lawyer permits his client's good cause of action to disappear by failure to file the claim before application of the statute of limitations.

My complaint lies in the fact where application of judgment by a *doctor* is criticized, the legal profession is more and more insisting that lay juries arrive at liability through what really amounts to criticism of the doctor by the lawyer in his closing argument to the jury. This amounts to the practice of medicine by laymen.

The most difficult of all sciences is the practice of medicine and in spite of all the advances of medical techniques in the past thirty years—incidentally, they *have* unlocked the door to our ailments more in the past thirty years than ever in the history of mankind—literally thousands upon thousands of medical problems remain unsolved and not understood by any member of the medical profession. This most noble of professions must not become the target of the legal profession in an effort to enlarge the field of *personal injury* litigation which already takes up far too much time and effort of our members and the courts, for I warn you that if this trend progresses, you and society will be the losers.

Permit me to read to you the recent legislative enactment of Alaska.

ALASKA

Regular Session

Chapter 49, Laws 1967

Senate Bill No. 142

AN ACT relating to medical malpractice claims. Be it enacted by the Legislature of the State of Alaska:

Section 1. As 09.55 is amended by adding new sections to read:

ARTICLE 6. MALPRACTICE ACTIONS

Section 09.55.530. Declaration of Purpose. The legislature considers that there is a need in Alaska to codify the law with regard to medical liability in order to establish that the law in Alaska in this regard is the same as elsewhere.

Section 09.55.540. Burden of Proof. (a) In a medical malpractice action based on the negligence of a physician licensed under As 08.64, or a dentist licensed under As 08.36, the plaintiff shall have the burden of proving

(1) the degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians or dentists practicing the

same specialty in similar communities to that in which the defendant practices;

(2) that the defendant either lacked this degree of knowledge or skill or failed to exercise this degree of care; and

(3) that as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.

(b) In malpractice actions there shall be no presumption of negligence on the part of the defendant.

Section 09.55.550. Jury Instructions. In medical malpractice actions the jury shall be instructed that the plaintiff has the burden of proving, by a preponderance of the evidence, the negligence of the physician or dentist. The jury shall be further instructed that injury alone does not raise a presumption of the physician's or dentist's negligence.

Approved, March 28, 1967.

This is no more or less than a codification of the common law rule establishing or defining malpractice. Now, that raises the question of whether or not even ordinary negligence, such as leaving the scissors in the belly, or otherwise, are not still governed by this legislative enactment.

What caused the State of Alaska to enact such legislation? Obviously the fear of the legislature or society in Alaska that these concepts, if they are by the courts and lawyers to be enlarged, that *they*, the citizens of Alaska as a society, may suffer from lack of proper or efficient medical attention either (a) through incompetent physicians, or (b) through a lack of physicians thereof.

THE NEW JERSEY PLAN

April, 1967, issue of American Bar Journal.

Our nation has a crying need for physicians. The complications and demands on the intellect require superior academic qualifications. How many here could or would conquer chemistry, higher mathematics, and other basic subjects of the sciences before even entering medical school? To practice medicine as a general practitioner is to invite suits for incompetence and lack of skill! The specialties require three to nine years to complete, after medical school.

The example of a young heart surgeon (thirty-nine years old) who in his entire life to that time had never earned over \$250 per month. He expected to enter private practice in open heart surgery at forty years of age!

The State of Minnesota is renowned throughout the world for its medical centers because of our University of Minnesota Medical School and Mayo Foundation at Rochester. Heads of state to the lowliest Indian from India receive treatment at our institutions. Yet we have a crying need for doctors in Minnesota.

The British and New Zealand Medical Societies have viewed with considerable concern the fact that in New Zealand under their socialized medical plan they have one doctor for every 1500 patients.

In Minnesota we have 3,400 active practicing physicians; 1,769 are located in Ramsey and Hennepin Counties; 718-plus are located at Rochester or Olmsted County. This leaves less than 1,000 physicians for the balance of Minnesota. A little arithmetic will tell you that in our medical state we are almost as bad off as New Zealand and we are accepting patients from all over the *world*!

Rural communities are watching their old doctor friends pass on without any prospect his vital contribution to the community will be replaced. In order to encourage young medical practitioners to come to rural communities, new hospital and medical facilities are provided in order to lure their services. Many of these inducements have failed and the institutions stand empty in my state.

The young doctor is learning more and more that he must be suspicious of his patient and the community. This paradox comes about even when medicine has done more for mankind than ever before.

The patient is an amateur physician. He watches Ben Casey on television and reads the *Reader's Digest*; the lawyer is an amateur physician. He also watches TV and has "Gray's Medical Textbook" in his library along with "The Best of Belli," or Louisell on "How to Try a Medical Malpractice Case." Did Louisell ever try one?

In Minnesota we have adopted in the most part the Federal Rules of Civil Procedure. However, discovery interrogation of a defendant physician is limited to what he saw, heard, or did. And when we adopted those rules we specifically provided in the rules that the opinion of an expert could not be obtained. This applies to all lawyers, doctors, engineers, anyone who it is claimed has violated professional standards. In other words, the facts. He may not be cross-examined on medical standards nor may his opinions be obtained.

Equally so, if a lawyer is sued for malpractice the same rules apply. Now, gentlemen, why should a physician or lawyer be required to divulge his medical or legal knowledge against his will when he neither consents thereto or is compensated.

All the lawyer or the doctor has to sell is his knowledge. And when he is compelled to reveal this knowledge for days on end under cross-examination he is, I think, being violated of his constitutional rights in taking his property without his consent or compensation. Imagine you as a lawyer being sued for malpractice on the contention that you have not properly or adequately examined an abstract, and that you are being questioned hour after hour on the techniques of how to examine an abstract, and what you learned in medical school, and what the standards were, while your office is unattended and you do not get paid for this. Not only is your judgment being questioned and your emotions being involved, but you are also compelled to divulge the very thing that you sell, without compensation.

Those states that compel the doctor or lawyer to do so, for possibly as I have said days on end—incidentally, I defended one doctor who was under cross-examination for four days just on the facts. Imagine what that lawyer would have done if he could have asked him about medical standards or cross-examined him from textbooks! So you can see that there are some real serious questions on the *other* side of the coin.

Now I was asked to digress just for a moment. Because my very good friend here, Mr. Richardson, has pointed this out, I am currently defending a lawyer. In fact, I am going to return this afternoon to try to figure out some more possible defenses for him if I can.

This is, very briefly, a case where the client comes into the lawyer's office—incidentally, he has been in there many, many times before but he never had paid his fees, admittedly; he had been taken through bankruptcy and some other things by this lawyer. This lawyer has been practicing law in the City of Minneapolis since 1923 without any question as to his competency that I am aware of in the general practice of law. This old client of his comes to him and explains to him that he thinks he has a medical malpractice claim. The lawyer consults with him, reviews the facts with him as he relates them, and the lawyer tells him he has no case and that he will not accept the employment.

He never hears again from that client until about three and one-half years later when he is served with a summons in complaint by *another* lawyer claiming that he should have sued, if you please, a medical malpractice case against the doctor and the hospital, and that he has violated his legal duties in not bringing such action within the period of the statute of limitations.

Now, mind you, this plaintiff admits that he has no papers of any kind, no copy of the allaged retainer agreement he says he

signed but left it there with the lawyer, and there is no reconciling the lawyer's statement that he refused to take the case and the client and his wife's story that he had accepted the employment. One of them is a perjurer.

The lawyer did not, when he told the person that he wouldn't accept the employment, write him any letter and have it acknowledged that he couldn't be employed. And now that I reflect, I think I have done that a number of times, after someone has consulted with me and attempted to employ me I have just passed them out the office, and on many occasions I haven't even charged them a fee.

But that poses the question, again, with such situations. So really what we are trying here now, and this will be the fourth week next week, I am defending a lawyer, mind you, but we have to try first the medical malpractice case to find out whether or not there is any claim in *any* event, whether he was guilty or not of malpractice. I might say that the malpractice case rests on the tenuous testimony of a Mexican psychiatrist.

Now, this is not a one-edged sword, gentlemen. *You* are involved in these concepts too, and when you talk to your courts that we ought to have these wide, broad concepts in applying it to the medical profession, how about *res ipsa loquitur* when you lose the lawsuit?

Now in closing may I suggest it is really our duty as lawyers to protect the medical profession, just as Mr. Richardson has told you, from unwarranted claims of dissatisfied or neurotic patients, to not permit the prospect of a glittering contingent fee to blind our discoveries as to the merit of the claim. If our experience in this field is limited, to seek competent consultation on the merits thereof before making accusations that slander and defame either the medical or the legal profession.

MR. RICHARDSON: I wonder if you would be interested in a couple of observations of mine before I leave for the plane. I would just like to answer one or two things. I think it is permissible for the plaintiff to get the last say.

Essentially I think that my good friend has made it clear that there is a threat against the community, you see, and that is that they are not going to get any doctors because if we have too many malpractice claims they are not going to practice medicine. You know, they won't take people. That is the threat.

So at this point I would like to give you my malpractice lecture at the two medical universities at which I teach. I say, I now tell you that I am now going to teach you law. As he says, doctors should not practice law. Do what you should do as you

were taught in the medical schools and don't fear the legal repercussions of it. But that isn't all of it: Get plenty of insurance with a good company and keep your mouth shut until the insurance adjustor comes around with ten experts of assorted beard lengths to testify that you weren't involved.

The malpractice premiums are extremely small. What are we talking about? All this fear! We are talking about \$200, \$300, \$400, tax deductible to a fellow who is making \$50,000 or \$60,000. That is what we are talking about. We are not talking about everybody not going to have medical care or treatment.

The second point that my good friend has made is that it is going to cost *you*—you and society. You see where “you” comes? First! You and society.

We have this story about the fellow with the Mexican psychiatrist. Did it ever occur that maybe this Mexican psychiatrist may be the smartest psychiatrist in this hemisphere? Just because he is Mexican, does that mean he is wrong?

Now, you can't scare people away. You can't scare the community by this talk about that you are not going to get doctors, and you're not going to scare the medical profession by telling us that *we* might get sued. There are plenty of means and problems whereby we are exposed to all kinds of liability, and as far as I am concerned I have never seen one of my brethren in this profession that has failed to face up to his responsibility, and who is looking at a fat contingent fee or some other kind. What I want to say is that I stand for both professions, not against them.

This talking down of the plaintiff Bar and the talking down of the insurance industry is wrong. We have our little jokes and play back and forth, but we all serve a great function in society, and we can't be blinded by the fact that I am a so-called plaintiff's lawyer, or that my friend here is a so-called defendant lawyer, because the law that he espouses is related, of course, to what he honestly in good faith believes and that only happens to fit his particular personal interest, but he must have rational and good reasons for them and not have scare talk against the community.

Now, you see, go out and bring in that verdict!

CO-CHAIRMAN MORRISON: Those two philosophies are as irreconcilable as the testimony in Mr. Markham's case, but I am sure that you will agree with me that if the plaintiff's position is represented by someone as able as Mr. Richardson, and the defendant's position by someone as able as Mr. Markham, out of that conflict I am sure that twelve people are going to find out what the truth is.

...The session adjourned at twelve-twenty o'clock...

ANNUAL ASSOCIATION LUNCHEON

FRIDAY NOON

October 20, 1967

The annual Association Luncheon was presided over by President Murl M. Maupin.

PRESIDENT MAUPIN: Ladies and gentlemen, while I can see there are some of you who have not had the opportunity of finishing your luncheon, by reason of the lateness of the hour and the unfortunate delay that occurred here, I shall attempt to get the program under way at this time.

Recently I had the pleasure of visiting the Truman Library in Independence, Missouri, and I saw there on the desk of President Truman the famous sign that he had used on his presidential desk while occupying the presidential chair, reading, to wit: "The buck stops here."

Having seen and heard of that sign and having experienced the unusual delay that we had in getting this luncheon program under way, I took it that one of the responsibilities of my office at least was to accept, though I did not know I was willingly participating therein, the buck for not having gotten this meeting started sooner. So I am sincerely regretful that we didn't get it arranged as programmed. I accept full responsibility for any of you who didn't get to finish your lunch, or may have a case of indigestion from eating too fast.

I should like at this time to introduce the distinguished people we have at the head table.

On my far right is George Turner, Secretary of our Association and also a member of the House of Delegates of the American Bar Association, and many other functions.

Seated next to him is Charles Adams of Aurora, Nebraska, who has been elected as President-Elect of this Association to serve with Russ Mattson in the coming year.

Next is our new President for the succeeding year, Russ Mattson of Lincoln.

Next to him is our President of a day or more, George Boland of Omaha.

Next we have with us as a personal friend of our speaker upon this occasion and also as an active member of this Association, Mr.

V. J. Skutt of Omaha, Chairman of the Board of Mutual of Omaha. Mr. Skutt, we are happy you are with us.

On my far left is Stan Seigel, the President of the Bar Association of South Dakota.

Next to him is Mr. Leo Eisenstatt, the newly elected Chairman of the House of Delegates of our Association.

Next we have with us Dean Henry Grether of the College of Law of the University of Nebraska.

Next is Mr. Jack Wilson, a member of the House of Delegates of the American Bar Association.

Mr. Roy Willy, former Chairman of the House of Delegates of the American Bar Association and from South Dakota.

I also wish to introduce at this time Mrs. Earl Morris, the wife of our speaker today. Mrs. Morris, would you stand.

And Mrs. Clarence A. Davis, would you please stand.

On the occasion of my official visit to the Missouri Bar, Mrs. Maupin and I were taken under the wing of and became the guests of our official hosts, Mr. and Mrs. Fred Allbach of Albany, Missouri. I would like to have you stand, if you would. I have an arrangement worked out. Fred, "Fritz" as they call him, is one of the lawyers over at Albany, Missouri, and if any of you happen to have any business that you desire to refer over in that area, I suggest his name to you. I hope our agreement is firm and that I'll get my usual referral...

There was some concern last night about my failure to introduce my wife. Would you stand, please, Ruthie.

Is there somebody here who is representing the National Association of Trial Attorneys to make this presentation? Would you come forward, please, Jim. Jim Bruckner!

M. J. BRUCKNER: There was a little mixup in the program last night when the annual award given by the Nebraska Association of Trial Attorneys was given to the Nebraska law student who best excelled in the art of oral advocacy last year. They said that Steve McWhorter was in the service of the United States. We are glad to report he is going in but has not gotten there yet. Fortunately Steve is here today. Because of the mixup he was not here last night and did not have the pleasure of receiving the award before this group. So I would call Steve up at this time.

Steve, this is the plaque that will repose in the halls of the Nebraska University School of Law with your name on it, and here is a check for \$100.

PRESIDENT MAUPIN: I would congratulate you, Steve, but I accept no responsibility for their not being able to find you last evening.

I am going to take about two minutes of your time here to ask Mr. Walter Black of our Association's Group Life Insurance Program to make a few remarks. They will be very brief.

ANNOUNCEMENT, GROUP LIFE INSURANCE

Walter I. Black

Mr. President and Members of the Bar Association: I have been cajoled, seduced, and so forth to a few minutes. I will not go over three minutes.

As administrator of your Group Life Insurance Plan, this is the ninth time I have been privileged to appear before you.

The few points that I wish to emphasize were contained in your July *Nebraska Bar Association Journal*. It has to do with the Group Life coverage enacted nine years ago. Since that time, the beneficiaries have received more than \$900,000. That is an average of better than \$90,000 per year. If you had been privileged to sit in my position to hand out the checks to the widows, and I am not up here to make a sales presentation, the gratitude and the tears would show on my coat sleeves.

Despite that amount of claims, I am privileged to announce that beginning One December of this year, 1967, there will be a ten per cent reduction in premiums. Further, there will be approximately a fifteen per cent dividend to those holding memberships throughout the year 1966.

At this time there is an open season in joining to any and all, if you are not now a member. To those who are just beginning their career and through the ages of thirty-five to forty, the premiums, as you will notice, are so low that you can hardly afford to pass it up. I have an ample supply of brochures. They were on your desk this morning and there are more out on the table and at George Turner's office. For those of you who have gray hairs, reaching mid-life age, you may now feel a problem, what to do when your personal plan at age sixty-five begins to decrease. Your underwriters, the John Hancock Mutual, think it has a suggestion to make that might be of great interest to you. I will be available

the rest of the afternoon and will be very happy to answer questions that you may have. Open season of enrollment from the 19th of October through December 1. The application blanks are very simple to fill out, and I have an ample supply.

I do appreciate, Mr. President, this time allotted me on behalf of your Association. Thank you.

PRESIDENT MAUPIN: Thank you. I suppose it would be appropriate for me to announce and take an oath to the effect that I don't participate in any cut on *that* sales talk, but I do think it is a service that our Association renders to our membership that is sometimes overlooked, particularly by the younger members, and I like to see it repeated and called to your attention that it is available.

I have one other very brief announcement, and that is concerning the film that is being shown by the Public Service Committee. It will continue to be shown in the Regal Room this afternoon from two to four. They tell me the attendance has not been too good, but I really think that if you can find the time to get in there you will find your time is very, very well occupied.

At this time it is my very good fortune to be able to present to you a man who, in fact, needs no introduction to this group. He is a former President of our Association, in 1951—Clarence A. Davis.

He admits himself that he obtained his law degree at Harvard in 1916. He has had so many other and various assorted honorary degrees that I would be trespassing upon your time to even attempt to enumerate a part of them.

I do think it is proper to call to your attention that he has served as Attorney General of this state from 1919 until 1923, I think it was, some time in there. He was Solicitor of the Department of Interior back in the '50s. He became Under-Secretary of Interior in 1954.

He is a former President of the Federal Bar Association, 1955-'56. He has always been interested and active in professional group activities, not only in our own State Association, the Federal Bar, but more particularly in the American Bar Association. He is now a member of the Board of Governors and has been since 1965. More importantly, he is Chairman of the Budget Committee of the American Bar Association.

Before I ask to have Clarence stand up, I thought I might draw on my own personal experience with him back a few years ago

as a trial lawyer. It stands out in my memory and will remain there so long as I have a memory, I suspect, because down in the wells of a courtroom before a jury in western Nebraska he taught me the meaning of the expression that is heard "the more than adequate award," in that he recovered a verdict against a client of mine in the largest amount of money that has ever been my misfortune to have to sit at a table and hear a jury return a verdict against me.

So Clarence has not only been active in the fields that I have mentioned, but he has done and is still doing trial work.

I am very happy to present to you Clarence Davis.

CLARENCE A. DAVIS: Thank you, Murl. As the years go by, you know, these introductions are awfully oiled and get into the form of obituaries, and mine is pretty well written in half a dozen places and you don't need to change it very much.

I have a nice privilege today. It is always a great privilege to be able to introduce your new friends to your old friends. That is my job, to present the President of the American Bar Association.

I always remember that Mr. Bryan, who once upon a time made numerous speeches about this country—some of you older people will know that he did—and Bryan said that the best introduction he ever had in his life was when a poor old country fellow got up in front of the crowd, became tongue-tied, lost his head and pointing said, "This is him!"

Well, I can't quite do that because I think you are entitled to a little bit more than that, but I have also been bored all my life with introductions that are twice too long. So we will try to not do either.

In defense of Earl Morris and Jean, let me tell you that this is a man-killing and a woman-killing job, this being President of the American Bar Association. I think Mrs. Morris is sitting there agreeing with me. If nothing else, the travel alone would kill you.

You must remember there are fifty states and fifty-two weeks in the year, so you see that is only about one a week, but in addition to that you must remember you've got to make all the big city Bar Associations—New York, Philadelphia, Washington, San Francisco, and Los Angeles. Of course you can't make San Francisco and Los Angeles together.

In addition to that you've got to be in the Chicago headquarters a great deal of the time trying to answer correspondence or having somebody answer for you.

You've got to attend four meetings a year of the Board of Governors. You've got to attend an annual meeting, which means ten days of preparation. So, as I say, if nothing else happens to you, if you are President of the ABA you're liable to wind up in the hospital exhausted or something of the kind purely from the travel alone.

But in addition to the travel I am sorry to say you have some other problems that crowd in on you from all directions. I don't think Earl will mind my telling you what a few of them are in a sentence or two apiece.

For instance, the race problem. Is that a political problem or is that a legal problem? Well, it is a mixture of both. But how far are we to get the legal aspects mixed up in the psychological, and what have you, political aspects, of the race problem? That is one he worries about, I know.

No. 2, what about crime in the streets? Somebody said yesterday, and we all knew this, but I was strikingly reminded when he said that you've got to remember that the lawyers are the only people who can represent both sides of these controversies, and therefore the solution by means of law of these controversies has got to be in the hands of lawyers.

So there is an obligation, and it is the President's business to worry about it and try to steer the American Bar Association into a sensible position.

Then we come to the point where we could talk all the time about availability of legal services. That never bothered me much back in Holdrege, Nebraska, or even in Lincoln. I will concede that in the cities maybe it amounts to a good deal. Anyhow it is a thing in which the Bar is disturbed, everybody is disturbed. We must have legal services available because, after all, if the cop stops you out here on the street and says, "Buddy, where are you going?" and you say, "I want a lawyer," there you are!

Then an age-long job that has been going on for three or four years and which we badly need, and that is a complete revision of the Canons of Ethics of the American Bar Association. As you all know, the Ethics thing has been a kind of patchwork for years. We have had a high-priced committee working on it for three or four years. But that is one which will cause you some headaches as President of the American Bar.

And then if that isn't enough, this encroachment of the other professions in which everybody is beginning to practice law, the engineers, the accountants, the real estate agents, the this'es and

thats—I won't name them—all seriously encroaching into the field of the practice of law. What is the American Bar Association going to do about that?

Then on top of everything else, congressional committees have gotten to the point, thank heaven, where they occasionally ask the lawyers' advice about what they ought to do. So the President has got to think about what you tell the congressional committees about what you think about XYZ legislation.

Then on top of everything else is court congestion. I had dinner with one of the New York judges the other day and they are four years behind with their jury dockets in New York, and of course that means a complete denial of justice in a great flock of the rather small things, the personal injury cases and things of that kind.

So those are some of the things that the President of the American Bar has got to worry about. Now Earl Morris is a pretty old hand at this thing. He has been right in the middle of it for a good many years.

I won't read you his personal obituary, except to tell you that he is a graduate of Wittenberg College and he is also a trustee and has got an honorary degree, so evidently they think pretty well of him in the hometown of Springfield, Ohio.

Incidentally, they haven't got a bit better football team than we've got, Earl, and ours is nothing to brag about.

One great consolation, the best asset, I think, that the President has is that he comes from west of the Allegheny Mountains. You know, east of the Alleghenies we have a lot of smog, and not all of it is physical. Quite a lot of it is intellectual, so I am awfully glad we've got a President from out in God's country, the Middle West, a little bit east of us but still Ohio is the great Middle West.

Earl has been President of the Columbus Bar. He has been a delegate to the ABA. He has been on the Board of Governors, and now he is the President of the American Bar.

If you will pardon me—and this is too long an introduction but I thought you just ought to have a little bit of an idea—before he starts speaking to you of some of the things that are on his mind, and I haven't any idea which of these he is going to talk about, I haven't discussed it with him at all, but any one of them is good for a major address because they are all major problems confronting the American Bar Association.

So with that introduction, allow me to present to you Mr. Earl Morris of Columbus, Ohio, the President of the American Bar Association.

... The audience arose and applauded ...

ADDRESS

Honorable Earl F. Morris

Clarence, President Murl, Visitors from the States outside of Nebraska, Members of the Nebraska Bar Association, Ladies and Gentlemen: Frankly, I came here thinking pretty well of this job but by the time Clarence got through telling me how hard it is, I'm not so sure, Clarence, that I shouldn't consider submitting my resignation. Really, it isn't half as bad as Clarence makes it sound. It is just that we have to keep the Board of Governors *thinking* it is that bad, that's all.

He indicated I was an old warrior, and I wasn't quite aware of that either, but perhaps that is part of the job.

However, I certainly did not come prepared to defend the Ohio State University football team. We didn't do too well last week, but as was indicated perhaps both we and you are in for a better week this week, and so we will hope at both ends, Clarence.

When George Turner wrote me and asked me to come and speak with you today, and when Murl Maupin seconded the invitation, as far as I was concerned it was a command. And here I am. I should, of course, have been happy to come under even less auspicious auspices than those two invitations because the circumstances and the connections between the American Bar Association and the Nebraska Bar are such that we run deep.

Interestingly enough, you gave to the Association two of its very early presidents: James M. Woolworth of Omaha in 1896-97, and just two years later Charles F. Manderson, likewise of Omaha.

Turning to more recent history, while it is always dangerous of course to mention names in a state where many have done much for the American Bar Association, I am sure I would be remiss if I did not speak of a few. There is Clarence Davis, and he is rendering yeoman service on our Board of Governors. As Murl indicated, he is Chairman of the Budget Committee of the Board of Governors. He is standing staunchly on a platform of reduced expenditures, no increase in the dues, and the elimination of cocktail parties at all social functions.

George Turner has, of course, been State Delegate for Nebraska so long that the memory of man runneth not to the contrary, and

he has been supported by John Wilson who has, really, I think, stuck faithfully to his duties—until he played hooky at two of the meetings in Honolulu, on one occasion I regret to announce to go surfing, and on the other I regret to announce even more to take a hula lesson.

I know, too, that three officers of our sections and seven members of our committees come from Nebraska, which probably means that you have disproportionate representation under the one-man one-vote rule, but if *you* don't mention it, I won't.

As you will recognize from Clarence's introduction, I do come today as having served as President of the Columbus Bar Association and the Ohio State Bar Association and then as Chairman of the National Conference of Bar Presidents. I refer to this only to indicate that, because of this type of service, I conceive of the Bar activity this year as a partnership between the American Bar Association on one hand and the state and local associations on the other. I say that, that I conceive of it as a partnership because it seems to me abundantly clear we are facing many common problems and striving to achieve many common goals.

I view this, ladies and gentlemen, as I think is quite clear to you, against a backdrop of drastic social change, sometimes subtle, sometimes violent, always complex. While, of course, there has always been change, as Dr. Oppenheimer, the famed scientist, put it recently, "One thing that is new," he said, "is the prevalence of newness, the changing scale and scope of change itself."

The face of America is changing. A rural America becomes increasingly urbanized. Negro families move from southern farms to northern cities. Corporations merge and grow larger, and labor unions follow suit. And even as the automobile becomes more numerous on our highways, we turn to supersonic airplanes and point a rocket at the moon.

I mention this to you because I think it quite clear that the legal profession is an integral part of this revolutionary age and that we must respond with all of the diverse talent that we have and must respond from the spring of our wide-ranging abilities. Never before has there been such an enormous need among the lawyers of this country for organization, for unity, for strength, for the partnership between the American Bar and state and local Bar associations to which I have referred.

The American Bar Association, as the national organization of lawyers in this country, recognizes its obligation to give leadership in developing and implementing programs to meet squarely the challenges that face our profession.

In order to meet this obligation we have this year embarked upon a three-point program, and it is to that that I would speak briefly with you today.

The primary thrust of this program is in the field of crime, which I think quite clearly is the No. 1 domestic problem in our country today. Last February the President's Commission on Law Enforcement and the Administration of Justice issued its excellent report, appropriately entitled "The Challenge of Crime in a Free Society," a report, I suggest, that should be required reading for every lawyer and every judge in this country, and a report, above all, that contains some two hundred recommendations dealing with the prevention and control of crime.

As one reads this report it is not difficult to envision the role of the organized Bar and of the individual lawyer in the war on crime. But in order to bring this role into sharper focus, if you will, the Attorney General of the United States, in cooperation with the American Bar Association, last May called the Lawyers' Conference on Crime Control. It was attended by Bar leaders from all over the United States.

Since that time the American Bar Association has considered ways and means of discharging its obligation in this field. At our annual meeting a Special Committee on Crime Prevention and Control was authorized and appointed. Activity is well under way. We have offered to assist the Bar Associations in Michigan in the almost insuperable task of processing the 5,500 cases arising out of the Detroit riot.

Our Criminal Law Section is embarked in preparing a Manual dealing with mass arrests and mass prosecutions, and we have tendered our services to the President's Commission on Civil Disorders.

I have been happy to learn that your Governor has appointed a State Crime Committee. I have been happy to learn since coming here that a Citizens Committee, headed by a lawyer, I believe, Mr. Keenan, has been named in Omaha and will shortly make a report.

And finally, I'm glad to know that President Maupin has appointed an Association Committee on Crime and Juvenile Delinquency. I tender to you today, to you, President Maupin, and to your successor, the full cooperation of our Association in this important area.

The second phase of the program concerns itself with court modernization, a campaign to bring our state courts up to a level of the minimum standards of judicial organization. You in this state have achieved these minimum standards in large measure,

and certainly it is a worthy tribute that the state that gave to this nation and to the world Dean Pound, who in 1916 before the American Bar Association certainly sounded the clarion call for judicial reform in this country, and while we have been slow to measure up to what Dean Pound then said, slowly but surely we do so. And while you have in large measure here, I have been gratified to learn, one important goal which still has not been achieved is the elimination of Justice of the Peace Courts, which is now part of your program.

While in some states Justice of the Peace Courts were abolished quite some time ago, in Ohio for example in 1958, the movement has again gained tempo and within the last five years they have been eliminated in Illinois, Connecticut, Maine, Delaware, Florida, and North Carolina. I am gratified to learn that you plan to hold a citizens conference early in 1968 to consider means of eliminating Justice of the Peace Courts and replacing them with an appropriate minor court system. I wish you success in this important undertaking.

The third phase of the program will be to move forward with those activities which our sections and committees are already engaged in. While I, of course, cannot cover these in any substantial degree, I refer what I shall say with some degree of apology to you, Clarence, in view of what you have said, to the field of availability of legal services. I do so, however, because frankly I find that this is a subject in its broad aspect that is of great interest to the State Bar Associations, and certainly it was true that it was the area which was of great interest to our members at our annual meeting in Hawaii and to the media as I move about this country.

Within this area, first, there are legal services to the poor. Traditional legal aid supported by private funds was infused with substantial federal funds with the proposal for a Legal Services Program under the Office of Economic Opportunity. While there have been some problems with this program, as there is bound to be with any nation-wide program of this sort, I think it can be safely said that over-all it has been very successful. The bugaboo of federal control has been scotched as local control of the program largely by lawyers has been achieved. There are now programs in forty-five states and in forty-five of our fifty largest cities. Some 600 neighborhood law offices have been opened, staffed by approximately 1,200 lawyers who have been rendering professional services in the traditional client-attorney way.

I am told that two programs have been funded in Nebraska: One in Lincoln and one in Omaha. I believe it can be safely said that

they have functioned in a reasonably satisfactory manner. I am told that a state-wide program is being considered by your Association, and likewise a program embracing five of your central Nebraska counties is being considered, and I trust that you will go forward with your efforts to both of these fronts.

Last year more than 825,000 indigents were furnished legal aid or public defender service by the lawyers of this country, and this fact, when coupled with the forward-looking and unselfish way in which the lawyers of this country approach the legal services program, constitutes in my judgment a record of which the profession may be justly proud.

Then, secondly, services to the middle-income group. *TIME* Magazine, while quoting accurately from one of my speeches in Honolulu, referred to me as, I quote, "a supporter of group legal services." What I had said on that occasion was that we in this country as lawyers have done quite an effective job in furnishing legal services to those who could well afford to pay at the one end of the economic spectrum, and to the indigent at the other, but that we had failed in substantial measure—and note this, if you will—that we have failed in substantial measure to educate the middle income group to the service that the lawyer could give, and then to provide such services at a price that they could afford to pay.

I said further that the suggested solutions were lawyer referral service on one hand and group legal services on the other. I then said that our Committee on Availability of Legal Services was studying the group legal service question, that in due course it would be prepared to report, and that in my judgment its report would be one of the landmarks in connection with the practice of law in this country, and that I felt that it was a subject that would be with us for many years to come.

And certainly, as I say to you today, the last week there was argued before the United States Supreme Court, after *Button*, after the *Railway Trainmen* case, and now argued a far more sweeping case, namely the *United Mine Workers* case going up from Illinois, the question of group legal services is something with which the profession of this country is going to have to come to grips. On that statement I am prepared to stand. But I have not and I shall not take a position on group legal services as long as it is under consideration by our committee and prior to any action being taken by our House of Delegates.

A related matter is specialization. In 1954 the House of Delegates of the American Bar went on record as favoring, in principle, voluntary specialization with certification of competency. Follow-

ing that action—and I might say as a part of that action, the Board of Governors was instructed to undertake to implement it—following that action, two attempts were made to develop an acceptable plan of specialization. Neither was accepted.

At the recent meeting action was taken which, while withholding approval in principle, instructed the Board of Governors to try again. Now I have no illusion as to the difficulty of this undertaking, but I also feel that we would be remiss, in view of the wide interest and wide concern in this field, if we did not undertake to develop a plan and submit it to the Association for full and complete study.

Related to this whole matter of availability is the matter of the revision of the Canons of Professional Ethics and the disciplinary study. Clarence has spoken to the first in, I suppose, sufficient detail, except for me to say just this, and that is that the proposed revised Canons, the first draft of such Canons on present schedule will be available in the spring or early summer of next year. They will be disseminated widely to state and local Bar associations and to individual lawyers who are interested. After the committee has had the benefit of the comments from all of these groups it will undertake then to prepare a final draft, and it is hoped that such final draft will come before the House of Delegates for action in February, 1969.

Justice Clark spoke to you last night about the disciplinary study. We are fortunate to have him as the Chairman of that all-important committee. The State Bar Associations have been magnificently helpful and cooperative in this endeavor. I feel confident that when this study is completed it will be a result that will be helpful to all of us, the length and breadth of this land.

As I conclude, may I say this to you in just a couple of sentences, and that is that in my judgment never has the Bar been as assiduous in reappraising itself and its role in society as it has been these past few years.

We are resolved that we shall serve our clients better, that we shall advance the interests of the members of the profession, and that we shall contribute in as large measure as possible to the public interest. We have, in a word, resolved that we shall discharge to the full our professional responsibility. With all else that we are doing, we shall try next March to examine our function even more closely. The American Bar Association, in conjunction with the American Assembly, will call a conference of participants drawn from law, sociology, business, and government to attempt to draw guidelines for the profession's role in meeting the emerging demands of a changing society in this last third of this century.

I have been proud of the practice of law and of the profession since the day I opened my first case book thirty-seven years ago this fall. I grow prouder of it every day. If we can but fix our gaze, if we can but fix our gaze on the lodestar that I have been undertaking to describe to you today, in my judgment the future is bright for the profession and for the public that we seek to serve.

...The audience arose and applauded...

PRESIDENT MAUPIN: Ladies and gentlemen of the Association, I feel that I may say on behalf of the membership of the Nebraska State Bar that we as a group and as individual members of that Bar will attempt to respond to the challenge that Earl has given us today, not only as lawyers but as citizens of this great country of ours. We thank you for coming here and bringing us this most timely message.

We are adjourned.

TORTS SEMINAR
FRIDAY AFTERNOON SESSION

October 20, 1967

The third session of the Torts Seminar was called to order at two forty-five o'clock by Chairman Frank B. Morrison, Jr.

CHAIRMAN MORRISON: Gentlemen, we are now fifty minutes behind time. We feel that we have brought to you this afternoon two of the best summation lawyers in the country—Moe Levine from New York and John C. Shepard from St. Louis.

I might tell you at the outset that we are altering the program somewhat. Your program calls for some talk on "The Psychology of the Closing Argument" and then a closing argument in a medical malpractice wrongful death action. Due to the fact that Mr. Levine has to be on an airplane for New York at five minutes after four, he and Mr. Shepard have decided to give you the psychology and the closing argument simultaneously. Mr. Levine will open up and, time permitting, he may rebut, although he has to leave the hall by about three-thirty in order to make that plane.

So at this time I will take this opportunity, first of all, to thank him for being here. It is at no small sacrifice that these men come to these programs, and it was at no small sacrifice that these men have come to these programs; and it was at no small sacrifice to Moe Levine in this particular case because he, as Tom Lambert, has to be in West Palm Beach, Florida, tomorrow morning for another speech.

As I have told you, we have two of the best advocates in the country. For the plaintiff I don't think that Moe Levine is exceeded by anyone. He is a graduate of St. Lawrence Law College in Brooklyn, which gives you some idea where he grew up. He has practiced law in New York since 1929 and is the senior man in the firm of Levine & Broder.

He is a deeply sensitive individual with an uncanny understanding of human emotions, as you will soon learn. He is an author, recently authored a book entitled "Summations" by Moe Levine. It is available to you through the Trial Lawyers Service published in 1966, and I recommend it to all of you. It is full of a million ideas.

He describes himself as a country lawyer practicing in a big city. I think you will get a little bit of the idea of what he means when he says he is a country lawyer when he gives you this presentation this afternoon. Mr. Levine!

FINAL ARGUMENT—
MEDICAL MALPRACTICE WRONGFUL DEATH

Moe Levine

I think you should know that I do not spend all of my time lecturing. I am on trial almost every day of the court season in New York, but I have felt for a long time that since the art of advocacy is dependent upon the growth and maturity of the advocate, I, having grown for so long and having so obviously matured, have acquired experiences which I am most eager to share. If they are of some value, then I will have fulfilled my function; if they are not, it will not be because I have not tried.

The trial of an accident case is an essay in advocacy through adversary proceeding. These words deserve reflection. My heart has gone out to you, sitting for two days and listening to great lawyers who have tried and won great cases. Your minds by now have been stretched. They have probably become a little tired. For the purpose of my discussion with you, you need not take notes. There will be no citations. I tell you now that I cannot teach you, nor can anyone, how to sum up. Summation is a rendering of yourself to the jury. The more you do it the more you will realize this.

You will not teach the jury anything they have not heard during the trial, anything they have not learned by living. What you will do if you have been successful in your effort at persuasion is to dredge up in them those things which they have always known and then articulately have failed to express for themselves. If you can do this, you have succeeded in the art of persuasion, and I shall concern myself for a very few moments on how I think this can best be done.

So when lawyers say that they will teach you, they cannot teach you. They can only reveal to you how they do it and ask you to examine yourselves as to whether these methods of doing it would be awkward to you or useful.

You know, people complain to me about the number of books they have to read and how little they get out of them, and my answer has always been that anyone who opens a book expecting to find a pearl on each page is doomed to disappointment. I most gratefully read a 500-page book if somewhere buried within it one pearl exists. So if one thought comes to you out of all the talk that has been given to you, your time would have been rewarded.

I personally feel rewarded just for having been here today and heard the discussion of the boy who was deaf and dumb and

lost the use of his hands. The expression which I heard him use was that this is the type of injury which is so massive that after the first shock is gone, there is a danger that it might be considered humorous.

I am reminded of a case which I tried years ago in which a young man lost both arms. He was run over by a subway train which severed both arms above the elbow, and to cap it he could not be fitted with prostheses, and so he was doomed to an armless life.

This case had been tried three times before by a very eminent lawyer in New York and I had been privileged to listen to his final argument on two of the occasions and they had always resulted in disagreements of the jury because of the difficulty of liability.

To my consternation I was invited to try it the fourth time. He had given it up. I had heard his summation. I had never heard a more eloquent description of the torment of a man with both arms missing. He went through a complete day of his life. He talked about how he could not embrace his children. He talked about all of his embarrassments. As I sat there and listened, never dreaming that I would try that case some day, I said to myself that if I were a juror maybe I would be offended at this. What is the point in demonstrating to twelve normal individuals the deprivation of arms as a serious damage. You are not dealing with computers, you are dealing with human beings. Isn't there some way to do this without tormenting them and wringing their hearts in the effort to obtain a large verdict? Maybe this does, on occasion, detract from your liability issue.

I have never forgotten that case because I, against all advice,—I was much younger, I wasn't young but I was much younger—and against all advice I decided I was going to simplify this and I was just going to take a chance. The other way hadn't worked. I would try something new.

I said to the jury that I suppose I could upset them if I tried, but I saw no purpose in it, that all I wanted to say about the injury that had been done to this man is that I had lunch with him. "And do you know," I said, "he eats *like a dog*." And that was it! There was this hush, and there was this chill that I get down my spine when something is said by me which sounds like someone else said it.

It brought a verdict. The verdict didn't stand eventually, but it brought the verdict and embarked me upon a career of expenditure that wiped out my year's income. I would have been better off if I had lost that case.

In this adversary proceedings, by its very nature and by tradition, two lawyers enter the arena against each other. In this case you are blessed by having John Shepherd, whom I have encountered before, and about the nicest thing I could say about him is that I wish he were on the plaintiff's end because then I might not have to meet him so often.

The adversary proceeding traditionally, and for a long time, was a game. It was a game of skill and charm, and personality, and persuasion by artifice. The times are changing. The days of Daniel Webster and the booming accents of Rufus Choate are gone. The men who taught me when I was a stripling, if they came back to try a case today, and they were the most successful of all, they would be laughed out of court. You try cases today against the background of professional television appearances of men with scripts. You look at your clock and you know that in two minutes the program is going to be over so this is the time for someone to break down and confess, and it is never the one on the witness stand. You cannot compete with this along that line.

What have you in its place? No artifice, no tricks. They don't work. They don't work. If they are successful there is a reviewing court that takes care of it. You may not introduce matter into evidence, or attempt to, which you know is not admissible in order to impress a jury.

Under the Canons of Ethics in New York I have not yet found a lawyer who had ever read them completely, they don't even know that this is considered to be improper conduct. Illustration: "I offer this police record in evidence, Your Honor." Now, you know that that police record contains hearsay statements. It may not be admitted. You expect your opponent to object. You hope that the Judge will sustain it. Why did you offer it? You offered it because, by his objection the jury might get the impression that there is something in it that hurts him. Therefore, he is objecting and keeping it from them, and you now have put him at a disadvantage. Wrong! Wrong thing to do! Wrong way to achieve your objective!

Without any bromides, let's see what the objective is. I could talk about humility. I used to love the word until Arthur Godfrey misused it. I could talk about the abstract concept of justice. These things are words which have no real meaning in the practical everyday living of your jury, and we are talking to a jury.

The trial of a personal injury case is an effort to achieve the recognition of a wrong and the compensation for its consequence. These words are not chosen idly. You may not have cause for action, in which event you should not be in court. I know this sounds like

a very hard statement but I put it to you on a practical basis. Nothing costs more money than the trial of a losing case. Insurance companies today generally throughout the City of New York and largely throughout the country are trying cases which they think they will win. They are settling the cases which they think they have a chance to lose, and they are paying in some cases where the damages look like they might be large, more than you could hope to get in settlement. This is an image which has been successfully employed in New York City. A county in which the verdicts used to go 65 to 70 per cent for the plaintiff have now become in Brooklyn, which was known as an outstanding plaintiff's court, 70 to 75 per cent no cause of action. Why? Lawyers not as skilled? The same lawyers! What has happened? They are trying bad cases.

Driver against driver—settle it? Settle it, right angle collision. The jury knows that any driver, or they will be told if they have John Shepherd there, that any driver approaching an intersection at right angles to another, if he had been careful could have avoided the accident. The condition of the lights is irrelevant. You have a duty which is superior to the question of the right-of-way, and that is the theory of mutual forbearance.

Don't try these cases! You are going to lose them, and insurance companies will settle them with you. They will not pay what you could achieve if you had a jury of your relatives!

I have a thought which I should like to pass to you because this was a troublesome matter to me. I finally achieved a solution to my satisfaction, and so while it is not relevant to this general subject I should like to state it to you.

I heard about the child darting cases today and I remember being called to Detroit to engage in a symposium because the lawyers in Detroit had not been able to win a child darting case for a long time, and they asked lawyers to come from all over the country to come and talk to them about child darting cases, how come they couldn't win them.

Well, you heard why they can't win them. The jury becomes the driver. I found what I thought was an approach to a solution in selection in voir dire: "How many of you are drivers?" I say. And in most counties of New York all are drivers. Then I take them one by one and I waste no time with other types of questions. This is *the* question: "Of course in the course of your driving you have had children run out in front of you, haven't you?"

Now, I haven't said, "*Have* you had children run out in front of you?" They might think they will be put off if they say "yes." So they say, "Yes."

"Did you ever hit one?" I ask.

And he says, "No."

I pass to the next juror. You end up with twelve jurors, all of whom have been in the same position as the defendant in this case who had a child run out in front of him, and none of them ever hit one of the children. Now you have a jury that has the perspective, and it is possible for them in this type of case, then, to say, "Well, if this guy drove as carefully as we drive, he wouldn't have hit this kid."

Don't waste time with the questions about "How many accidents have you had in which fenders got bumped?" "How many of you own stock in an insurance company?" Who cares? If you don't have a target defendant you are not going to get a large verdict anyway.

I have found out that juries generally, when you are suing an individual, and the defense lawyer is smart enough to have his client sit in court all through the case, even though his client has a million dollar insurance policy, that the jury will figure there is a \$10,000 policy and anything above that is punishment, so you are not going to get a large verdict anyway. When you are suing the A&P or Sears Roebuck, you can forget about that. Where you have an individual defendant you have a different type of problem because the jury again will relate.

So what is your purpose in summation?—to revert to the subject. The trial has been conducted, the evidence has been produced, and the jury is waiting now—for what? For a solution to this conflict that has occurred, to a solution for the medical conflict which exists in so many of these cases where two warring factions of doctors are competing with each other to express their attitudes, diametrically opposed, and asking the jury to decide between them in this medical debate. Is this your function to resolve these problems? You cannot. If you try to, you must fail.

The jury by the time you get up to sum up has formed very definite conclusions. What *you* are doing is to present to your friends on the jury, who have come to believe your side, arguments which they can use in the jury room to persuade the others who may be undecided. This is the most you can do. Beyond that you can only, as I started by saying, dredge up out of them those feelings which are inherent within them and which they suppress, especially in conversation with each other, because they are embarrassed about revealing their deep-felt feelings about things like pride—the pride of man in his work; the pride of a woman in her womanhood; the

importance of the enjoyment of living and its impairment. How much of life is spent working and how much of it is spent enjoying the fruits of work, and what happens to a human being who has been so injured that the *fruits* of work are gone. Work may exist, but no longer the pleasure of the leisure hours which cannot be enjoyed in the presence of pain.

Now let us come to the case at hand. Problems exist in this case for the plaintiff's lawyer. I hope you have all read it. Have you? Put your hands up so I'll know how much of the facts to go into. Too many have not.

A forty-seven year old Negro lady died. She entered the hospital for what developed to be a minor procedure. It was thought she might need a hysterectomy, and it was determined that she did *not* need a hysterectomy. So all that was contemplated and all that was intended to be done, and was done but not completed, was that she had a dilatation and a curettage.

Now, this is a matter of little moment. In small outlying agricultural districts this is not even a case which goes to the hospital. But this was done in a hospital under optimum circumstances. There was an anesthesiologist and there was a surgeon. And a game was played in this case, as demonstrated by the evidence. Apparently it was decided to see whether this woman could be operated upon by the surgeon while the anesthesiologist was controlling her continued life without either one knowing what the other was doing, because the testimony is that they drew a curtain between the anesthesiologist who was at the head and the surgeon who was at the feet, and neither one paid the slightest attention to what the other one was doing.

And what were they doing? They anesthetized this lady, and you have heard now all the evidence, they anesthetized this lady by spinal anesthesia. Since you have heard the evidence, let me rapidly recapitulate.

Spinal anesthesia inserted between L3 and L4, Lumbar 3rd and 4th, the spinal anesthesia travels up the spinal cord. The anesthesiologist tests sensation at the various levels to which it travels in order to determine that it does not travel too far. Why? Because if it reaches T1, T2, T3, it will involve the pulmonary system and this woman will be paralyzed in her lungs and unable to breathe and she will die.

So this anesthesiologist, by his own admission, tested her as the anesthesia went up along her spine until it reached T6. Now I told you T2 or T3 is the critical point, so you might say, "Well,

what is wrong with T6, still three vertebrae away." He stated under oath that his intention was to anesthetize up to T10. Now, that is considerably removed from T6, so we already have a traveling of the anesthesia for an additional six vertebrae.

Did it stop at T6? He doesn't know, because when it reached T6 he decided she had been sufficiently anesthetized, and so he turned her over on her back and he raised her legs to the lithotomy position so that the surgeon could then proceed to operate upon her uterus through the vagina.

What do *my* doctors say? They say that the drug which was used for anesthesia had instructions with it, and it said, "Do not move the patient until you have determined that the spinal anesthesia has reached its ultimate point." It has to "set." It has to "set." And when it sets it will move no further. And when he raised her legs into the lithotomy position, this accelerated the movement of the anesthesia down, and so it was no surprise when the doctor started to operate and decided he didn't need to operate, that he was going to do a D&C, it is no surprise that her blood pressure started to sink and it finally became zero, and she was dead.

The surgeon said, "Why do you sue me? I had nothing to do with this. I was down at the feet. We had a blanket between him and me. He didn't tell me that this woman's blood pressure was dropping."

The anesthesiologist said, "I didn't tell him." He confirms it, and so you might say, "Well, he didn't tell him," except that in the hospital record there is one statement during the course of this in which the surgeon states that the anesthesiologist informed him that the pressure was dropping even lower.

Now, pressure doesn't drop from 120 to zero like that! Common sense dictates to you that it drops from 120 to 110 to 100 to 90 to 80 to 70 before it reaches 0.

The anesthesiologist said, "That's right, it went down to 90."

"Well, how did you feel about that?"

"I wasn't worried." He wasn't worried.

Then it became 80—80 over 60. "How about that?"

"I wasn't worried at 80. But at 80 I began to medicate."

"Well, did you tell the surgeon to stop operating?"

"No, because I still wasn't worried. I thought I could get it back.

He didn't get it back.

Who chose the anesthesiologist? Not the lady—the surgeon. And so she died. And when she died, then massive procedures were engaged in which I will not trouble you with except to tell you that they pumped oxygen into her. They intubated. Jurors, oxygen pumped into her might make her float but it is not going to bring her back to life. The oxygen must reach the brain. It can only reach the brain by circulation of blood. The blood had stopped circulating. There was no point in injecting oxygen through her throat until they brought her back to life.

And so they massaged her chest. Did they know *how*? Should they have done it if they didn't know how? I submit to you that upon the evidence in this case they did not know how to massage her chest. They achieved nothing with it because of their lack of knowledge and ineptitude in this area, and the proof of it is that they opened her chest up after five minutes and when they did open the chest up they didn't even massage the heart. The moment they touched the heart, the heart started to beat and she became alive. I submit to you that inference and common sense would dictate to you that if they had compressed the heart properly in a close position so as to put pressure upon the heart, there would have been a resumption of breathing.

She lived for eleven months. She lived imprisoned within a body which had become her casket. The defendant contends that she was not in conscious pain. This contention is based upon the fact that the injury to her brain had rendered her inarticulate. I suggest to you that the way to wipe out a cause of action for conscious pain is to cut out the victim's tongue, on the assumption that if the victim cannot express pain you may contend that the victim cannot feel pain.

But she made grimaces during those eleven months. She responded to painful stimuli. She groaned from time to time. This brain remained alive for eleven months within a body which didn't allow it to express itself. And these are eleven months of agony which I shall not torment you with but which you as people can understand and appreciate.

What are our problems in this case with respect to damages? I see no defense with respect to responsibility. No sympathy may go out to doctors who acted in the manner in which their own testimony has demonstrated they did act. I have no diatribe against doctors in general. I am concerned with the conduct of these two on this occasion. Had they become so calloused with this woman's body and mind that they inflicted upon her the things which they did which could have been so easily avoided.

What is the problem? You may hear the defense counsel talk about the type of person this was. She had been married three times and so had her husband. Theirs had been a stormy marital history, each of them unsuccessfully married twice before and finally found each other. You saw him. You could not see her. And you may say, "Well, he wasn't too much to look at, and from what we hear about her, she couldn't have been too much. These were not important people. Her departure left no gap in the social structure of our community."

She was just a woman, and she worked to supplement his meager income, and she lived her little cloistered life with him and his son whom she treated as her own, and she kept his house. She was his companion. Where is he to get another companion now?

It would be easy to look down upon these little people who expect very little from you, except that I have assured them that whatever your ultimate determination is, it will contain within it the recognition of the dignity of these people and the right to be considered by you as human beings. In the Psalm when it talks about human beings created second only to the angels, it does not speak about color.

A living human being was removed from her small circle of relationship, and this gap that has been left can never be filled. And you are asked to make assessment of the value of this woman, the assessment of your appraisal of her eleven months of silent agony, not even relieved by the ability to express the pain so as to seek help, but a brain so damaged that it would not permit the vocal chords to function, and so she lay there for eleven months. And they shifted her from hospital to hospital. As she became less and less responsive to care, less and less care was given to her. And finally God in His mercy took her—and she died, and ended the torment of eleven months.

Now, what is she worth? Not as a human being, because this involves sympathy, charity. I urge you not to demean this woman's memory nor her husband's presence by thrusting upon him and her memory the indignity of charity. They come here as supplicants asking that you appraise their rights and to treat them as equivocal human beings.

What was she worth as a money machine, not even breathing and not as a human being? She was a money machine. Forty-seven years old, and she did housework. She could have done that kind of work three times a week for the rest of her life and she earned \$36.00 a week. That's it. She had a life expectancy of twenty-seven

years. Let's call it twenty. Twenty years at \$36.00 a week is approximately \$36,000.

The defendant will say this must be amortized. I say to you that in time, as the years go by, the inflation which you will hear the Judge talk about, will run along at about seven per cent a year. The amortization would only be about four per cent a year, and instead of asking credit for that, let us omit that. So, without amortization, the damages should be the equivalent of her present earnings for the rest of her life.

With respect to her action for the pain and suffering preceding death, I ask you to consider that the law will consider, and the Judge has told me he will so charge you, that the right to that in her absence is equivalent to what it would have been if she had come to ask you for damages for what had been done to her the moment before she died.

The defendant may have no rebate. The defendant may have no reduction because the injuries inflicted upon her were so serious that she could not survive them. Having destroyed the victim completely, the defendant may ask for no reduction in damages because she is not here to ask for these damages herself. These damages should be awarded.

So for the damages for her pain and suffering for eleven months, and don't brush them off as a lump amount of time—eleven months in her case amounted to eleven months containing days and nights and hours and minutes. Man does not suffer month by month, year by year, but minute by minute, and what happened to her was unemitting. The autopsy demonstrated that there had been disintegration of the secondary layer of brain cells, and you have heard evidence that the layer of brain cells which controls sensation are the top layer. The top layer was not damaged. The middle layer was damaged. Why? Because of oxygen not getting into it? No. Because of carbon dioxide not getting *out* of it. There was a lot of oxygen in it because she was under anesthesia, but the carbon dioxide stayed in the brain and damaged the secondary layers of the brain, and so she died of an accumulation of carbon dioxide which destroyed the middle layers of the brain.

Why couldn't she talk? Because the middle layers of the brain contain the speech centers. That's why she couldn't tell about her pain. Why didn't she open her eyes? Because they control the sleep centers. And so she suffered mutely and silently.

How do you compensate for this type of suffering? The reason you are here as jurors is that no computer has ever been invented which could compensate for suffering of this type.

The money machine I talked about, when you are all finished with it, does not bleed, does not weep, and does not suffer. And so when you are finished completing her value as a money machine, you must begin to compute the hurt that has been done to her as a human being.

Her medical expenses and all of the nursing expenses and all of the doctors amounted to \$18,000.

You now have arrived at the loss of the machine which would have earned \$36,000 and from which \$18,000 was spent to repair it. That is \$54,000 before you begin to equate her pain and suffering.

Gentlemen of the jury, my client will be finally put to rest when your verdict is rendered. She has been in the ground for three years, and all that is left of her is the memory which from this day on will be preserved by no one but those she left behind, and your verdict will represent the monument to a life abruptly and unnecessarily ended. I beg you to treat the memory of what has happened here with dignity, with an understanding of the loss which has occurred, separating yourselves from all the things which plague us in the world about us. For the purpose of this deliberation there must be nothing to occupy your mind but the rights of these parties, and if you believe that these rights deserve compensation then you must contemplate what happened to her and how she died.

I have prayed that I might find the wisdom and the eloquence to adequately present this case to you. If I have been emotionally moved, I beg you to forgive me. I did not mean to express any emotional reaction. I tried, if I could, to speak to you unemotionally. I could not at times. I pray now that you will find the strength and the courage to do what must be done in order to set right this wrong. And whatever your verdict is, blessed by your conscience, sanctioned by your reason, no one may be heard to complain.

I am sorry I spoke so long. I got carried away by my own tears. I do have to leave, but I would like to hear what John says right at the beginning. John, say something!

JOHN C. SHEPHERD: Let him tell them what a great guy I am first.

CHAIRMAN BRUCKNER: Well, you've got a little idea of what kind of guy John C. Shepherd is right now.

Mr. Levine, thank you very much.

John Shepherd, at the rather young age of forty-two, has become a nationally known defense lawyer. He is a 1951 graduate of St.

Louis University and has practiced in that city since that time. He is a partner in the defense firm of Evans & Dixon in St. Louis.

He lectures around the country, which is unusual for defense lawyers. He has been a regular lecturer at the Michigan Annual Advocacy Institute held in Michigan every spring.

I had a chance to spend a little time with him last night and he is quite a raconteur. He is an iron man, as Frank Winner can tell you. He is witty, clever, colorful.

It is with a great deal of pleasure that I present to you John C. Shepherd from St. Louis.

FINAL ARGUMENT—

MEDICAL MALPRACTICE WRONGFUL DEATH

John C. Shepherd

This is the first time that I have had the experience of making an argument when my opponent just walked away. So I am a little non-plused to begin the argument in his absence.

It might be, and I was thinking here a moment ago, it might be a good technique to just walk out and let the other guy say whatever he wants to, because it does give you a pause to find out how you can say anything, even the least bit accusing him when he is not here.

All I can say is that with the recitation of my speaking engagements, when they asked me to be on this program, and I say this advisedly as the only blow I am going to strike against Moe when he is not here, when they asked me to be on this program they said it was going to last until four-thirty—and I'll be here until it is over.

Now how do you handle a case of this kind? Since the spell has somewhat been broken with the introduction and Moe's leaving, perhaps I could continue along with the psychology of what the defendant would be up against and then go into the argument. Or I might, while it is still fresh in your mind, begin instead, as Moe suggested, "What will he say first?" because he knows that when the defense lawyer gets up and faces those twenty-four tearful eyes that he has got a real problem on his hands to change immediately the mood of that trial to get this jury back down out of this emotional aura in which Moe has put them and get them back down to face the responsibility which they have sworn to God they will face as jurors. And that is the job for the defense. So I think I would do it this way:

May it please the Court, and may it please you ladies and gentlemen, no one could listen to Mr. Levine without being caught up in the same spirit of emotion that he has, and now it is my task to try in the few minutes that are allowed me under the law to speak to you about the real thing that we are here for, to decide the evidence under His Honor's instruction, which he will later give you, which is the law in this case.

I am sure, as I stand here, that if I could do anything, if *you* could do anything, if these doctors that I represent, Dr. Kleist and Dr. Anders, could do anything to bring Mrs. Brooks back to life, they would certainly do it.

Don't you know, with all the experience that Mr. Levine has had in suing these doctors, don't you know that any doctor who has dedicated his life to saving people and to giving them health would do anything he could to bring this woman back. But that is impossible. We can't do that. So we've got to face up to the realities of this lawsuit and decide what the evidence really was—not what Mr. Levine *says* it was.

Your memory about this is just as good as his. You were paying close attention. His Honor and I were talking about it at lunch today, that we've never seen a more attentive jury, and that during the tedious parts of this trial when you heard doctor after doctor, ours of course doctors who I am sure you recognize, men from our own community; Mr. Levine's doctor, Doctor Opitz from New York who, I am sure, you were somewhat interested in meeting and hearing how he conducts himself as he travels around in these cases.

Therefore, I want to say on this record, and not to carry any favor with you, of course, but I feel that you are the kind of jury that it ought to be spread on this record, and I have the approval of His Honor to say this and to put it on the record, that you are to be complimented in the attention you have given to this case. I know that despite the emotional appeal, despite the smoke-screen that Mr. Levine has tried to lay down here, you are going to pierce through every bit of this and come to a right decision.

What was that evidence? First of all, it showed that Dr. Anders is a well qualified anesthesiologist in this community. He has performed hundreds of surgical procedures just like the one that we are here in court about. He doesn't need, if you please, Mr. Levine to tell him where the drape should be when you are operating on the most private parts of a female patient. Dr. Anders does not need to sit here and listen to Levine tell him that he should not have any drape over this woman. I know and you know that it is customary

practice, it is the expected thing of a doctor to properly drape a patient. Yes, Mr. Levine, it is the customary practice to properly drape a patient *regardless* of her color, if you please.

And I didn't much like the reference he made to color. There has been no suggestion on *our* side of the case that that has anything to do with it, and for him to try to dress up that attack of prejudice by quoting the Scripture and quoting the Psalms is a dirty trick, and I challenge him for it, and I think he ought to be reprimanded.

I say to you that when these doctors draped Mrs. Brooks, ready to perform an operation which she needed, they gave her the care that you would have expected them to give, the care that all of the doctors who have come in here and testified from the community have said repeatedly that they gave her the standard care, the proper care, the approved care that all the doctors in this community exercise. And that is what the evidence is.

Then Mr. Levine says, "Why, they didn't even communicate with each other." Dr. Kleist, as the evidence shows, is one of the most revered surgeons in this entire community and undoubtedly has been the doctor for, well, I won't say for you jurors, but certainly for many of the people in this very courtroom, in this very courthouse. So we all know that Dr. Kleist is well qualified.

And Levine says, "Why, he ought to be talking in the operating room. There ought to be conversation going on." Can you imagine a doctor with the serious responsibility that he has in performing this operation in the most delicate and sensitive parts of the internal organs of a woman's body that he is carrying on a conversation with somebody? With whom? With a qualified, a well qualified expert in his own field.

He did exactly the right thing. He paid attention to the task that he had, not knowing at the time he was down there performing that surgery whether this woman's vital organs were going to have to be removed in what has been referred to as a hysterectomy. But sensitive to the question, a determination that no doctor in the world makes lightly, this is a decision that goes to the vitals of this woman, a decision that he had to make based on his own knowledge, his own observation, his own training, not a time, if you please, to be carrying on a conversation with Dr. Anders.

Unfortunately, as you know, as I know, and though he won't admit it, as Mr. Levine knows, things do happen to all of us human beings that no doctor can predict.

The hospital record is replete here that this lady's blood pressure started to drop from 120. She is there in the hands of a trained

anesthesiologist who has seen blood pressure drop, who knows that many operations in today's world of modern medicine are performed where there is no blood pressure felt at the arm level. In today's field of modern medicine, as I am sure Mr. Levine knows but will not admit to us here, operations are performed where it is necessary to insert a stethoscope internally down the esophagus so that the anesthesiologist can hear the faint pulse of the heart. So the absence, the total absence of blood pressure is a thing that Dr. Kleist and Dr. Anders had had experience with.

But when this lady's blood pressure started to decrease, Dr. Anders in his training and in his wisdom began taking care of her and he gave her vasopressors, which is the recommended treatment, as all the evidence shows, trying to narrow those vessels in her body so that the blood would have some resiliency, so that it wouldn't drop any more drastically, so that it wouldn't reduce.

Unfortunately for Mrs. Brooks, she had a condition in her that made the normal expected drugs slow to react, and that as these drugs were given they didn't take hold, a thing that no one could have predicted, and not a doctor has come in here, not a scintilla of evidence shows that either Dr. Anders or Dr. Kleist could have predicted this slow reaction to the vasopressor drugs. But that is what happened.

Dr. Anders, continuing, trying to bring her back with all the drugs, intravenous fluids, doing everything, as the evidence shows, that modern medicine dictates, trying to bring her back, he finally tells the surgeon. I say "finally" because it came to the point where it required joint effort, not that Dr. Anders needed any help in the anesthesiology field, not that Dr. Kleist needed any help in the surgical field, but both together had to dedicate their attentions to Mrs. Brooks to revive her quickly. And that is what they did, and that is what you would expect them to do.

Within a matter of seconds they were trying to give external massage to the heart to bring this heart back to beat, and it did beat, and she did breathe, which is the definite proof that refutes this argument that he tries to make that the drug was administered too high. If the pontocaine had reached a level too high, which had depressed the lungs and had depressed the heart, then this spontaneous breathing and this spontaneous heartbeat could never have happened, so that his own evidence shows that the pontocaine was injected properly, just as the doctors have so testified.

Trying to revive Mrs. Brooks, doing everything they can, they bring her back so that she is breathing, but there has been, by the nature of the thing, not by negligence, not by fault, but by the nature

of this operation there has been an absence of time, and this lady is left permanently, horribly, unfortunately—use any word you want to—it was a terrible thing that happened in that hospital room, and terrible for Mr. Brooks.

And let me say this: I don't know why Mr. Levine chose to say that I was going to be critical of Mr. Brooks because he had two wives who had divorced him. Now, I don't know why he chose to try to throw up that kind of a distraction from the thing that we are actually here to decide. Why did he throw that out in the argument, saying, "Well, Mr. Shepherd is going to say that his wives had divorced him and that when he got the third one he was going to keep her a while." Why does he bring that up? Surely he must know that that has nothing whatever to do with this case. He throws that out hoping, just as he did in the figures, you know, he said, "Well, they want to amortize how much the lady would make working for twenty-five years." I mean, they have calculated her life expectancy, they've got her working every day of the week, no time off even for Christmas or Mother's Day. They have calculated every day, and they tell me and they say on the floor of this courtroom, he stands under the law just as Drs. Kleist and Anders, and money." Well, that is false. Certainly I am not going to get up here and say that any more than I would have injected, as he did, this question of her race.

But I do say to you that when Mr. Brooks stands in this courtroom, he stands under the law just as Drs. Keist and Anders, and he is bound by the same law that they are bound by. In a moment His Honor is going to tell you that, forgetting everything emotional in the case, forgetting all other things, His Honor is going to tell you that the burden is on Mr. Brooks, who has filed this suit, to prove the allegation that he has made, to prove to your satisfaction that, indeed, these doctors in their handling of this serious, complicated, not a simple operation, as Mr. Levine would have you say—do you think that a hysterectomy when a woman is put completely unconscious in the hands of a doctor, do you think that is a *simple* operation? Well, I'll tell you, any woman in this country will tell you it is not a simple operation, and I don't care how many times Mr. Levine wants you to believe it is a simple operation. It was a complicated task, a serious operation that was handled, as the evidence shows, in the very best way that it could be.

But this unfortunate experience occurred, and I dare say that some unfortunate experience may be occurring some place else today, not always in a hospital, maybe some place in the street, maybe some place in a home. That is the nature of the life we live, unfortunately, and it is not a time for lawyers to get up and criticize

men who are dedicating their lives to try to help people. It is not a time—why, not only is he critical of the drape, he is even critical, saying that the doctors didn't know how to put the lady in a proper position with the pontocaine. Why, that, you know, is an effort to blind you to the truth. An operating table has stirrups on it. You don't raise the lady's legs, you know, and put here feet flat on the table. Her legs are in a stirrup so that they can be put in the proper position. Her back stays level. That is the way an operating table is built. Maybe this is some way that Mr. Levine got confused in the very beginning of this case. But with a proper operating table, as all the evidence shows this was, that pontocaine doesn't flow any place. He has thrown out one after another after another confusing elements to you, hoping that you will bring in a verdict against these two doctors that they will have to live with.

Yes, I know Mr. Brooks is a serious man. I know he is the kind of a man that Mr. Levine says. In listening to Mr. Levine I sometimes felt that I thought more of Mr. Brooks than his own lawyer does. But I can say this—I can say this—these two doctors are great men too. And when you get up in your jury room, you don't have just *one* side of the case to think about; you've got *two* sides.

I asked you Monday when we impaneled this jury, if you could do the *hard* thing, if you had enough nerve, enough strength, that if the evidence showed that these doctors were *not* responsible you would be able to bring in a verdict in their favor.

I suggest to you, after you have heard His Honor's instructions and listened and reviewed the evidence up in your jury room, that you are going to come to the conclusion that on these facts, in this case, they have not met that burden of proof.

Dr. Kleist, Dr. Anders, and I will, of course, be here waiting for your verdict when you return it.

I expect now that may be Mr. Levine will have something further to say—he usually does. I suspect that he may not only now be critical of these two doctors but perhaps even critical of me. But whatever he says has been answered from the evidence. And in keeping, not only with your promise to me that you would bring in the right kind of verdict, but in keeping with the oath that you have taken, I sit here confident that this evidence exonerates these doctors from responsibility. I can tell them that, they have been told by the doctors, they have been told by the hospital, they have been told by anyone who knows anything about medicine, but they need, here today, a verdict from this jury to show as a final step, the final finding in this case of the community, not just the expert but

even the people who have sat here and become experts in listening to this evidence.

We will be here waiting for you, confidently.

Thank you.

CHAIRMAN BRUCKNER: Gentlemen, that concludes the program. Thank you.

...The Torts Seminar adjourned at four-five o'clock...

GENERAL ASSEMBLY
FRIDAY AFTERNOON SESSION

October 20, 1967

The final session was called to order at four-thirty o'clock by President Maupin.

PRESIDENT MAUPIN: The meeting will please come to order. Pursuant to adjournment at eleven-fifty o'clock on October 19, 1967, the General Assembly scheduled at the conclusion of the Torts Seminar will now come to order.

First, let the record show the presence of C. Russell Mattson, the duly elected President of the Nebraska State Bar Association, and the presence of Charles Adams, the duly elected President-Elect of the Nebraska State Bar Association.

At the opening session held on Thursday morning, the 19th, all scheduled items of business were presented for the consideration of that session with the exception of the report of the Secretary-Treasurer, the report of the Executive Council by me, and the announcement as to group life insurance. In order to close that meeting promptly, it was necessary to forego disposition of those three items.

The report of George H. Turner as Secretary-Treasurer of the Association was submitted in detail to the House of Delegates before the convening and at the time of its annual meeting on Wednesday, October 18, 1967, and appears as a part of the record of those proceedings. It is therefore deemed unnecessary to re-present and reproduce the same at this time.

The report that your President is required to make to this meeting on behalf of the Executive Council was submitted to the House of Delegates at its annual meeting in much detail. Thus it is deemed sufficient for me to report unto this Assembly that the Executive Council of your Association held seven separate sessions from the adjournment of the 1966 annual meeting until this date. Generally speaking, these sessions required the greater part, if not an entire day of time to dispose of the business of this Association. One of the meetings, in fact, was a partial two-day session. The attendance of the members of the Executive Council was exceedingly high at each and every meeting and absentees were generally only by reason of illness or other compelling causes. In my judgment and opinion, your Executive Council and its members demonstrated the highest fidelity to their duties and responsibilities as individuals and as a collective body.

Other details of Executive Council activity will appear in the House of Delegates annual meeting report as described by me at that meeting.

The announcement as to the group life insurance program of the Nebraska State Bar Association was made by Mr. Walter I. Black of the John Hancock Mutual Insurance Company at the Annual Luncheon held today and will not be repeated herein.

Your President now inquires if there is any other business to come before this closing General Assembly of the Association. Hearing none, I now declare that we are prepared to close the Sixty-eighth annual meeting of the Nebraska State Bar Association.

Before doing so I wish to express my personal thanks and personal appreciation to all the officers of this Association, particularly to the members of the Executive Council, to our Secretary-Treasurer, to the Chairmen of the various Sections and various Committees, and to those of the membership who have so diligently and willingly aided and assisted me during my term of office.

On the occasion of the Annual Dinner last year, at which time I was inducted into office, I made the statement to the effect that I considered the election to the Presidency of the Nebraska State Bar Association the greatest professional honor that could come to a member of that Association, particularly under the present method of selection of such officer. I desire to repeat that statement for the purposes of the record. I would have you know that my efforts devoted to the affairs of the Association during the past year, whether they have been of any particular value or not to the Association, have, nevertheless, attempted to be an expression of gratitude on my part to the members of this Association for the honor that you have bestowed upon me in making me the President of the Nebraska State Bar Association.

I now turn the responsibility of the office of President and of President-Elect over to these two very capable and conscientious members of this Association, the Honorable C. Russell Mattson, as President, and the Honorable Charles F. Adams, as President-Elect. In so doing, I now declare the Sixty-eighth annual meeting of the Nebraska State Bar Association adjourned sine die.

NEBRASKA STATE BAR ASSOCIATION

NEBRASKA STATE BAR ASSOCIATION

Statement of Cash Receipts and Disbursements

Year ended August 31, 1967

Receipts:

Active members' dues	\$60,450
Inactive members' dues	5,720
Reinstatements	105
Interest	375
Expense refunds	96
Legislative Bill Digest receipts in excess of cost	928
	<u>\$67,674</u>

Disbursements:

Salaries	\$11,700
Payroll taxes	665
Printing and stationery	1,053
Office supplies and expense	1,185
Telephone and telegraph	135
Postage and express	2,675
Directory	1,210
Officers' expenses	1,782
Executive council	2,613
Judicial council	285
Nebraska Law Review	8,622
Nebraska State Bar Association	
Journal	\$ 2,639
Less receipts for advertising	586
	<u>2,053</u>
Public service	4,539
Less receipts for pamphlets	141
	<u>4,398</u>
American Bar Association	
meetings	7,978
Less reimbursements	421
	<u>7,557</u>
Mid-year meeting	257
Annual meeting, 1966	12,158
Less reimbursements and	
exhibit space	3,984
	<u>8,174</u>
Committee on inquiry	872
Committee on legal education	
and continuing legal education	60
Advisory committee	667
Committee on crime and	
delinquency prevention	186

PROCEEDINGS, 1967

451

Committee on reorganization	26	
Committee on legislation	3,264	
Committee on availability of legal service	146	
Committee on economics and law office management	482	
Young lawyer's section	323	
Aid to local bars	14	
Carried forward	<u>\$60,404</u>	<u>67,674</u>

NEBRASKA STATE BAR ASSOCIATION

NEBRASKA STATE BAR ASSOCIATION

Statement of Cash Receipts and Disbursements, Continued

Brought forward	\$60,404	67,674
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Disbursements, continued:

Tax institute	\$ 1,904	
Less reimbursements and registration receipts	770	1,134
Medico—legal institute		194
Institute on insurance	951	
Less reimbursements	415	536
Amendment #7		4,024
Law day U.S.A.		1,469
State ex rel Nebraska State Bar Association, Richards and Schafersman		163
Insurance		77
Maintenance expense		320
Auditing		335
Dues and subscriptions		40
Section on real estate, probate and trust law		67
Nebraska State Bar Foundation		3
Traffic court conference		211
Bridge the Gap program		65
Annual meeting, 1967		184
Annual meeting, 1968		98
Excess of disbursements over receipts		1,650
Balance at beginning of year		13,238
Balance at end of year		<u>\$11,588</u>

ROLL OF PRESIDENTS

1. 1900 *Eleazer Wakely	Omaha	35. 1934 *John J. Ledwith	Lincoln
2. 1901 *William D. McHugh	Omaha	36. 1935 *L. B. Day	Omaha
3. 1902 *Samuel P. Davidson	Tecumseh	37. 1936 *J. G. Mothersead	Scottsbluff
4. 1903 *John L. Webster	Omaha	38. 1937 *C. J. Campbell	Lincoln
5. 1904 *C. B. Letton	Fairbury	39. 1938 Harvey M. Johnsen	Omaha
6. 1905 *Ralph W. Breckenridge	Omaha	40. 1939 *James M. Lanigan	Greeley
7. 1906 *E. C. Calkins	Kearney	41. 1940 E. B. Chappell	Lincoln
8. 1907 *T. J. Mahoney	Omaha	42. 1941 Raymond G. Young	Omaha
9. 1908 *C. C. Flansburg	Lincoln	43. 1942 *Paul E. Boslaugh	Hastings
10. 1909 *Francis A. Brogan	Omaha	44. 1943 *Robert R. Moodie	West Point
11. 1910 *Charles G. Ryan	Grand Island	45. 1944 *George L. DeLacy	Omaha
12. 1911 *Benjamin F. Good	Lincoln	46. 1945 Virgil Falloon	Falls City
13. 1912 *William A. Redick	Omaha	47. 1946 Paul F. Good	Omaha
14. 1913 *John J. Halligan	North Platte	48. 1947 *Joseph T. Votava	Omaha
15. 1914 *H. H. Wilson	Lincoln	49. 1948 Robert H. Beatty	North Platte
16. 1915 *C. J. Smyth	Omaha	50. 1949 *Abel V. Shotwell	Omaha
17. 1916 *John N. Dryden	Kearney	51. 1950 *Earl J. Moyer	Madison
18. 1917 *F. M. Hall	Lincoln	52. 1951 Clarence A. Davis	Lincoln
19. 1918 *Arthur C. Wakely	Omaha	53. 1952 *George B. Hastings	Grant
20. 1919 *R. E. Evans	Dakota City	54. 1953 Laurens Williams	Omaha
21. 1920 *W. M. Morning	Lincoln	55. 1954 J. D. Cronin	O'Neill
22. 1921 *A. G. Ellick	Omaha	56. 1955 John J. Wilson	Lincoln
23. 1922 *George F. Corcoran	York	57. 1956 Wilber S. Aten	Holdrege
24. 1923 *Edward P. Holmes	Lincoln	58. 1957 Barton H. Kuhns	Omaha
25. 1924 *Fred A. Wright	Omaha	59. 1958 Paul L. Martin	Sidney
26. 1925 *Paul Jessen	Nebraska City	60. 1959 Joseph C. Tye	Kearney
27. 1926 *E. E. Good	Wahoo	61. 1960 Flavel A. Wright	Lincoln
28. 1927 *F. S. Berry	Wayne	62. 1961 Hale McCown	Beatrice
29. 1928 *Robert W. Devoe	Lincoln	63. 1962 Ralph E. Svoboda	Omaha
30. 1929 Anan Raymond	Omaha	64. 1963 George A. Healey	Lincoln
31. 1930 *J. L. Cleary	Grand Island	65. 1964 Floyd E. Wright	Scottsbluff
32. 1931 *Fred Shepherd	Lincoln	66. 1965 Harry B. Cohen	Omaha
33. 1932 *Ben S. Baker	Omaha	67. 1966 Herman Ginsburg	Lincoln
34. 1933 *J. J. Thomas	Seward	68. 1967 M. M. Maupin	North Platte

ROLL OF SECRETARIES

1. 1900-06 Roscoe Pound	Lincoln	5. 1920-27 Anan Raymond	Omaha
2. 1907-08 Geo. P. Costigan, Jr.	Lincoln	6. 1928-36 Harvey Johnsen	Omaha
3. 1909 W. G. Hastings	Lincoln	7. 1937- George H. Turner	Lincoln
4. 1910-19 A. G. Ellick	Omaha		

ROLL OF TREASURERS

1. 1900 Samuel F. Davidson	Tecumseh	6. 1914-16 Chas. G. McDonald	Omaha
2. 1901 S. L. Geisthardt	Lincoln	7. 1917-22 Raymond M. Crossman	Omaha
3. 1902-03 Charles A. Goss	Omaha	8. 1923-37 Virgil J. Haggard	Omaha
4. 1904-05 Roscoe Pound	Lincoln	9. 1938- George H. Turner	Lincoln
5. 1906-13 A. G. Ellick	Omaha		

* Deceased

ROLL OF EXECUTIVE COUNCIL

1. 1900-04 R. W. Breckenridge	Omaha	12. 1910-19 Alfred G. Ellick	Omaha
2. 1900-08 Andrew J. Sawyer	Lincoln	13. 1911-13 John A. Ehrhardt	Stanton
3. 1900-02 Edmund H. Hinshaw	Fairbury	14. 1911-11 Benjamin F. Good	Lincoln
4. 1903-06 W. H. Kelligar	Auburn	15. 1912-15 C. J. Smyth	Omaha
5. 1904-07 John N. Dryden	Kearney	16. 1912-12 William A. Redick	Omaha
6. 1905-08 F. A. Brogan	Omaha	17. 1913-15 W. M. Morning	Lincoln
7. 1907-10 S. P. Davidson	Tecumseh	18. 1913-16 J. J. Halligan	North Platte
8. 1908-09 W. T. Wilcox	North Platte	19. 1914-14 H. H. Wilson	Lincoln
9. 1909-11 R. W. Breckenridge	Omaha	20. 1915-17 Edwin E. Squires	Broken Bow
10. 1910-12 Frank H. Woods	Lincoln	21. 1916-16 John N. Dryden	Kearney
11. 1910-10 Charles G. Ryan	Grand Island	22. 1916-17 Fredrick Shepherd	Lincoln
		23. 1917-17 Frank M. Hall	Lincoln

24. 1917-18	Anan Raymond	Omaha	98. 1946-48	Harry W. Shackelford	
25. 1918-18	A. C. Wakely	Omaha	99. 1946-48	Paul F. Good	Lincoln
26. 1918-22	Fred A. Wright	Omaha	100. 1947-48	Joseph T. Votava	Omaha
27. 1919-19	R. E. Evans	Dakota City	101. 1947-48	John E. Dougherty	York
28. 1919-22	Geo. F. Corcoran	York	102. 1947-55	Lyle E. Jackson	Neligh
29. 1919-20	L. A. Flansburg	Lincoln	103. 1948-49	Robert H. Beatty	
30. 1920-20	W. M. Morning	Lincoln			North Platte
31. 1920-27	Anan Raymond	Omaha	104. 1947-50	Frank D. Williams	Lincoln
32. 1921-21	Alfred G. Ellick	Omaha	105. 1947-50	Thomas J. Keenan	Geneva
33. 1921-23	Guy C. Chambers	Lincoln	106. 1948-51	Laurens Williams	Omaha
34. 1922-24	James R. Rodman	Kimball	107. 1949-51	Joseph H. McGroarty	
35. 1923-26	E. E. Good	Wahoo			Omaha
36. 1924-26	Robert W. Devoe	Lincoln	108. 1949-54	Wilber S. Aten	Holdrege
37. 1924-24	Fred A. Wright	Omaha	109. 1948-49	Abel V. Shotwell	Omaha
38. 1925-28	Paul Jessen	Nebraska City	110. 1949-55	Paul L. Martin	Sidney
39. 1925-27	Clinton Brome	Omaha	111. 1949-55	Joseph C. Tye	Kearney
40. 1927-29	Charles E. Matson	Lincoln	112. 1949-51	Earl J. Moyer	Madison
41. 1927-28	Fred S. Berry	Wayne	113. 1950-60	Harry A. Spencer	Lincoln
42. 1928-29	Robert W. Devoe	Lincoln	114. 1950-55	Paul P. Chaney	Falls City
43. 1928-30	T. J. McGuire	Omaha	115. 1950-59	Paul Bek	Seward
44. 1928-34	Harvey Johnsen	Omaha	116. 1950-52	Clarence A. Davis	Lincoln
45. 1929-31	E. A. Coufal	David City	117. 1951-55	Barton H. Kuhns	Omaha
46. 1929-29	Anan Raymond	Omaha	118. 1952-57	Thomas C. Quinlan	Omaha
47. 1930-32	Paul E. Boslaugh	Hastings	119. 1951-52	George B. Hastings	Grant
48. 1930-30	J. L. Cleary	Grand Island	120. 1952-53	Laurens Williams	Omaha
49. 1931-33	W. C. Dorsey	Omaha	121. 1953-54	J. D. Cronin	O'Neill
50. 1931-31	Fred Shepherd	Lincoln	122. 1954-57	Norris Chadderdon	
51. 1932-34	Richard Stout	Lincoln			Holdrege
52. 1931-32	Ben S. Baker	Omaha	123. 1954-56	John J. Wilson	Lincoln
53. 1933-35	Barlow F. Nye	Kearney	124. 1955-56	Wilber S. Aten	Holdrege
54. 1933-33	J. J. Thomas	Seward	125. 1955-58	F. M. Deutsch	Norfolk
55. 1934-36	Chas. E. McLaughlin	Omaha	126. 1955-64	Clarence E. Haley	
56. 1934-34	John J. Ledwith	Lincoln			Hartington
57. 1935-35	L. B. Day	Omaha	127. 1955-58	R. R. Wellington	Crawford
58. 1935-37	James M. Lanigan	Greeley	128. 1955-64	Alfred G. Ellick	Omaha
59. 1935-38	H. J. Requartte	Lincoln	129. 1954-55	Jean B. Cain	Falls City
60. 1935-38	Raymond M. Crossman		130. 1955-57	Hale McCown	Beatrice
61. 1935-40	F. H. Pollock	Stanton	131. 1956-62	C. Russell Mattson	Lincoln
62. 1935-41	T. J. Keenen	Geneva	132. 1956-58	Barton H. Kuhns	Omaha
63. 1935-39	Walter D. James	McCook	133. 1957-59	Paul L. Martin	Sidney
64. 1935-37	Roland V. Rodman	Kimball	134. 1957-60	Richard E. Hunter	Hastings
65. 1936-36	J. G. Mothersead	Scottsbluff	135. 1957-64	John R. Fike	Omaha
66. 1936-36	James L. Brown	Lincoln	136. 1957-64	Thomas F. Colfer	McCook
67. 1937-39	David A. Fitch	Omaha	137. 1958-63	William H. Lamme	Fremont
68. 1937-39	Raymond G. Young	Omaha	138. 1958-61	Carl G. Humphrey	Mullen
69. 1937-41	M. M. Maupin	North Platte	139. 1958-60	Joseph C. Tye	Kearney
70. 1937-41	Golden P. Kratz	Sidney	140. 1959-65	Charles F. Adams	Aurora
71. 1938-42	Sterling F. Mutz	Lincoln	141. 1959-61	Flavel A. Wright	Lincoln
72. 1938-42	Don W. Stewart	Lincoln	142. 1959-60	Thomas C. Quinlan	Omaha
73. 1940-46	George N. Mecham	Omaha	143. 1960-61	Hale McCown	Beatrice
74. 1940-42	Abel V. Shotwell	Omaha	144. 1960-63	Ralph E. Svoboda	Omaha
75. 1940-42	Frank M. Colfer	McCook	145. 1960-67	Herman Ginsburg	Lincoln
76. 1941-43	Virgil Falloon	Falls City	146. 1960-65	James F. Begley	
77. 1941-43	Joseph C. Tye	Kearney			Plattsmouth
78. 1941-47	Earl J. Moyer	Madison	147. 1961-64	George A. Healey	Lincoln
79. 1937-37	C. J. Campbell	Lincoln	148. 1962-65	Lester A. Danielson	
80. 1938-38	Harvey Johnsen	Omaha			Scottsbluff
81. 1939-39	James M. Lanigan	Greeley	149. 1962-65	Floyd E. Wright	Scottsbluff
82. 1940-40	E. B. Chappell	Lincoln	150. 1962-	John C. Mason	Lincoln
83. 1942-45	Fred J. Cassidy	Lincoln	151. 1961-	Vance E. Leininger	
84. 1941-41	Raymond G. Young	Omaha			Columbus
85. 1942-48	Max G. Towle	Lincoln	152. 1964-	Fred R. Irons	Hastings
86. 1942-42	Paul E. Boslaugh	Hastings	153. 1964-66	Wm. J. Baird	Omaha
87. 1942-45	John E. Dougherty	York	154. 1964-66	Tracy J. Peycke	Omaha
88. 1942-49	Yale C. Holland	Omaha	155. 1964-	W. E. Mumby	Harrison
89. 1943-45	Robert R. Moodie	West Point	156. 1964-65	Hale McCown	Beatrice
90. 1941-45	B. F. Butler	Cambridge	157. 1963-	Harry B. Cohen	Omaha
91. 1943-46	Frank M. Johnson	Lexington	158. 1965-	Bernard B. Smith	
92. 1944-49	Floyd E. Wright	Scottsbluff			Lexington
93. 1945-50	John J. Wilson	Lincoln	159. 1965-67	Robert D. Mullin	Omaha
94. 1945-48	Robert B. Waring	Geneva	160. 1966-	Paul P. Chaney	Falls City
95. 1944-46	George L. DeLacy	Omaha	161. 1966-	M. A. Mills, Jr.	Osceola
96. 1945-47	Virgil Falloon	Falls City	162. 1966-	M. M. Maupin	
97. 1945-49	Leon Samuelson	Franklin	163. 1966-67	George B. Boland	North Platte
					Omaha